

**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
Secretary-Designee of the Wisconsin
Department of Health Services,

Defendants.

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

PARTIAL SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Partial Settlement Agreement and Mutual Release (“Agreement”) is jointly entered into by Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin (the “Named Plaintiffs”), and the Wisconsin Department of Health Services (“DHS”) and DHS Secretary-Designee Andrea Palm, in her official capacity (collectively, “Defendants”), to partially resolve the above-captioned lawsuit (the “Lawsuit”). Specifically, this Agreement resolves: (1) the Named Plaintiffs’ individual claims for damages against Defendant DHS; and (2) the claims of Relman, Dane & Colfax PLLC, Davis & Pledl, S.C., and the National Health Law Program (collectively, “Class Counsel”) for their reasonable attorneys’ fees, costs, and expenses against both Defendants incurred through the date of District Court’s entry of final judgment.¹ The

¹ This includes claims for attorneys’ fees, costs, and expenses incurred by Plaintiffs’ former counsel, McNally Peterson, S.C., through that firm’s termination on March 14, 2019, which will be distributed by Class Counsel pursuant to a separate agreement.

Named Plaintiffs and Defendants are jointly referred to herein as the “Parties,” and each separately as a “Party.” This Agreement does not address or resolve Plaintiffs’ claims for declaratory, injunctive, and equitable relief, except for the reasonable attorneys’ fees, costs, and expenses for Class Counsel on those claims.

RECITALS

WHEREAS, this Lawsuit challenges the lawfulness of Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the “Challenged Exclusion”) under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (“Section 1557”); the comparability and availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A)-(B); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; and

WHEREAS, the Court certified Plaintiffs’ claims for declaratory and injunctive relief as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of “[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,” Op. & Order 9, 27 [ECF No. 150]; and

WHEREAS, the Court named Plaintiffs’ counsel at Relman, Dane & Colfax PLLC, Davis & Pledl, S.C., and the National Health Law Program as Class Counsel; and

WHEREAS, the Named Plaintiffs, in their individual capacities, sought compensatory damages from Defendant DHS, as permitted under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, in an amount that would fully compensate each of them for: (1) the harms to their short- and long-term health and well-being, including emotional distress, from being denied access to medically necessary health care as a result of the Challenged Exclusion and its application to them, (2) their economic losses, and (3) all other

injuries that have been caused by Defendant DHS's acts and omissions alleged in the Lawsuit;²
and

WHEREAS, the Court declared the Challenged Exclusion to violate Section 1557, the Medicaid Act, and the Equal Protection Clause in its Opinion and Order [ECF No. 217] granting summary judgment to Plaintiffs on August 16, 2019; and

WHEREAS, the Parties agree that, following final entry of judgment for Plaintiffs in this case, Class Counsel will be entitled under 42 U.S.C. § 1988 to their reasonable attorneys' fees, costs, and expenses from Defendants under Plaintiffs' Section 1557, Medicaid Act, and Equal Protection Clause claims; and

WHEREAS, the Parties wish to amicably, fully, and finally resolve the Named Plaintiffs' claims for compensatory damages, and Class Counsel's claims for attorneys' fees, costs, and expenses, to avoid the expense and uncertainty of further litigation on those issues;

NOW, THEREFORE, the Parties mutually agree as follows:

AGREEMENT

1. **EFFECTIVE DATE**. The Effective Date of this Agreement shall be the first date on which all Parties and Class Counsel have executed this Agreement as evidenced by the latest date on the signature pages below.

2. **IMPLEMENTATION DATE**. The Implementation Date of this Agreement shall be one day after the appeal deadline of the Court's final entry of judgment for Plaintiffs in this Lawsuit, or one day after final disposition of any appeal in Plaintiffs' favor, to the extent an appeal is filed by an individual or entity that is not a party to this Agreement, whichever is later.

² This Agreement does not address or affect any rights of unnamed Class Members to pursue individual relief not requested in this Lawsuit.

3. SETTLEMENT OF NAMED PLAINTIFFS' DAMAGES CLAIMS.

- a. Defendant DHS agrees to pay the Named Plaintiffs a total of \$837,500.00 (the "Damages Payment"), to compensate them for the emotional distress, physical injuries, economic losses, and other injuries incurred as a result of the Challenged Exclusion and its application to them, in full and final satisfaction of their individual claims for compensatory damages against DHS under Section 1557; and
- b. The total amount of the Damages Payment specified in Paragraph 3.a. above will be paid pursuant to Paragraph 5 below and allocated to the Named Plaintiffs as follows:
 - i. Cody Flack: \$215,037.50;
 - ii. Sara Ann Makenzie: \$216,287.50;
 - iii. Marie Kelly: \$202,537.50; and
 - iv. Courtney Sherwin: \$203,637.50.

