

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official
capacity as Secretary of the Wisconsin
Department of Health Services,

Defendants.

DEFENDANTS' AMENDED ANSWER AND DEFENSES

Defendants Wisconsin Department of Health Services (DHS) and Linda Seemeyer, pursuant to Federal Rules of Civil Procedure 7(a)(2) and 15(a)(1), hereby answer Plaintiffs' Complaint as follows:

INTRODUCTION

1. As to paragraph 1, Defendants lack knowledge or information sufficient to form a belief as to the specific meaning of the allegations that Plaintiffs are "transgender." As to the remaining allegations in the first and second sentences of paragraph 1, ADMIT. As to the third sentence, Defendants ADMIT that Plaintiffs bring a lawsuit, and DENY the remaining allegations.

2. As to paragraph 2, Defendants ADMIT that DHS enforces Wis. Admin. Code § DHS 107.03(23)–(24) (the “Challenged Exclusion”), that this state regulation was promulgated in 1997, that Plaintiffs have been denied Medicaid coverage based on the Challenged Exclusion, DENY the allegations about Wis. Admin. Code § DHS 107.03(23)–(24) in that they are complete representations of the law cited, DENY the stated definition of “gender dysphoria” is complete and correct, and lack knowledge or information sufficient to form a belief as to the meaning of remaining allegations.

3. As to paragraph 3, Defendants DENY the allegations.

4. As to paragraph 4, Defendants ADMIT that Defendant DHS is the state agency charged with administering Wisconsin’s medical assistance program, that Defendant Linda Seemeyer is the Secretary of DHS, that Plaintiffs bring this action against them alleging violations of the laws referenced therein, and DENY the remaining allegations.

BACKGROUND

5. As to paragraph 5, Defendants ADMIT.

6. As to paragraph 6, Defendants ADMIT that Flack is 30 years old, that Makenzie is 41 years old, that Flack was denied Medicaid coverage based on Wis. Admin. Code § DHS 107.03(23), lack knowledge or information sufficient to form a belief as to the specific meaning of the allegations that Plaintiffs are a “transgender man” and a “transgender woman,”

lack knowledge or information sufficient to form a belief as to the allegations that Makenzie was denied insurance coverage, and DENY the remaining allegations.

7. As to paragraph 7, Defendants lack knowledge or information sufficient to form a belief as to the allegations that Plaintiffs “have disabilities” and rely exclusively on federal SSI benefit payments to meet their basic needs for food, clothing, and shelter, and ADMIT the remaining allegations.

8. As to the first, third, fourth, and fifth sentences in paragraph 8, Defendants ADMIT that Flack is being prescribed testosterone cypionate and has been diagnosed with gender dysphoria, and lack knowledge or information sufficient to form a belief as to the remaining allegations. As to the second sentence, Defendants DENY the definition of “gender dysphoria” is complete and correct.

9. As to paragraph 9, Defendants ADMIT that Flack and Makenzie have received medical treatment and lack knowledge or information sufficient to form a belief as to the remaining allegations.

10. As to paragraph 10, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

11. As to paragraph 11, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

12. As to paragraph 12, Defendants DENY.

13. As to paragraph 13, Defendants ADMIT that Plaintiffs seek the relief stated but DENY that they are entitled to it.

PARTIES

14. As to the first sentence in paragraph 14, Defendants ADMIT. As to the second sentence, Defendants lack knowledge or information sufficient to form a belief as to the specific meaning of the allegation that Flack is a “transgender man,” and Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations. As to the last sentence, Defendants ADMIT.

15. As to the first sentence in paragraph 15, Defendants ADMIT. As to the second sentence, Defendants lack knowledge or information sufficient to form a belief as to the specific meaning of the allegation that Makenzie is a “transgender woman,” and Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations. As to the last sentence, Defendants ADMIT.

16. As to paragraph 16, Defendants ADMIT that DHS is the Wisconsin state agency charged with the administration of Medicaid, its principal offices are located at 1 West Wilson Street, Madison, Dane County, it receives federal funds from the U.S. Department of Health and Human Services, including Medicaid funding, and DENY the remaining allegations.

17. As to paragraph 17, Defendants ADMIT the allegations.

18. As to paragraph 18, Defendants ADMIT Defendant Seemeyer acted under color of state law, and DENY the remaining allegations.

