UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK, SARA ANN MAKENZIE, MARIE KELLY, and COURTNEY SHERWIN, *individually and on behalf of all others similarly situated,* Plaintiffs, v. WISCONSIN DEPARTMENT OF HEALTH SERVICES and ANDREA PALM, in her official capacity as the Acting Secretary of the Wisconsin Department of Health Services, Defendants.	Case No. 3:18-cv-00309-wmc Judge William Conley

BRIEF IN SUPPORT OF PLAINTIFFS' PROPOSED REMEDIAL PLAN

INTRODUCTION

For over two decades, Defendants' enforcement of the Challenged Exclusion sent a clear and consistent message to transgender beneficiaries, their providers, and the various managed care organizations ("HMOs") that administer Medicaid under contract with the Wisconsin Department of Health Services ("DHS"): Wisconsin Medicaid does not and will not cover surgical or hormone treatments for gender dysphoria. Accordingly, transgender Medicaid beneficiaries were either denied coverage or were deterred from seeking it in the first place. The Wisconsin Medicaid HMOs were barred from covering these treatments. And, of course, DHS never adopted the type of objective clinical coverage criteria for gender-confirming treatments that it routinely does for other medically necessary services. While DHS and participating HMOs use such criteria to make consistent coverage determinations for other conditions, there is no such framework in place for gender-confirming treatments.

The Court's expanded preliminary injunction of the Challenged Exclusion entered on April 23, 2019 and the permanent injunction entered on August 16, 2019 have, unfortunately, been insufficient to ensure that Class Members can obtain Wisconsin Medicaid coverage for medically necessary gender-confirming treatments for gender dysphoria. In fact, some Wisconsin Medicaid HMOs have continued to categorically deny coverage for medically necessary gender-confirming surgical procedures to Class Members based on the HMOs' own categorical exclusions, including the incorrect classification of these procedures as "cosmetic," because DHS has not yet provided them with clear direction as to their obligations to cover these services that were previously excluded by the Challenged Exclusion for the past two decades. As a result, transgender beneficiaries and their providers are facing lengthy, complex grievance and appeals

processes that are delaying or denying coverage for these medically necessary treatments for gender dysphoria, and subjecting them to continuing harm.

The permanent injunction barring Defendants' enforcement of the Challenged Exclusion is a necessary first step to ensuring that transgender Wisconsin Medicaid beneficiaries can obtain coverage for gender-confirming care when it is medically necessary for them. But, as the experience of the last few months has shown, it is not sufficient to cure the effects of DHS's decades-long enforcement of the Challenged Exclusion. More needs to be done to ensure that all Wisconsin Medicaid beneficiaries needing gender-confirming treatments—whether they get their Medicaid from DHS directly on a fee-for-service basis or through one of the contracted HMOs—can get coverage when those treatments are medically necessary for them under the prevailing standards of care for gender dysphoria.

Accordingly, in addition to permanently enjoining Defendants' enforcement of the Challenged Exclusion, Plaintiffs request that the Court order the declaratory, injunctive, and equitable relief contained in Plaintiffs' proposed remedial order to effectively cure the longstanding Constitutional and statutory violations of transgender Wisconsin Medicaid beneficiaries' rights resulting from the continuous enforcement of the Challenged Exclusion for the past 22 years, and to ensure that the Named Plaintiffs and all members of the Class can now seek and obtain coverage for medically necessary treatments for gender dysphoria in accordance with Section 1557, the Medicaid Act, and the Constitution. Specifically, in their proposed plan ("Plaintiffs' Plan"), Plaintiffs ask the Court to permanently enjoin Defendants and their agents and contractors (including HMOs that provide covered services to Wisconsin Medicaid beneficiaries under contract with DHS) from enforcing any policy or practice that categorically excludes Medicaid coverage for any treatment of gender dysphoria recognized by the prevailing

standards of care; order DHS to develop written coverage criteria for gender dysphoria treatments (akin to those it has developed for other medical treatments) consistent with the prevailing standards of care; direct Defendants to notify Wisconsin Medicaid HMOs, providers, and Class Members of the terms of the final injunction, and to notify current Medicaid beneficiaries who were denied coverage for a gender dysphoria treatment since January 1, 2014 of their ability to resubmit coverage requests; and require Defendants to submit periodic compliance reports to the Court and comply with requests for documents or information from Plaintiffs to monitor their compliance with the final injunction.

