UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

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

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

It is now beyond dispute that gender dysphoria is a serious medical condition often requiring medical treatment. *See Mitchell v. Kallas*, No. 16-3350, 2018 WL 3359113 (7th Cir. July 10, 2018). Indeed, Defendants (the "State") agree that "[u]ntreated gender dysphoria can result in psychological distress." Stip. Findings of Fact [Dkt. No. 51] ¶ 51. Yet the State also concedes that it has denied coverage to Plaintiffs based on the Challenged Exclusion with *no* consideration of their individual, documented medical needs. *Id.* ¶¶ 38, 42, 55. By actively enforcing the policy, the State is failing to "treat[] gender dysphoria with the same urgency and care as it would any other serious medical condition," *Mitchell*, at *7. It is exposing Plaintiffs to continuing and worsening harms as a result and, for the reasons below, the State's purported justifications for and defenses of the Challenged Exclusion have no merit.

I. The State's defenses are largely premised on the flawed opinions of an "expert" who is unqualified to testify on the medical necessity of gender dysphoria treatments.

Much of the State's opposition is based on the opinions of one putative expert in another case—Lawrence Mayer. The State, relying on Mayer's views, posits that "there is inadequate evidence" that surgeries "actually treat" gender dysphoria and suggests the State therefore has some "public health" interest in categorically denying this care regardless of individual medical necessity. Defs' Opp. Br. 15, 36-38 [Dkt. No. 53] ("Opp. Br."). Mayer's analysis is deeply flawed and unlikely to meet the requirements of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which the Court should consider when weighing his testimony at this stage.[1]

Mayer's assertion that inadequate research exists to show that the surgeries Plaintiffs seek are safe and effective is refuted by all of Plaintiffs' experts, the prevailing medical consensus,

[1] While the Court may consider evidence at the preliminary injunction stage that may be inadmissible at trial, *see Dexia Credit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010), the Court should still "conduct its *Daubert* analysis in tandem with its assessment of the evidence's weight." *A.A. v. Raymond*, No. 2:13-cv-01167, 2013 WL 3816565, *4 (E.D. Cal. July 22, 2013) (collecting cases).

and the prevailing standards of care. Pls' Br. in Support of Mot. for Prelim. Inj. 4-5 [Dkt. No. 19] ("Pls' Br."). Because the State simply recycled Mayer's report from *Boyden*, the report obviously fails to address Plaintiffs' individual needs or the evidence Plaintiffs have submitted in *this* case.[2]

Mayer himself concedes that he is not qualified to provide expert testimony regarding the issues presented in this case. Although Mayer refers to himself as a "research physician," Roth Decl. Ex. 1000 (Mayer Report ¶ 1), he in fact has never practiced, nor been licensed to practice, medicine. Roth Decl. Ex. 1002 (Mayer Dep. 7:5-6, 12:8-17). (The State refers to him as a "psychiatrist," Opp. Br. at 37, which is false.) Mayer readily admits that he is unqualified to offer clinical opinions about medical necessity, is "not an expert regarding the clinical treatment of gender dysphoria," and is unqualified to assess the efficacy of surgeries. Mayer Dep. 14:17-15:9, 22:19-23, 23:3-19, 32:17-22, 64:1-65:8, 153:14-17. And his only publications on gender dysphoria are two non-peer-reviewed articles in *The New Atlantis*, a conservative think tank's magazine. Mayer Dep. 19:22-25, 134:18-135:4; *see also* Decl. of J. Wardenski Ex. 1.

Even if Mayer were qualified to provide expert testimony here, his testimony does not actually support the State's defenses to its categorical coverage ban. Namely, he does not dispute that hormone therapy and gender confirming surgeries are appropriate and medically necessary treatments for gender dysphoria for some people. Mayer Dep. 72:8-19, 85:17-86:4.

In short, Mayer provides no reliable or meaningful justification for the Challenged Exclusion. The Court should accordingly assign little to no weight to his opinions.

II. The State has failed to rebut Plaintiffs' showing of likely irreparable harm.

Defendants argue that because Plaintiffs cannot prove that they *will* imminently attempt

[2] If the State formally designates Mayer as an expert, Plaintiffs anticipate making a *Daubert* challenge to his testimony at that time.

suicide or engage in self-harm, they fail to show a sufficient likelihood of irreparable harm to warrant a preliminary injunction. Opp. Br. at 13. This grossly exaggerates Plaintiffs' burden and disregards the ongoing, worsening harms to Plaintiffs from their continued inability to obtain surgical care. As the Seventh Circuit held in *Whitaker*, the moving party must show that irreparable harm is likely, *not* "that the harm be certain to occur before a court may grant relief on the merits." *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1045 (7th Cir. 2017).