JURISDICTION AND VENUE

19. As to paragraph 19, Defendants DENY the allegations.

20. As to paragraph 20, Defendants DENY the allegations.

21. As to paragraph 21, Defendants DENY the allegations.

FACTS

Gender Identity and Gender Dysphoria

22. As to the first sentence of paragraph 22, Defendants DENY the allegations. As to the second and third sentences, Defendants lack knowledge or information sufficient to form a belief as to the allegations. As to fourth, fifth, and sixth sentences, Defendants DENY the allegations.

23. As to the first sentence of paragraph 23, Defendants ADMIT the allegations. As to footnote 1 and the last sentence, Defendants lack knowledge or information sufficient to form a belief as to the allegations. As to the remaining sentences, Defendants DENY that the allegations are complete representations of the documents cited.

24. As to the first and second sentences of paragraph 24, Defendants ADMIT the allegations. As to the remaining sentences, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

25. As to paragraph 25, Defendants DENY the allegations. As to the first and second sentences of footnote 2, Defendants lack knowledge or information sufficient to form a belief as to the allegations. As to the third sentence of the footnote, Defendants ADMIT that “sex reassignment surgery” and “sex change surgery” are not used in the body of the Complaint but DENY the remaining allegations.

Federal Medicaid Program

26. As to paragraph 26, Defendants ADMIT the allegations.

27. As to paragraph 27, Defendants ADMIT the allegations.

28. As to paragraph 28, Defendants ADMIT the allegations.

29. As to paragraph 29, Defendants ADMIT that 42 U.S.C. § 1396a concerns state plans for medical assistance and DENY that the allegations fully describe the requirements of a plan.

30. As to paragraph 30, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

31. As to paragraph 31, Defendants ADMIT that 42 U.S.C. § 1396a(a)(10) concerns state plans for medical assistance and the care and services required and DENY that the allegations fully describe the requirements of a plan.

32. As to paragraph 32, Defendants DENY the allegations are complete representations of the law cited.

33. As to paragraph 33, Defendants DENY the allegations are complete representations of the law cited.

34. As to paragraph 34, Defendants DENY the allegations are complete representations of the law cited.

Wisconsin Medicaid

35. As to paragraph 35, Defendants ADMIT the allegations.

36. As to paragraph 36, Defendants ADMIT the allegations.

37. As to paragraph 37, Defendants ADMIT the allegations.

38. As to paragraph 38, Defendants ADMIT the allegations.

39. As to the first sentence of paragraph 39, Defendants ADMIT the allegations. As to the second and third sentences, Defendants DENY the allegations are complete representations of the law. As to the last sentence, Defendants DENY the allegations.

Wisconsin Medicaid's Categorical Exclusion on Transition-Related Health Care for Transgender Medicaid Enrollees

40. As to paragraph 40, Defendants ADMIT that they deny coverage based on the Challenged Exclusion in DHS's medical assistance regulations and DENY the remaining allegations.

41. As to the first and second sentences of paragraph 41, Defendants DENY the allegations are complete representations of the law cited. As to the last sentence, Defendants DENY.

42. As to paragraph 42, Defendants DENY that the Challenged Exclusion was adopted in 2016, and ADMIT the remaining allegations.

43. As to the first sentence of paragraph 43, Defendants ADMIT the allegations. As to the last sentence, Defendants DENY the allegations.

44. As to paragraph 44, Defendants DENY that DHFS issued a “bulletin” and DENY the remaining allegations are complete representations of the Jan. 6, 1995, document cited.

45. As to the first sentence of paragraph 45, Defendants DENY the allegations. As to the remaining sentences, Defendants DENY the allegations are complete representations of the documents cited.

46. As to paragraph 46, Defendants DENY the allegations.

47. As to paragraph 47, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

48. As to paragraph 48, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

49. As to paragraph 49, Defendants ADMIT that they follow the Challenged Exclusion, they have not taken action to remove the Challenged Exclusion from the Wisconsin’s medical assistance regulations and that Plaintiffs are eligible for medical assistance coverage, lack knowledge or information sufficient to form a belief as to whether Plaintiffs are in medical need of care to treat gender dysphoria, and DENY the remaining allegations.

50. As to paragraph 50, Defendants DENY Wisconsin maintains explicitly discriminatory prohibitions on Medicaid coverage and lack knowledge or information sufficient to form a belief as to the remaining allegations.