Because this requested relief is calculated to remedy the past and continuing effects of DHS's enforcement of the Challenged Exclusion, Plaintiffs respectfully request that the Court adopt their plan and enter their proposed order.

RELEVANT PROCEDURAL BACKGROUND

On July 25, 2018, this Court issued a preliminary injunction barring Defendants from enforcing the exclusion against the two original plaintiffs, Cody Flack and Sara Ann Makenzie. Op. & Order Granting Prelim. Inj. [ECF No. 70]. After that decision, with leave of the Court, Plaintiffs amended their complaint to add class allegations and two additional named plaintiffs, Marie Kelly and Courtney Sherwin. First Am. Compl. [ECF No. 85]. Plaintiffs subsequently moved for class certification, Mot. for Class Cert. [ECF No. 89], and to expand the preliminary injunction to fully enjoin Defendants from enforcing the Challenged Exclusion against any Class Member, Pls.' Mot. to Modify Prelim. Inj. [ECF No. 107]. On April 23, 2019, the Court granted both motions, certifying the Class as "[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria," and expanding the

preliminary injunction to enjoin Defendants' enforcement of the Challenged Exclusion against any member of the Class. Op. & Order, at 9, 27 [ECF No. 150] ("April 2019 Order"). Following that decision, also on April 23, 2019, Plaintiffs moved for summary judgment on all claims and for a permanent injunction barring Defendants from enforcing the Challenged Exclusion. Pls.' Mot. for Summ. J. & Perm. Inj. [ECF No. 151]. Noting that "Defendants' violations of these laws will not be remedied fully by a permanent injunction alone," Plaintiffs further moved the Court "to order such other equitable relief needed to cure these violations." *Id.* at 2. As Plaintiffs requested in that motion,

> [s]uch relief may include, *inter alia*, providing notice to transgender Wisconsin Medicaid beneficiaries and their medical providers that medically necessary treatments for gender dysphoria are no longer excluded from coverage; adopting internal guidelines for determining when gender-confirming care is medically necessary, and as a result, covered under Wisconsin Medicaid, consistent with DHS's policies and practices for other services; and providing the third-party managed care organizations that administer Wisconsin Medicaid with those coverage guidelines and other guidance on covering these services.

Id. Accordingly, Plaintiffs asked the Court to give the Parties the opportunity to present joint or separate remedial plans shortly after a summary judgment ruling in Plaintiffs' favor. *Id.*

In its August 16, 2019 Opinion and Order granting summary judgment to Plaintiffs [ECF No. 217] ("Summary Judgment Opinion"), the Court held as a matter of law that Wisconsin Medicaid's categorical coverage exclusion on gender-confirming surgical and hormone treatments, Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the "Challenged Exclusion"), and Defendants' enforcement thereof, violated Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"); (2) the Medicaid Act's availability and comparability requirements, 42 U.S.C. § 1396a(a)(10)(A)-(B) ("Medicaid Act"); and (3) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoined Defendants from enforcing the Challenged Exclusion.

Summ. J. Op. at 24, 32, 37, 38. The Court, granting Plaintiffs' request for the opportunity to submit a proposed plan for injunctive and equitable relief, also directed the Parties to submit joint or separate proposals for permanent injunctive and equitable relief within 14 days. *Id.*[1] Because the Parties, having met and conferred, have been unable to agree to the terms of a proposed remedial order, Plaintiffs have submitted their own proposed order to the Court.

RELEVANT FACTUAL BACKGROUND

Since the Court's April and August orders, a number of Wisconsin Medicaid beneficiaries enrolled in Wisconsin Medicaid HMO plans, including Named Plaintiff Courtney Sherwin, have still been denied coverage by their HMOs for gender-confirming treatments deemed medically necessary by their treating providers because the HMOs consider these treatments "cosmetic" and thus excluded services. Second Supp. Decl. of Courtney Sherwin ¶¶ 4-5 ("Sherwin Decl."); Second Supp. Decl. of Emma Grunenwald-Ries ¶ 5 ("Grunenwald-Ries Decl."); Decl. of Emily Smith, RN, BSN ¶ 6 ("Smith Decl."). At UW Health alone, at least three Wisconsin Medicaid beneficiaries have been denied prior authorization for medically necessary gender-confirming surgeries since the expanded preliminary injunction was entered in April based on Medicaid HMOs' blanket exclusions on these services. Smith Decl. ¶ 6.

