

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

CODY FLACK, et al.,

Plaintiffs,

v.

Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES, et al.,

Defendants.

DEFENDANTS' MOTION TO STAY PROCEEDINGS

Defendants Wisconsin Department of Health Services and its Secretary, in her official capacity, hereby move for an order immediately staying the proceedings in this action pending the outcome of the Department's promulgation of emergency and permanent rules to remove Wisconsin Administrative Code §§ DHS 107.03(23)–(24)¹ (hereafter “the Challenged Exclusion”) and 107.10(4)(p). A stay order would include, among other things, suspending the briefing schedule on Plaintiffs' motion for

¹ The Challenged Exclusion includes the following services not covered under the Wisconsin Medicaid program: “Drugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics,” and “Transsexual surgery.” Wis. Admin. Code § DHS 107.03(23)–(24).

summary judgment (Dkt. 151)² and removing from the Court calendar the trial scheduled to begin on September 16, 2019. The grounds for this motion are as follows.

1. Generally, a court considers four factors about whether to grant a stay: “(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.” *Grice Engineering, Inc. v. JG Innovations, Inc.* 691 F.Supp.2d 915, 920 (W.D. Wis. 2010) (citations omitted). And a court has discretion to stay its proceedings in the interest of judicial economy. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (recognizing “the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”). In consideration of these factors, a stay is appropriate under the circumstances here. *See Grice Engineering*, 691 F.Supp.2d at 920 (party requesting a stay bears burden).

² Defendants intend to file a separate motion to extend the deadline for its summary judgment response brief—due May 14—until one week after the Court rules on this motion to stay proceedings.

2. First, a stay will not unduly prejudice or tactically disadvantage the named plaintiffs and the certified class. Indeed, Plaintiffs have already obtained the preliminary injunctive relief they sought on two occasions. On July 25, 2018, this Court entered a preliminary injunction enjoining Defendants from enforcing the Challenged Exclusion against Plaintiffs Flack and Makenzie. Then, on April 23, 2019, this Court granted Plaintiffs' motion to certify a class of Medicaid beneficiaries suffering from gender dysphoria who seek surgical treatment and also "expanded" the preliminary injunction by enjoining Defendants from enforcing the Challenged Exclusion against the named plaintiffs (which by then included Kelly and Sherwin) and the class. (Dkt. 150.) So, during the duration of the stay, the named plaintiffs and class members have the ability to obtain Medicaid coverage for gender reassignment surgery and related hormone therapy, subject to an individualized medical necessity determination. (Dkt. 150:26.)

3. Second, a stay would not only simplify the issues in question and streamline the trial but also would permit the class to obtain all the relief it seeks—removal of the Challenged Exclusion. This outcome would reduce the burden of litigation on the Court and the parties, leaving only the named plaintiffs' monetary damages claim under the Affordable Care Act, which may be subject to mediation.

4. In furtherance of this result, the Department has begun the preliminary steps required to promulgate emergency and permanent rules to remove the Challenged Exclusion. The timing of this action makes sense, given the Court's recent expansion of the original preliminary injunction to now cover an entire class of Medicaid beneficiaries. (Declaration of Ciotola ¶ 5.) Department staff have begun drafting the statement of scope, which is the required first step. *See* Wis. Stat. § 227.24(1)(e)1d. (Declaration of Ciotola ¶ 7.) After the emergency statement of scope is complete, which the Department estimates will be May 13, the Department will send it to the Governor's Office for approval and then to the Legislative Reference Bureau for publication. (Declaration of Ciotola ¶ 8.) *See id.* After publication, an emergency rule would take effect and last for 150 days or more (if extensions are granted), absent legislative temporary suspension. *See* Wis. Stat. §§ 227.24(1)(c), (2), and 227.26(2). And while the emergency rule is in place, the Department intends to promulgate a permanent rule. (Declaration of Ciotola ¶ 6.) If successful in removing the Challenged Exclusion and Wis. Admin. Code § DHS 107.10(4)(p), the class' equitable relief claims would become moot. Therefore, continuation of these proceedings would only waste the Court's, Plaintiffs', and the State's time and resources.

5. Moreover, a stay of proceedings may provide Plaintiffs and the class with *more* relief than they are entitled to in this lawsuit. Wisconsin

Admin. Code § DHS 107.10(4)(p) is not a part of the Challenged Exclusion, and Plaintiffs readily admit that this Medicaid rule was not part of its Amended Complaint. (Dkt. 152:13.) Nonetheless, the Department will seek to remove another Medicaid services exclusion found in Wis. Admin. Code § DHS 107.10(4)(p)—“Drugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics.” To include § DHS 107.10(4)(p) as part of this case, Plaintiffs would need to obtain leave of the court to amend their complaint. However, a stay and subsequent successful removal of § DHS 107.10(4)(p) through promulgation would avoid that.

6. Finally, although this case is not at its early stages, a successful outcome would nonetheless save significant resources of the Court and the parties. A stay and successful promulgation could render moot or unnecessary the remaining summary judgment briefing by both parties, this Court’s decision as to the summary judgment motion, the parties’ pre-trial motions and the Court’s related decisions, a five-day jury trial, and the parties’ post-trial motions and the Court’s related decisions.

7. In sum, because the factors weigh in favor of a stay of proceedings, Defendants respectfully urge the Court to exercise its significant discretion and grant Defendants’ motion, thereby giving the political process a chance to resolve the real substance of this lawsuit.

Dated this 9th day of May, 2019.

Respectfully submitted,

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