51. As to the first sentence of paragraph 51, Defendants DENY. As to the remaining sentence and footnote, Defendants DENY the allegations are complete representations of the website cited.

52. As to paragraph 52, Defendants DENY the allegations.

53. As to paragraph 53, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

54. As to paragraph 54, Defendants ADMIT that Medicaid may cover services as medically necessary when not excluded by law and DENY all remaining allegations.

Plaintiff Cody Flack

55. As to the first sentence in paragraph 55, Defendants ADMIT that Flack is 30 years old and resides in Green Bay, Wisconsin, and lack knowledge or information sufficient to form a belief as to the remaining allegations.

56. As to paragraph 56, Defendants ADMIT that Flack has received a determination of disability, receives SSI and Wisconsin Medicaid, and lack knowledge or information sufficient to form a belief as to the remaining allegations.

57. As to paragraph 57, Defendants lack knowledge or information sufficient to form a belief as to the specific meaning of the allegation that Flack is a “transgender man,” and Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

58. As to paragraph 58, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

59. As to paragraph 59, Defendants ADMIT.

60. As to paragraph 60, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

61. As to paragraph 61, Defendants ADMIT that Flack was granted a legal name change to Cody Jason Flack and lack knowledge or information sufficient to form a belief as to the remaining allegations.

62. As to paragraph 62, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

63. As to paragraph 63, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

64. As to the first and second sentence of paragraph 64, Defendants ADMIT that Medicaid has covered some of Flack’s hormonal therapy. As to the last sentence, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

65. As to the first and second sentences of paragraph 65, Defendants ADMIT the allegations. As to the last sentence, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

66. As to paragraph 66, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

67. As to paragraph 67, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

68. As to paragraph 68, Defendants ADMIT that Flack sought to obtain a mastectomy and breast reconstruction services, DENY that “top surgery” or “upper surgery” are effective surgical treatments for treating gender dysphoria in transgender men, and lack knowledge or information sufficient to form a belief as to the remaining allegations.

69. As to paragraph 69, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

70. As to paragraph 70, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

71. As to paragraph 71, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

72. As to paragraph 72, Defendants ADMIT the allegations.

73. As to the first sentence of paragraph 73, Defendants ADMIT the allegations. As to the remaining sentence, Defendants DENY the allegations are complete representations of the document cited.

74. As to paragraph 74, Defendants DENY the use of the term “immediately” and ADMIT the remaining allegations.

75. As to the first sentence of paragraph 75, Defendants ADMIT that DHS denied preauthorization based on the Challenged Exclusion and DENY the remaining allegations. As to the second sentence, Defendants ADMIT that DHS did not consider the medical necessity of the services requested for Flack in reaching its decision and DENY the remaining allegations. As to the last sentence, Defendants DENY the allegations are complete representations of the document cited.

76. As to paragraph 76, Defendants ADMIT the allegations.

77. As to paragraph 77, Defendants DENY the allegations are complete representations of the document cited.

78. As to paragraph 78, Defendants ADMIT the allegations.

79. As to paragraph 79, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

80. As to paragraph 80, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

Plaintiff Sara Ann Makenzie

81. As to paragraph 81, Defendants ADMIT that Makenzie is 41 years old and resides in Baraboo, Wisconsin, and lack knowledge or information sufficient to form a belief as to the allegations.

82. As to paragraph 82, Defendants ADMIT that Makenzie receives SSI for her income and Wisconsin Medicaid, and lack knowledge or information sufficient to form a belief as to the remaining allegations.

83. As to paragraph 83, Defendants lack knowledge or information sufficient to form a belief as to the specific meaning of “transgender woman.” As to the remaining sentences, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

84. As to paragraph 84, Defendants ADMIT the allegations.

85. As to paragraph 85, Defendants ADMIT that DHS received a court order to change name and sex of birth certificate for Makenzie and lack knowledge or information sufficient to form a belief as to the remaining allegations.

86. As to paragraph 86, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

87. As to paragraph 87, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

88. As to paragraph 88, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

89. As to paragraph 89, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

90. As to paragraph 90, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

91. As to paragraph 91, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

92. As to paragraph 92, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

93. As to paragraph 93, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

94. As to paragraph 94, Defendants lack knowledge or information sufficient to form a belief as to the allegations.

95. As to paragraph 95, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

96. As to paragraph 96, Defendants lack knowledge or information sufficient to form a belief as to the remaining allegations.