One Wisconsin Medicaid HMO, Quartz, incorrectly considers many of the surgical treatments for gender dysphoria recognized by the WPATH Standards of Care to be "cosmetic" in all instances and therefore not covered for any Quartz plan, including Wisconsin Medicaid beneficiaries. Sherwin Decl. ¶ 4. The current coverage policy that Quartz applies both to Medicaid beneficiaries and individuals under other Quartz plans is the following:

[1] The deadline was later extended to September 10, 2019. *See* Text-Only Order [ECF No. 222].

> *The following procedures are considered cosmetic and will be denied as contract exclusions, therefore not covered (not an all-inclusive list).*
>
> *1. Chin augmentation: reshaping or enhancing the size of the chin;*
>
> *2. Laryngoplasty: reshaping of laryngeal framework (voice modification);*
>
> *3. Liposuction: removal of fat;*
>
> *4. Hair removal/hair transplantation;*
>
> *5. Facial feminizing (facial bone reduction);*
>
> *6. Rhinoplasty: reshaping of the nose;*
>
> *7. Lip reduction/enhancement: decreasing/enlarging lip size;*
>
> *8. Rib excision: to enhance waistline;*
>
> *9. Breast augmentation.*

See Sherwin Decl. ¶ 4, Ex. A-B.

On August 21, 2019—nearly four months after the Court's April 2019 Order expanding the preliminary injunction, and five days after the Summary Judgment Opinion was issued granting the permanent injunction—DHS issued a *ForwardHealth Update* entitled "Transgender Surgery Policy" to Wisconsin Medicaid providers and HMOs. Fourth Decl. of Orly T. May, Exs. 1-2 ("May Decl."). The document, referring to the *preliminary* injunction issued in April, stated:

> In response to the preliminary injunction 18-cv-309-wmc by the United States District Court for the Western District of Wisconsin, effective April 23, 2019, providers may no longer exclude transgender services based on the Wisconsin Administrative Code's currently enjoined exclusion of: "Drugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics" and "Transsexual surgery." Services previously considered noncovered under these exclusions are currently allowable under ForwardHealth with an approved prior authorization (PA) request.

May Decl. Ex. 2 at 1. The bulletin listed the information that a provider must include in a prior authorization request. *Id.* at 1-2. By its own terms, the bulletin was limited to "fee-for-service and applies to services members receive on a fee-for-service basis only," *i.e.*, the minority of beneficiaries whose plans are administered directly by DHS. *Id.* at 2. With respect to Wisconsin

Medicaid HMOs, the bulletin stated that, "[f]or managed care policy, contact the appropriate managed care organization (MCO)," stating that "MCOs are required to provide at least the same benefits as those provided under fee-for-service arrangements." *Id.* However, the bulletin did not contain any further detail as to when DHS, or its contracted HMOs, would cover gender-confirming treatments or the coverage criteria that would apply. To Plaintiffs' knowledge, DHS has issued no further written communications to providers or HMOs since the April 2019 Order or the Summary Judgment Opinion. Because DHS has failed to provide clear direction to its contracted HMOs on coverage for gender-confirming treatments since the Court's April and August orders, those HMOs are considering coverage requests for gender-confirming treatments under a hodge-podge of conflicting internal policies, resulting in unnecessary coverage denials, confusion to beneficiaries and their doctors, and continuing harm to Class Members with untreated or inadequately treated gender dysphoria.

For example, Quartz considers the August 2019 *ForwardHealth* bulletin to be insufficient to require it to cover the services otherwise subject to its own exclusions, as the document did not contain a published medical policy on surgical treatments for gender dysphoria. Decl. of Kristie Meier ¶ 5 ("Meier Decl."). Quartz has explained that it will continue to apply its internal policy, noted above, which excludes as "cosmetic" many gender-confirming treatments recognized by the WPATH Standards of Care. *Id.*; Sherwin Decl. ¶ 4, Ex. A-B. If DHS were to release published coverage criteria for gender dysphoria treatments, it is Quartz's position that it would then be compelled to follow such a policy and cover procedures required by the policy. Meier Decl. ¶ 6. Until then, it will continue to deny coverage for certain medically necessary services subject to its own exclusion.

