UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

KARI SUNDSTROM and ANDREA FIELDS,

Plaintiffs,

v. Case No. _____

MATTHEW J. FRANK, et al.,

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ENJOINING DEFENDANTS FROM REDUCING OR TERMINATING PLAINTIFFS' HORMONE THERAPY

The Wisconsin legislature recently passed 2005 Wisconsin Act 105 (the "Act"), which is codified at Wis. Stat. § 302. 386(5m), and will become effective on January 24, 2006.[1] The new law prohibits the use of state funds or resources or "federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy," for the treatment of transgender prisoners, juvenile detainees, or residents in forensic mental health facilities in Wisconsin. Wis. Stat. § 302.386(5m).

Plaintiffs, Kari Sundstrom ("Ms. Sundstrom") and Andrea Fields ("Ms. Fields") (collectively, "Plaintiffs"), are prisoners at the Oshkosh Correctional Institution, a facility operated by the Wisconsin Department of Corrections ("OCI"). (Sundstrom Decl. ¶ 1; Fields Decl. ¶ 1.) Both have received hormone therapy for the treatment of Gender Identity Disorder

[1] The Act will be published on January 23, 2006 and will, therefore, take effect the next day. Wis. Stat. § 991.11.

(GID)[2] for many years. Ms. Sundstrom has taken them continuously for almost 16 years, and Ms. Fields has taken them for 10 years. (Sundstrom Decl. ¶ 3; Fields Decl. ¶ 3.) Both were told by OSCI prison medical personnel that their hormone therapy would be stopped. (Sundstrom Decl. ¶¶ 6, 7; Fields Decl. ¶ 5, 6.) Defendants reduced their dosages by one-half on January 12, 2006. Plaintiffs were told that the reduction would continue so that they would be completely taken off hormone therapy by March 13, 2006. (Sundstrom Decl. ¶ 7; Fields Decl. ¶ 6.)

Because "hormonal therapy is medically necessary adequate treatment of a biological male diagnosed with GID," (F. Ettner Decl. ¶ 2), and "[t]erminating circulating sex steroid hormones, which act on every organ system in the body, places the patient in a potentially life-threatening situation," (R. Ettner Decl. ¶ 3), in violation of the Eighth Amendment's protection against cruel and unusual punishment and the Fourteenth Amendment's equal protection clause, preliminary injunctive relief is necessary to protect Ms. Sundstrom and Ms. Fields. Reducing and terminating their hormone therapy "wreak[s] havoc on [Ms. Sundstrom's and Ms. Fields'] physical and emotional state[s]." *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 800 (W.D.Mich. 1990), *aff'd without opinion*, 932 F.2d 969 (6th Cir. 1991). In addition to the permanent physical damage that the reduction and cessation of hormone therapy cause, Plaintiffs are at great risk of suicide or self-harm as a result of the medical treatment they require.

Accordingly, Plaintiffs ask this Court to enter a Temporary Restraining Order and Preliminary Injunction directing Defendants and persons acting under their authority to continue administration of Plaintiffs' hormone therapy at the dosages administered prior to January 12, 2006, and enjoining their enforcement of Wis. Stat. § 302.386(5m), because its enforcement, as

[2] GID involves a "strong persistent cross-gender identification" and "[p]ersistent discomfort with [one's] sex or sense of inappropriateness in the gender role of that sex." *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).

applied to Plaintiffs, violates Plaintiffs' Eighth Amendment right to be free from cruel and unusual punishment and Plaintiffs' Fourteenth Amendment right to equal protection.