4. ATTORNEYS' FEES AND COSTS.

- a. Defendants will make a single payment of \$1,362,500.00 ("Fee Payment") to Class Counsel in full and final satisfaction of Class Counsel's claims for reasonable attorneys' fees, costs, and expenses incurred through the entry of final judgment by the District Court. The Fee Payment will be paid pursuant to Paragraph 5 below.
- b. Defendants are responsible for their own attorneys' fees, costs, and expenses.

- c. In the event of an appeal in the Lawsuit initiated by a third party in which Plaintiffs are the prevailing party, Plaintiffs agree to seek any attorney's fees, costs, and expenses from that party.

5. LUMP SUM PAYMENTS. Defendants will make two payments, the Damages Payment in the amount specified in Paragraphs 3.a. above and the Fee Payment in the amount specified in Paragraph 4.a. above, no later than 15 calendar days after the Implementation Date or December 19, 2019, whichever is later. If the Implementation Date falls in December 2019 on or after December 15, 2019, Defendants agree to make every effort to issue payment by December 30, 2019. These payments will be issued via checks made payable to "Relman, Dane & Colfax PLLC IOLTA Trust Account" and sent via overnight courier to:

Jennifer I. Klar
Relman, Dane & Colfax PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036

Named Plaintiffs are wholly responsible for the payment of any state or federal taxes that may result from Defendants' payment of the Damages Payment. Class Counsel are wholly responsible for the payment of any state or federal taxes that may result from Defendants' payment of the Fee Payment.

6. STIPULATION OF DISMISSAL. No later than two days following the Effective Date of this Agreement, the Parties agree to file a joint stipulation of dismissal, with prejudice, of Plaintiffs' claims for individual damages and attorneys' fees, costs, and expenses incurred through the entry of final judgment by the District Court.

7. MUTUAL RELEASE OF CLAIMS. In exchange for the consideration listed above in Paragraph 3, and the Parties' performance and satisfaction of their respective obligations assumed under this Agreement, the Parties, on behalf of themselves, their affiliates,

predecessors, successors, officers, employees, attorneys, beneficiaries, assigns, and agents, hereby and forever release each and every other Party, and each Party's affiliates, predecessors, successors, officers, employees, attorneys, beneficiaries, assigns, and agents, from any and all claims existing at the time of the Effective Date of this Agreement pertaining to the subject matter of this Lawsuit (whether in law or equity, or based on state or federal law) that any Party has against any other Party, whether or not raised in the Lawsuit.

8. COVENANT NOT TO SUE. This Agreement shall also be deemed a covenant by the Named Plaintiffs not to sue any Defendant for any of the matters released or discharged by this Agreement and not to file any appeals of any court decision in this Lawsuit.

9. OTHER PROVISIONS.

- a. Governing Law. The Parties stipulate that the law of the State of Wisconsin will govern this Agreement.
- b. Captions and Interpretation. Section titles or captions contained in this Agreement are inserted as a matter of convenience and for ease of reference and in no way define, limit, extend or describe the scope or any provision of this Agreement. This Agreement is mutually drafted, and no provision in this Agreement is to be interpreted for or against any Party because that Party or its legal representative drafted such provision.
- c. Representations. Each party to this Agreement represents that the party has the full power and authority to enter into this Agreement and that there are no other persons whose consent to this Agreement or whose joinder to this Agreement is necessary to make provisions of this Agreement fully effective.