Because Quartz and other Medicaid HMOs have continued to deny medically necessary care to transgender Wisconsin Medicaid beneficiaries, the result has been the continued delay or denial of these treatments. One of these individuals is named plaintiff Courtney Sherwin, whose current Medicaid HMO is Quartz. Before the April 2019 Order, Ms. Sherwin's prior authorization requests for female genital reconstruction surgeries (orchiectomy and vaginoplasty) had been denied based on the Challenged Exclusion. Summ. J. Op. at 18. Shortly after the Court's April 23, 2019 order, Ms. Sherwin's surgeons at UW Health, Dr. Katherine Gast and Dr. Scott Chaiet, submitted prior authorizations for orchiectomy, vaginoplasty (including laser hair removal that is necessary for that surgery to prevent infection and complications), chest reconstruction (breast augmentation), and facial feminization. Sherwin Decl. ¶ 3. Quartz approved the orchiectomy and vaginoplasty. *Id.* ¶ 4. However, it denied the other three procedures, including the necessary hair removal, based on Quartz's own policy that considers these procedures "cosmetic" and therefore excluded from coverage. *Id.*

UW Health submitted internal appeals of each denial to Quartz. Sherwin Decl. ¶ 7. In connection with those appeals, UW Health and Plaintiffs' attorneys provided Quartz with a copy of the Court's April 2019 order. *Id.* ¶ 7. Plaintiffs' attorneys also gave Quartz a draft of the August 2019 *ForwardHealth Update* provided to them by Defendants' counsel. Quartz held reconsideration committee meetings for each of the denials in July and August. *Id.* Nevertheless, Quartz immediately affirmed the original denials after each of those meetings. *Id.* Ms. Sherwin has now submitted a request for a fair hearing and a concurrent review to DHS and is awaiting a response from DHS. *Id.* ¶ 8.

After Quartz approved the prior authorizations for the genital reconstruction surgeries, Ms. Sherwin scheduled her vaginoplasty for October 2019. *Id.* ¶ 6. However, because she has

been unable to obtain the necessary hair removal required for that surgery, she will be unable to keep that surgery date and will need to reschedule it for months or more in the future. *Id.* She continues to experience significant gender dysphoria as a result of this continued delay. *Id.* ¶ 9. Being unable to obtain the care she needs—even after this Court specifically enjoined the Challenged Exclusion—has significantly exacerbated Ms. Sherwin's gender dysphoria. *Id.*

Another Class Member, Emma Grunenwald-Ries, had a similar experience with Quartz. After the April 2019 Order, UW Health submitted prior authorization requests for two gender-confirming surgeries deemed medically necessary by her treating providers—genital reconstruction (vaginoplasty) and chest reconstruction (breast augmentation). Grunenwald-Ries Decl. ¶ 2. Quartz approved the former but, pursuant to its policy, denied the breast augmentation as a "contract exclusion." *Id.* ¶ 5. After the Summary Judgment Opinion was issued, UW Health submitted a new prior authorization request for the chest surgery to Quartz, a decision on which is pending. *Id.* ¶ 6. If Quartz again denies the authorization because of its policy treating all breast augmentation surgeries for transgender women as "cosmetic," Ms. Grunenwald-Ries will either have to pay for this surgery out-of-pocket, or indefinitely delay receiving this medically necessary treatment while she pursues the lengthy grievance and appeal process. *Id.* ¶ 6.

Even for the surgical procedures that Wisconsin Medicaid HMOs *are* covering, some HMOs are imposing onerous coverage criteria for these surgeries that have no basis in the WPATH Standards of Care. *Id*. ¶ 3. For example, Quartz has required individuals seeking genital reconstruction to prove that they have received psychotherapy at least once monthly for one year, something that is not required by the WPATH Standards of Care or considered necessary by the treating surgeons at UW. *Id.* Ultimately, despite this Court's injunctions of the Challenged Exclusion, Class Members continue to face significant obstacles to obtaining necessary care.