STATEMENT OF FACTS

Plaintiffs Kari Sundstrom and Andrea Fields have been incarcerated at OSCI since February 10, 2004 and August 8, 2005 respectively. (Sundstrom Decl. ¶ 1; Fields Decl. ¶ 1.)[3] Ms. Sundstrom is 41 years old and felt great discomfort with her anatomical male gender starting when she was about 4 or 5 years old. (Sundstrom Dec. ¶¶ 1,2.) She was first diagnosed as a transsexual in about 1990 by a psychiatrist in Duluth, Minnesota, Dr. Gary Cowan, and has been taking hormones to treat her GID continuously since then, or for almost 16 years. (Sundstrom Decl. ¶ 3.) Ms. Sundstrom has been hospitalized three times, in 1984, 1995 and 2003, because of suicidal ideation. (Sundstrom Decl. ¶ 4.) She has been prescribed several different anti-depressants. However, all of the anti-depressants except one particular combination of an anti-depressant and a neuroleptic have been unsuccessful in treating her depression. (Sundstrom Decl. ¶ 4.) Her discomfort with her anatomical sex has contributed greatly to Ms. Sundstrom's depression and has been a major factor behind two of her hospitalizations. (Sundstrom Decl. ¶ 4.) Under the medical supervision of the Department of Corrections' medical personnel, Ms. Sundstrom's hormone therapy has been continued at the same dosage she received at the time of incarceration. (Sundstrom Decl. ¶ 5.) The only reason that Defendants gave Ms. Sundstrom for reducing her hormones was the passage of the Act. (Sundstrom Decl. ¶¶ 6, 7.) Since Kari's hormone dosage was halved, she already has begun to experience mood swings, hot flashes, severe headaches, bloating and crying fits. She believes that she soon will begin to experience

[3] Because of the necessity of bringing this matter before the Court as quickly as possible, Plaintiffs have submitted unsigned declarations in support of this motion, which orally have been approved by Plaintiffs. As soon as reasonably possible, Plaintiffs will substitute signed declarations for these.

suicidal thoughts, especially as her body begins the masculinization process. (Sundstrom Decl. ¶ 7.) On or around January 21, 2006, Ms. Sundstrom filed a written grievance complaining of the reduction and ultimate denial of her hormone therapy, in accordance with the grievance procedure in place at the Oshkosh Correctional Institution. No relief has been granted. (Sundstrom Decl. ¶ 8.)[4]

Andrea Fields has experienced severe discomfort with her anatomical male gender since she was 14 years old. (Fields Decl. ¶ 2.) She is 29 years old, and was first was diagnosed with GID in 1993. (Fields Decl. ¶¶ 1, 3.) She started hormone therapy ten years ago, in 1996. (Fields Decl. ¶ 3.) When Ms. Fields was incarcerated at OCI, the medical personnel continued her hormone therapy. (Fields Decl. ¶ 4.) Like Ms. Sundstrom's, her hormone dosage was halved on January 12, 2006 because of the Act, and the reduction has already caused her to experience depression, nausea, muscle weakness, loss of appetite, increased hair growth and skin bumps. (Fields Decl. ¶¶ 5-7.) Ms. Fields is afraid of what the reduction and termination of her hormones will do to her body, especially her breast implants, and the extra tissue that she has developed because of the feminizing effects of taking female hormones for 10 years. (Fields Decl. ¶ 7.) On January 22, 2006, Ms. Field filed a written grievance complaining of the reduction and ultimate

[4] The relief sought in this motion falls within the exception to the requirement that a prisoner wait for completion of the exhaustion process in the Prison Litigation Reform Act, 42 U.S.C. § 1997e, because plaintiffs will suffer irreparable harm waiting for exhaustion to be completed; *see Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001); *Borgetti v. Bureau of Prisons*, 2003 WL 743936 at *2 n.2 (N.D.Ill., Feb. 14, 2003) (holding that "the court's jurisdiction is secure" to decide a case in which the prisoner sought immediate injunctive relief and exhaustion would almost certainly take longer than the remainder of his sentence); or because courts retain their traditional equitable discretion to grant temporary relief to maintain the status quo pending exhaustion. *Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C. Cir. 2001); *Tvelia v. Depatment of Corrections*, 2004 WL 298100 *2 (D.N.H., Feb. 13, 2004) (following *Jackson*). Plaintiffs seek a Temporary Restraining Order and Preliminary Injunction pending exhaustion of administrative remedies in order to avert irreparable harm. Furthermore, there is no remedy that will avert the short-term irreparable harm that Plaintiffs seek to avoid, and therefore no remedy is "available" within the meaning of the Prison Litigation Reform Act, 42 U.S.C. § 1997(e). By passage of 42 U.S.C. § 1997(e), Congress did not intend for inmates to suffer unconstitutionally because of delays in administrative remedies.

denial of her hormone therapy, in accordance with the grievance procedure in place at the Oshkosh Correctional Institution. No relief has yet been granted. (Fields. Decl. ¶ 8.)