Plaintiffs easily clear this threshold burden in several ways. As the State concedes, the deprivation of Plaintiffs' Fourteenth Amendment rights, without more, is sufficient to establish irreparable harm. Opp. Br. at 19. Because Plaintiffs are likely to succeed on their equal protection claims, *see* Pls' Br. 34-40, the Court's analysis could stop there. But Plaintiffs have demonstrated other harms that independently establish the threshold harm.

Indeed, courts recognize (and the State acknowledges) that delayed or denied health care is itself irreparable harm. *See Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 608 (7th Cir. 2012); *Koss v. Norwood*, 305 F. Supp. 3d 897, 922 (N.D. Ill. 2018); *Doctors Nursing & Rehab. Ctr. v. Norwood*, 2017 WL 3838031, at *9 (N.D. Ill. Sept. 1, 2017) ("What is needed is a showing that plaintiffs face irreparable harm if forced to wait for post-trial relief."). The State tries to distinguish these cases by arguing that "there is no proven medical benefit to the procedures for which Plaintiffs seek Medicaid coverage," citing Mayer's unreliable opinions in support. But this conclusion can only be reached by wholly ignoring the standards of care and medical consensus that surgeries are necessary and effective treatments for gender dysphoria.[3]

Plaintiffs have plainly demonstrated that *they* are at substantial risk of ongoing and

[3] Last month, a court struck down Iowa's similar Medicaid exclusion, finding that the policy was based on "outdated medical evidence" and "the current medical consensus no longer supports the conclusion that gender affirming surgery is not therapeutic." *Good v. Iowa Dep't of Human Servs.*, CVCV054956., slip op. 20, 28 (Iowa Dist. Ct. June 6, 2018) (attached as Ex. A).

worsening psychological distress—including exacerbated symptoms of gender dysphoria, depression, anxiety, and increased suicidal ideation—resulting from their ongoing inability to obtain surgical care. Pls' Br. at 16-20; Decl. of S. Budge ¶¶ 70-73 [Dkt. No. 24]; Supp. Decl. of S. Budge ¶¶ 7-14. The Seventh Circuit has recognized these as harms sufficient to justify a preliminary injunction. *Whitaker*, 858 F.3d at 1044-46. The State suggests that Plaintiffs must be actively suicidal or about to engage in self-harm to show irreparable harm. Opp. Br. 16-17; Decl. of C. Schmidt ¶¶ 16-17 [Dkt. No. 56]. This would essentially demand that a movant meet the elements of Wisconsin's civil commitment statute, Wis. Stat. Ann. § 51.20, to be entitled to a preliminary injunction. There is no support in controlling case law for that absurd proposition. Rather, the *risks* to Plaintiffs' health and well-being are sufficient to show irreparable harm.

The State's expert, Chester Schmidt, offers no opinion on the medical necessity or benefits of surgical treatments for gender dysphoria, nor does he attempt to refute the unanimous opinions of Plaintiffs' treating providers that they will benefit from surgery and be harmed by a continued inability to access it.[4] Rather, he bases his opinion solely on a perceived technicality: that no "current mental status exam" was reflected in Plaintiffs' medical records. Schmidt Decl. ¶ 9. However, Plaintiffs' expert, Stephanie Budge, did conduct a mental status exam of both Plaintiffs during her clinical evaluations of them this spring. Budge Supp. Decl. ¶ 2-4. Mr. Flack's therapy records also reflect routine mental status exams. *Id.* ¶ 6. Schmidt suggests that neither Plaintiff is "so destabilized" that self-harm is imminent. Again, courts do not demand such a draconian showing for an injunction to issue. Other errors in Schmidt's declaration—including that Mr. Flack has "no prior evidence of self-harm," Schmidt Decl. ¶ 12, despite

[4] Ms. Makenzie has now obtained letters of support for surgery from her therapist and a second mental health provider who evaluated her in June. *See* Supp. Decl. of S. Makenzie ¶¶ 4-5.

considerable evidence to the contrary, Budge Supp. Decl. ¶ 9—undermine his overall credibility.

Finally, the State discounts the distress its policy causes to Plaintiffs by baldly asserting, without support, that the policy "does not stigmatize Plaintiffs." Opp. Br. 18. To the contrary, as well-documented in the record, both Mr. Flack and Ms. Makenzie experience ongoing stigma in the form of mistreatment, fears of being in public, and heightened anxiety and distress about being misgendered, as a result of being unable to live fully in accordance with their gender identities. Budge Decl. ¶¶ 44-47, 59-64; Flack Decl. ¶ 14-16, 29-31; Makenzie Decl. ¶ 23-24, 36.