LEGAL STANDARD

This Court is authorized to grant injunctive and equitable relief necessary to remedy Defendants' violations of the Equal Protection Clause, Section 1557 (incorporating the enforcement mechanisms of Title IX of the Education Amendments of 1972),[2] and the Medicaid Act. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (Equal Protection Clause); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (Title IX); *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 582-83 (7th Cir. 2014) (same); *Antrican v. Odom*, 290 F.3d 178, 186 (4th Cir. 2002) (Medicaid Act); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 992-93 (D. Minn. 2016) (same).

Where, as here, a federal district court has found violations of the Constitution, the court's remedial authority to cure those violations is at its most expansive. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S. at 15; *see also Brown v. Plata*, 563 U.S. 493, 538 (2011) (quoting same); *French v. Owens*, 777 F.2d 1250, 1253 (7th Cir. 1985) ("The district court has broad powers to forge an adequate remedy to permanently correct any constitutional violation."). "A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *United States v. Paradise*, 480 U.S. 149, 183 (1987) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). A district court may use its equitable powers both to "remedy[] the present effects of a violation in the past" and "to bring an ongoing violation to an immediate halt." *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978).

[2] *See* 42 U.S.C. § 18116(a).

The Supreme Court has mandated that "in the event of a constitutional violation 'all reasonable methods [must] be available to formulate an effective remedy,'" *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976) (quoting *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971)), "and that every effort should be made by a federal court to employ those methods 'to achieve the greatest possible degree of (relief), taking into account the practicalities of the situation.'" *Id.* (quoting *Davis v. Sch. Comm'rs of Mobile Cty.*, 402 U.S. 33, 37 (1971)). "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Id.* at 293-94 (1976) (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)).

Because "[t]he district court has firsthand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands,'" *Paradise*, 480 U.S. at 184 (quoting *Swann*, 402 U.S. at 6), the district court is "'in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending [the] discriminatory practices.'" *Id.* (quoting *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 412, 480 (1986) (Powell, J., concurring)). The district court's "proximate position and broad equitable powers mandate substantial respect for this judgment." *Id.*

Accordingly, district courts regularly use that broad authority to order remedies of a nature and scope necessary to cure constitutional civil rights violations, including detailed injunctive orders requiring prospective relief that goes beyond merely enjoining the unlawful policy or activity. *See, e.g., Brown*, 563 U.S. at 538 (affirming district court's order forcing California to reduce the population in its prisons to 137.5% of design capacity in two years to remedy systemic Eighth Amendment violation); *Paradise*, 480 U.S. at 183-86 (affirming district

court's order requiring that 50 percent of the state trooper promotions go to black candidates in Fourteenth Amendment class action employment discrimination case); *French*, 777 F.2d at 1258 (affirming most aspects of a detailed injunction requiring prison reforms to cure Eighth Amendment violations). Federal courts have also granted prospective injunctive and equitable relief to remedy violations of Title IX (which Section 1557 incorporates by reference) and the Medicaid Act. *See, e.g.*, *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1116 (S.D. Cal. 2016) (finding injunctive relief necessary to cure Title IX violation in class action case and ordering parties to propose a detailed compliance and monitoring plan to the Court), *aff'd*, 768 F.3d 843 (9th Cir. 2014); *K.G. ex rel. Garrido v. Dudek*, 981 F. Supp. 2d 1275, 1289 (S.D. Fla. 2013) (in Medicaid Act case, ordering state Medicaid program "to provide, fund, and authorize Applied Behavioral Analysis treatment to Plaintiffs," to notify community behavioral health services providers and physicians enrolled in Medicaid that the treatment was now a covered service, and to take other actions necessary to administer that treatment to beneficiaries).

The Court here similarly has broad authority to adopt appropriate relief to effectively remedy the State's violations and to ensure adequate prospective relief to members of the Class.

DISCUSSION

Based on the longstanding violation of transgender Wisconsin Medicaid beneficiaries' rights and the continuing failure of DHS to ensure that its contracted HMOs are covering gender-confirming treatments previously excluded by the Challenged Exclusion, this Court should exercise its broad discretion in ordering a prospective remedy to cure these violations and to rectify fully the ongoing harms suffered by the Class as a result of Defendants' enforcement of the Challenged Exclusion for many years. Plaintiffs' plan, contained in their proposed order, is tailored to achieve those remedial objectives.