INJURIES TO PLAINTIFFS

97. As to paragraph 97, Defendants DENY the allegations.
98. As to paragraph 98, Defendants DENY the allegations.
99. As to paragraph 99, Defendants DENY the allegations.
100. As to paragraph 100, Defendants DENY the allegations.
101. As to paragraph 101, Defendants DENY the allegations.
102. As to paragraph 102, Defendants DENY the allegations.
103. As to paragraph 103, Defendants DENY the allegations.

FIRST CAUSE OF ACTION

Unlawful Discrimination on the Basis of Sex in Violation of section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116

Against Defendant Wisconsin Department of Health Services (for compensatory damages, declaratory relief, and injunctive relief) and Defendant Seemeyer (for declaratory and injunctive relief)

Defendants DENY the allegations in the above heading.

104. Defendants reassert and incorporate by reference their responses in all preceding paragraphs of this Answer as though fully set forth herein.

105. As to paragraph 105, Defendants DENY the allegations are complete representations of the law cited.

106. As to paragraph 106, Defendants DENY the allegations.

107. As to paragraph 107, Defendants DENY the allegations.

108. As to paragraph 108, Defendants DENY the allegations.

SECOND CAUSE OF ACTION

**Violation of the Medicaid Act's Availability Requirements,
42 U.S.C. § 1396a(a)(10)(A)**

Against Defendant Seemeyer (for declaratory and injunctive relief)

Defendants DENY the allegations in the above heading.

109. Defendants reassert and incorporate by reference their responses in all preceding paragraphs of this Answer as though fully set forth herein.

110. As to paragraph 110, Defendants DENY the allegations.

THIRD CAUSE OF ACTION

**Violation of the Medicaid Act's Comparability Requirements,
42 U.S.C. § 1396a(a)(10)(B)**

Against Defendant Seemeyer (for declaratory and injunctive relief)

Defendants DENY the allegations in the above heading.

111. Defendants reassert and incorporate by reference their responses in all preceding paragraphs of this Answer as though fully set forth herein.

112. As to paragraph 112, Defendants DENY the allegations.

FOURTH CAUSE OF ACTION

Violation of 42 U.S.C. § 1983 Based on the Deprivation of Plaintiffs' Rights Under the Equal Protection Clause of the Fourteenth Amendment

Against Defendant Seemeyer (for declaratory and injunctive relief)

Defendants DENY the allegations in the above heading.

113. Defendants reassert and incorporate by reference their responses in all preceding paragraphs of this Answer as though fully set forth herein.

114. As to paragraph 114, Defendants DENY the allegations.

115. As to paragraph 115, Defendants DENY the allegations.

116. As to paragraph 116, Defendants DENY the allegations.

REQUEST FOR RELIEF

Defendants DENY that Plaintiffs are entitled to any of the relief they seek.

DEFENSES

1. One or more of the plaintiffs lack standing.
2. One or more of the plaintiffs' claims is unripe.
3. One of more of the plaintiffs have failed to exhaust administrative remedies as to one or more claims.
4. One or more of the plaintiffs' claims are not enforceable through a 42 U.S.C. § 1983 action, for lack of a private right of action or otherwise.

5. One or more of the plaintiffs' claims in their complaint fails to state a claim upon which relief can be granted.

6. One or more of the plaintiffs' claims in their complaint is barred by the Eleventh Amendment to the U.S. Constitution.

7. Plaintiffs have failed to mitigate their alleged damages.

JURY TRIAL DEMAND

Pursuant to Federal Rule of Civil Procedure 38, Defendants demand a trial by jury.

WHEREFORE, Defendants respectfully request that judgment be entered in their favor dismissing this action with prejudice, denying all of the relief requested, and granting them such further relief as the Court deems appropriate.

Dated this 19th day of June, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

Attorneys for Defendants State of
Wisconsin Department of Health Services
and Linda Seemeyer

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (Kilpatrick)
(608) 264-6219 (Roth)
(608) 266-3094 (Schmelzer)
(608) 267-2223 (Fax)
rothct@doj.state.wi.us
schmelzerjj@doj.state.wi.us
kilpatricksc@doj.state.wi.us