III. The State misconstrues the scope of prohibited discrimination "on the basis of sex."

The State urges the Court to disregard controlling case law and narrowly construe Section 1557's prohibitions on discrimination "on the basis of sex" to exclude protections against gender identity discrimination. The State's argument that the Court should apply a narrow conception of "sex" has been squarely rejected by the Supreme Court. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). Accordingly, Title IX and Title VII's prohibitions encompass gender-based discrimination (including based on gender identity). *Whitaker*, 858 F.3d at 1047-48; *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017). And the Seventh Circuit has already rejected the argument that "Congress does not view Title IX as applying to transgender status claims," Opp. Br. 43, because it has not passed legislation expressly banning gender identity discrimination. *Whitaker*, 858 F.3d at 1049 ("Congressional inaction is not determinative.") (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *accord Hively*, 853

F.3d at 344 (Congress can and does "use both a belt and suspenders to achieve its objectives").[5]

The State misstates the holdings of *Whitaker* and *Hively* in an attempt to limit the application of those decisions here. Both decisions command a broad application of the sex-stereotyping doctrine to include discrimination and differential treatment against an individual or group for not conforming to societal gender norms—in *Whitaker*, for being transgender, and in *Hively*, for not being heterosexual. *Whitaker*, 858 F.3d at 1048-49; *Hively*, 853 F.3d at 346. The Challenged Exclusion specifically disfavors transgender people by denying them health care related to their gender identity. And because the policy cannot be discussed or understood without reference to sex, it is *per se* sex discrimination. Pls' Br. 22-26.

IV. The State's other defenses to Plaintiffs' Section 1557 claim are meritless.

The State's contention that no private right of action exists under Section 1557 is at odds with the language of the statute itself and the interpretation of every federal court to consider the question. *See* Pls' Br. 22; *see also Edmo v. Idaho Dep't of Corr.*, No. 1:17-cv-00151, 2018 WL 2745898, at *8-9 (D. Idaho June 7, 2018). Even if Congress had not expressly incorporated the enforcement mechanisms of Title IX and the other spending clause statutes, the Court could nevertheless conclude that Congress intended to imply a private right of action in Section 1557 by including the "rights-creating" language that exists in each of those incorporated statutes. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *Edmo*, 2018 WL 2745898, at *8.

The State's contention that interpreting Section 1557 to cover discrimination against transgender people would violate the Spending Clause "since Wisconsin could have had no idea

[5] Indeed, many members of Congress, including the sponsors of legislation that would expressly prohibit gender identity discrimination, consider existing sex discrimination statutes to already contain such protections. *See* Br. of 196 Members of Congress as Amicus Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, *vacated and remanded* (U.S. Mar. 6, 2017) (No. 16-273) [Wardenski Decl. Ex. 2]; Ltr. from 40 U.S. Senators to Sec'y J. King, May 2, 2016 [Wardenski Decl. Ex. 3].

that this interpretation would someday prevail when it chose to accept federal Medicaid funding" is nonsensical. Section 1557 was enacted in 2010, by which time federal courts had interpreted various sex discrimination laws to apply to transgender plaintiffs' discrimination claims. *See Whitaker*, 858 F.3d at 1048-49 (collecting cases). Yet Wisconsin has continued to accept billions in Medicaid funds every year and thus has continuously agreed to comply with Section 1557.

V. The State's justifications for the Challenged Exclusion fail any level of scrutiny.

Intermediate scrutiny of the Challenged Exclusion is appropriate for reasons already briefed. Pls' Br. 34-39. The rationales for the policy proffered by the State—cost savings and a "public health" interest in not "encouraging Medicaid beneficiaries to undergo these unproven treatments," Opp. Br. 37—are neither substantially nor rationally advanced by the exclusion.

With respect to costs, Medicaid exists to cover health care costs. Categorically excluding coverage for transgender health care—while considering individual medical need for every other condition—is not rational. The State has not attempted to estimate the size of the affected Medicaid population or undertaken any Medicaid-specific cost impact analysis, Opp. Br. 10-11. Counsel's "arithmetic" to estimate costs savings based on an unrelated analysis of the state employee health plan, *id.* at 11, should be given no weight. Medicaid reimbursement rates are much lower than the payment rates in standard insurance plans; thus, current Medicaid rates for Plaintiffs' surgeries for the treatment of other diagnoses are a more appropriate benchmark.[6] Moreover, the State fails to account for the federal contribution to its Medicaid expenses, which would more than halve any cost impact on the State itself from covering gender dysphoria treatments. Pls' Br. 6, 39.

[6] For example, the published reimbursement rates for Mr. Flack's surgeries, mastectomy and chest reconstruction, are $976.68 and $561.86, respectively [Wardenski Dec. Ex. 4].

Because the "public health" rationale wholly relies on Lawrence Mayer's faulty opinions, Opp. Br. 36-38, the State cannot show that the policy has any valid relation to that interest.

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For the reasons stated herein and in Plaintiffs' opening brief, the Court should preliminarily enjoin the State's enforcement of the Challenged Exclusion against Plaintiffs.

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Respectfully submitted,

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