I. OVERVIEW OF PROPOSED RELIEF

In addition to the permanent injunction already entered by the Court on August 16, 2019, enjoining Defendants from enforcing the Challenged Exclusion, Plaintiffs request that the Court order the following relief:

- Permanently enjoining Defendants from enforcing any regulation, policy, practice, procedure, or guidance with the purpose or effect of categorically excluding any gender-confirming treatment recognized by the prevailing standards of care for the treatment of gender dysphoria (including, but not limited to, excluding any such treatment for being "cosmetic" when it is medically necessary to treat gender dysphoria), or subjecting any such treatment to more stringent review or prior authorization requirements than the same treatments when intended or used to treat any condition other than gender dysphoria;
- Ordering Defendants to cover all gender-confirming treatments recognized by the prevailing standards of care for the treatment of gender dysphoria (as reflected in the WPATH Standards of Care and/or Endocrine Society Guidelines) for all Wisconsin Medicaid beneficiaries diagnosed with gender dysphoria who meet the treatment criteria for the treatment or services specified in the applicable standards of care, and adopting written coverage criteria for gender dysphoria treatments consistent with the prevailing standards of care for use by DHS and HMO staff responsible for making coverage decisions;
- Ordering Defendants to promptly notify appropriate DHS staff, Wisconsin Medicaid HMOs, and providers of the terms of the final injunction, using the mechanisms specified in Plaintiffs' Plan;

- Directing Defendants to take reasonable steps to identify Wisconsin Medicaid beneficiaries denied coverage for a gender dysphoria treatment since January 1, 2014, and to notify those individuals and/or the providers who submitted prior authorization requests on their behalf, of the (a) terms of the permanent injunction; (b) right of the individual and/or provider to request reconsideration of the previously denied prior authorization request; (c) individual's right to seek the assistance of counsel regarding the individual's rights under the Court's order; and (d) contact information for Class Counsel; and
- Requiring that Defendants file written compliance reports with the Court 90 days after the Court's entry of final injunctive relief and annually on the anniversary of the date of the Court's order for three years, and to provide Plaintiffs, through Class Counsel and upon request, documents or information needed to monitor and enforce Defendants' compliance with the final injunction.

II. THE REQUESTED RELIEF IS NECESSARY TO PROTECT THE RIGHTS OF ALL CLASS MEMBERS

Because a permanent injunction alone will be insufficient to ensure that all Wisconsin Medicaid beneficiaries in the Class can obtain coverage for gender-confirming treatments when medically necessary, Plaintiffs propose that the Court further issue an order requiring that Defendants affirmatively provide coverage for all gender-confirming treatments recognized by the prevailing standards of care for the treatment of gender dysphoria (i.e., the WPATH Standards of Care and Endocrine Society Guidelines), and that DHS publish and disseminate coverage criteria to all DHS staff involved in administering Medicaid and to the various HMOs that contract with DHS to administer the bulk of Wisconsin Medicaid plans.

A. Written Coverage Criteria Consistent with Prevailing Standards of Care

As Plaintiffs propose, the Court should direct DHS to cover all medically necessary gender-confirming surgeries recognized by the prevailing standards of care when clinically indicated under those standards. This Court, as well as DHS's own medical staff, has already recognized the medical consensus that the WPATH Standards of Care and Endocrine Society Guidelines are the authoritative standards governing the treatment of gender dysphoria. Summ. J. Op. at 4-5. Using those standards of care as the benchmark for making coverage decisions will be consistent with the medical consensus and the clinical practice of Wisconsin surgeons who offer gender-confirming surgeries, Decl. of Katherine Gast MD, MS ¶ 1 [ECF No. 32]; Decl. of Clifford King, MD ¶ 1 [ECF No. 30], and will ensure consistent coverage decisions by DHS and its contracted HMOs.

A policy affirmatively setting forth coverage criteria for gender-confirming treatments is crucial in ensuring that both DHS and HMO staff who are making coverage determinations have clarity about the new coverage requirements. Without this, Class Members will continue to face the same types of unnecessary and burdensome hurdles that Ms. Sherwin, Ms. Grunenwald-Ries, and others have already faced since this Court entered the preliminary and permanent injunctions in this case. Class Members whose Medicaid plans are administered by HMOs are particularly at risk of coverage decisions inconsistent with this Court's broad injunction absent an affirmative policy detailing the specific coverage guidelines. *See* Meier Decl. at ¶¶ 5-6 (indicating that Quartz's own coverage exclusion will apply to certain gender-confirming treatments unless and until DHS issues an affirmative coverage policy).