- d. Independent Advice of Counsel. Each Party represents and declares that in executing this Agreement, the Party has relied solely on the Party's own judgment, belief, and knowledge, and the advice and recommendations of its independently selected counsel, concerning the nature, extent, and duration of the Party's rights and claims, and that it has not been influenced to any extent whatsoever in executing the same by any representations or statements made by any other Party or by any person representing any other Party.
- e. Entire Agreement. This Agreement constitutes the entire agreement between the Parties pertaining to the Named Plaintiffs' claims for individual damages and Plaintiffs' claims for reasonable attorneys' fees, costs, and expenses, and fully supersedes any and all prior understandings, representations, warranties, and agreements between the Parties pertaining to those subjects.
- f. Amendment. This Agreement may be amended only by a written agreement executed by the Parties in interest at the time of the amendment.
- g. Severability. If any portion of this Agreement is held to be void, invalid, or otherwise unenforceable, in whole or in part and for any reason, the remaining portions of this Agreement shall remain in full force and effect.
- h. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same instrument.
- i. Continuing Jurisdiction. The Parties agree that the U.S. District Court for the Western District of Wisconsin shall retain jurisdiction over this matter with

respect to any dispute between the Parties arising from the terms of this Agreement.

- j. Public Document. The Parties recognize that this Agreement is a public document and may be subject to disclosure under the State of Wisconsin's Public Records Law.

[SIGNATURES ON NEXT PAGE]

The following signatures indicate the Parties' and Class Counsel's consent to the terms of this Agreement:

NAMED PLAINTIFFS:

CODY FLACK:

By: 

Printed Name: Cody Flack

Date: 10-29-19

SARA ANN MAKENZIE:

By: _____

Printed Name: _____

Date: _____

MARIE KELLY:

By: _____

Printed Name: _____

Date: _____

COURTNEY SHERWIN:

By: _____

Printed Name: _____

Date: _____

The following signatures indicate the Parties' and Class Counsel's consent to the terms of this Agreement:

NAMED PLAINTIFFS:

CODY FLACK:

By: _____

Printed Name: _____

Date: _____

SARA ANN MAKENZIE:

By: 

Printed Name: Sara Ann Makenzie

Date: 10/29/2019

MARIE KELLY:

By: _____

Printed Name: _____

Date: _____

COURTNEY SHERWIN:

By: _____

Printed Name: _____

Date: _____

The following signatures indicate the Parties' and Class Counsel's consent to the terms of this Agreement:

NAMED PLAINTIFFS:

CODY FLACK:

By: _____

Printed Name: _____

Date: _____

SARA ANN MAKENZIE:

By: _____

Printed Name: _____

Date: _____

MARIE KELLY:

By: 

Printed Name: Marie Claire Kelly

Date: 10/29/2019

COURTNEY SHERWIN:

By: _____

Printed Name: _____

Date: _____

The following signatures indicate the Parties' and Class Counsel's consent to the terms of this Agreement:

NAMED PLAINTIFFS:

CODY FLACK:

By: _____

Printed Name: _____

Date: _____

SARA ANN MAKENZIE:

By: _____

Printed Name: _____

Date: _____

MARIE KELLY:

By: _____

Printed Name: _____

Date: _____

COURTNEY SHERWIN:

By:  _____

Printed Name: Courtney Sherwin

Date: 10/29/2019

CLASS COUNSEL:

RELMAN, DANE & COLFAX PLLC

By:  _____

Printed Name: Jennifer I. Klar

Date: October 30, 2019

DAVIS & PLEDL, S.C.

By: _____

Printed Name: _____

Date: _____

NATIONAL HEALTH LAW PROGRAM

By: _____

Printed Name: _____

Date: _____

CLASS COUNSEL:

RELMAN, DANE & COLFAX PLLC

By: _____

Printed Name: _____

Date: _____

DAVIS & PLEDI, S.C. 

Printed Name: Robert Thorne Pledl

Date: 10/29/2019

NATIONAL HEALTH LAW PROGRAM

By: _____

Printed Name: _____

Date: _____

CLASS COUNSEL:

RELMAN, DANE & COLFAX PLLC

By: _____

Printed Name: _____

Date: _____

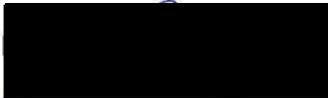
DAVIS & PLEDL, S.C.

By: _____

Printed Name: _____

Date: _____

NATIONAL HEALTH LAW PROGRAM



Printed Name: Jane Perkins

Date: 10-30-2019

DEFENDANTS:

Consent of Attorney and Settlement

The undersigned, an attorney for Defendants Wisconsin Department of Health Services and Wisconsin Department of Health Services Secretary-Designee Andrea Palm, in her official capacity, hereby consents to the Partial Settlement Agreement and Mutual Release:



Steven C. Kilpatrick
Assistant Attorney General
Wisconsin Department of Justice

Date: 10-30-2019