In addition, the adoption of published coverage criteria based on the prevailing standards of care would be consistent with DHS's normal course of conduct. As DHS's 30(b)(6) deponent

Dr. Julie Sager testified, DHS typically issues affirmative coverage guidelines for treatments for other conditions. Tr. of Rule 30(b)(6) Dep. of DHS [ECF No. 165] 16:15-17:17 ("DHS Dep.") (noting that most preauthorization requests are for treatments for which DHS has published internal coverage guidelines). Plaintiffs' requested order would merely require that DHS follow its standard practice by adopting coverage criteria for these previously-excluded treatments.

B. Requiring DHS to Ensure that Wisconsin Medicaid HMOs Cover Medically Necessary Gender-Confirming Treatments

A permanent injunction of DHS's enforcement of the Challenged Exclusion is insufficient if the HMOs that administer the large majority of Wisconsin Medicaid plans continue to deny coverage for gender-confirming treatments as if the Challenged Exclusion was still in effect. Even assuming DHS properly handles prior authorization requests for fee-for-service beneficiaries, who comprise roughly 20 percent of the Wisconsin Medicaid population, the remaining 80 percent of beneficiaries receive Medicaid through Wisconsin Medicaid HMOs, which typically apply their own coverage criteria *unless* DHS has published coverage criteria for its own staff and the HMOs to follow. DHS Dep. 15:12-16 ¶ 4. DHS has such criteria for many services, but, due in large part to the fact that the Challenged Exclusion was in place until this year, has not yet adopted or published criteria for gender-confirming surgical and hormone treatments. Left to their own devices, some HMOs are applying their own blanket exclusions on gender-confirming surgeries absent specific direction from DHS that they must cover medically necessary procedures for gender dysphoria as they would for any other treatments.

At bottom, it is DHS's responsibility to ensure that *all* of its contracted HMOs comply with this Court's orders and cover medically necessary services for gender dysphoria and that they comply with federal legal requirements for Medicaid. This includes the responsibility—which DHS has thus far not fulfilled—to prevent HMOs from applying their own categorical

exclusions on certain gender-confirming treatments. Under federal law, each state must designate a "single state agency" to administer its Medicaid program. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10. That agency may contract with managed care entities to provide services to Medicaid beneficiaries. 42 U.S.C. §§ 1396b(m), 1396d(t), 1396u-2. When they do so, however, the agency remains ultimately responsible for compliance with the Medicaid Act. *See, e.g., McCartney ex rel. McCartney v. Cansler*, 608 F. Supp. 2d 694, 701 (E.D.N.C. 2009) (single state agency "may not disclaim its responsibilities under federal law by simply contracting away its duties"), *aff'd sub nom. D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334 (4th Cir. 2010); *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 565 (6th Cir. 2001) (private HMOs contracted with Tennessee Medicaid agency are bound by a consent decree to which agency was party because they "are acting on behalf of the State, since the State, by statute, is the 'single State agency' responsible for administration of the [Medicaid] program"); *Catanzano ex rel. Catanzano v. Dowling*, 60 F.3d 113, 118 (2d Cir. 1995) ("[I]t is patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity.") (internal citations omitted).

Thus, even when, as in Wisconsin, the Medicaid agency contracts with managed care entities to administer services to beneficiaries enrolled in its Medicaid program, it may not delegate "duties relative to ensuring that [beneficiaries] receive medical services" *Carr v. Wilson-Coker*, 203 F.R.D. 66, 75 (D.Conn. 2001). Defendants must therefore ensure that their contracted managed care plans follow the law and the orders of this Court to provide medically necessary gender-confirming care to Medicaid beneficiaries. The injunctive and equitable relief contained in Plaintiffs' plan is designed to require Defendants to fulfill this duty and prevent HMOs from categorically excluding coverage for gender-confirming treatments (including by

labeling these procedures "cosmetic" and not undertaking individualized medical necessity determinations based on the prevailing standards of care).

C. Notification Requirements

Plaintiffs' plan would require DHS to take steps to notify Class Members, providers, and Wisconsin Medicaid HMOs of the terms of this Order and their attendant rights and obligations.

1. Notice to Relevant DHS Staff and HMOs

First, Plaintiffs request that the Court order Defendants to promptly notify appropriate DHS staff involved in administering Medicaid, Wisconsin Medicaid HMOs, and medical providers of the terms of the final injunction and related policy changes, using the notice mechanisms specified in the proposed order. Given the reversal of the longstanding policy resulting from this case and the continuing confusion among beneficiaries, providers, and HMOs as to what services will now be covered and under what circumstances, this notice requirement is necessary to effectuate the permanent injunction and ensure consistent treatment of all Class Members seeking coverage for gender-confirming care.

2. Notice to Class Members

Plaintiffs' plan includes several provisions designed to notify Class Members of the relief ordered by the Court and their rights in this case. This includes notifying Wisconsin Medicaid participating providers through a *ForwardHealth* update regarding the injunction, notifying providers and social service organizations serving transgender Wisconsin Medicaid beneficiaries of the terms of the order and their patients'/clients' rights to seek coverage, and identifying and notifying all current Wisconsin Medicaid beneficiaries who were denied prior authorization for one or more gender-confirming treatments since January 1, 2014 pursuant to the Challenged

Exclusion, and the treating providers who submitted those requests, that the exclusion has been removed and that they may now resubmit prior authorization requests for those treatments.[3]

Rule 23 specifically grants the Court authority to "issue orders that…require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of…any step in the action" or "the proposed extent of the judgment[.]" Fed. R. Civ. P. 23(d)(1)(B). Here, fairness demands that DHS take the steps contained in Plaintiffs' plan to notify members of the Class of the liability findings made by this Court, as well as the permanent injunctive relief already granted by the Court and any additional relief the Court may order now. Notice to Class Members (directly and through providers and organizations that serve them) is crucial to ensuring that Class Members are aware of their right to seek coverage for previously excluded treatments.

Because the Challenged Exclusion was in effect for over 20 years, many Class Members and their providers may, based on their own experience or knowledge of the longstanding policy, believe that the services they need are excluded and remain unaware that this is no longer the case. The notice contemplated in the proposed order will rectify this. Moreover, for Class Members who were unlawfully denied care in recent years and remain in need of previously-excluded gender-confirming treatments, direct notice to them and their providers that they may resubmit those requests now will help remedy those violations by ensuring those individuals understand their current rights. Plaintiffs' other requested notice provisions, including notice to

[3] Identifying these individuals should not be burdensome. Plaintiffs subpoenaed information from each of the Wisconsin Medicaid HMOs regarding the number of coverage denials they made since January 1, 2014 and received responsive information from each of them. A tabulation of that data was provided to this Court in connection with Plaintiffs' summary judgment motion. *See* Decl. of Abigail Moats [ECF No.167], Ex. 2. DHS can request that the HMOs identify the affected individuals and the providers who submitted the denied requests, and then issue notifications to any of those individuals who remain Wisconsin Medicaid beneficiaries now.

certain medical providers and organizations serving the transgender community, to HMOs, and to DHS staff and contractors, are all likewise crucial to ensuring that Class Members who have not previously submitted coverage requests, but who may have been aware of Defendants' exclusion, are informed of their rights to seek care pursuant to this Court's decisions.

D. Reporting and Compliance Requirements

Plaintiffs have further proposed that the Court order that Defendants report to the Court information sufficient to confirm its completion of the remedial provisions outlined in the rest of the proposed order on two occasions: 180 days after entry of the Court's remedial order and one year thereafter. Plaintiffs' proposed order also mandates that Defendants provide Plaintiffs' counsel, on request, documents and information necessary to monitor and enforce compliance with the Court's orders. These minimal and straightforward reporting requirements simply require Defendants to report to the Court that they have completed the actions required by the Order with supporting documentation. These requirements impose a minimal burden on Defendants, and are needed to ensure that the rights of all Class Members are protected.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to order the injunctive and equitable relief contained in Plaintiffs' proposed plan.

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Respectfully submitted,

/s/ Joseph J. Wardenski

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