Hormone therapy is an established treatment for GID that, for many persons living with GID, is medically necessary. Defendants have already determined that hormone therapy was medically necessary for Plaintiffs, as evidenced by the fact that they provided Plaintiffs hormones while in prison. Even the expert hired by the Department of Corrections in the case of *Konitzer v. Bartow*, Case No. 03 CV 717 (E.D. Wis.) (J. Clevert) agrees that stopping hormone therapy would be "cruel and clinically inappropriate." (Dupuis Decl. ¶ 3, Ex. B.)

ARGUMENT

I. Plaintiffs are entitled to preliminary injunctive relief against the enforcement of Wis. Stat. § 302.386(5m) to preserve the status quo that existed with respect to Plaintiffs' medically necessary hormone therapy.

Preliminary injunctive relief should be granted when a party demonstrates that: "its case has some likelihood of success on the merits; [ ] that no adequate remedy at law exists; and [ ] it will suffer irreparable harm if the injunction is not granted," the harm to the moving party sufficiently outweighs the harm to the non-moving party, and the public interest supports the entry of a preliminary injunction. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). This test is easily met in the present case. Defendants' actions in implementing Wis. Stat. § 302. 386(5m) clearly violate Plaintiffs' Eighth and Fourteenth Amendment rights. Plaintiffs have no adequate remedy at law, and, absent preliminary injunctive relief, will suffer irreparable harm. In contrast, no one will be harmed by granting the requested preliminary relief,

and the only burden on the defendants is the minor cost of continuing hormonal treatment Defendants previously have been providing Plaintiffs.[5]

A. Plaintiffs Have A Substantial Likelihood Of Success On The Merits.

Although Plaintiffs must only show "some likelihood of success," *Ty, Inc.*, 237 F.3d at 895 (citation omitted), Plaintiffs here establish a high likelihood of successfully establishing that Defendants' actions and intended actions violate their Eighth Amendment right to be free from cruel and unusual punishment and their Fourteenth Amendment right to equal protection of the laws.

1. Defendants' Withdrawal Of Plaintiffs' Medically Necessary Hormone Therapy Violates The Eighth Amendment.

Corrections officials inflict cruel and unusual treatment on a prisoner, in violation of the Eighth Amendment, when they are deliberately indifferent to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). To establish deliberate indifference, "plaintiff[s] must make an "*objective*" showing that the deprivation was 'sufficiently serious,' or that the result of defendant[s'] denial was sufficiently serious. Additionally, the plaintiff[s] must make a '*subjective*' showing that defendant[s] acted with 'a sufficiently culpable state of mind.'" *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002) (citing *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991)). To meet the objective requirement, a prisoner must demonstrate the existence of a serious medical need, *Montgomery*, 294 F.3d at 500, or demonstrate a substantial risk of future serious harm resulting from the prisoner's exposure to the challenged conditions. *Helling v. McKinney*, 509 U.S. 25 (1993). The subjective prong is one of deliberate indifference, which "entails something more than mere negligence . . . [but] is satisfied

[5] Plaintiffs assert in their complaint that Wis. Stat. § 302.386 (5m) is not only unconstitutional as applied to them, but is facially unconstitutional under the Eighth and Fourteenth Amendments. However, this Court need not decide whether the statute is facially invalid in order to grant Plaintiffs the preliminary relief they seek.

by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). If defendants knew that the risk existed and either intentionally or recklessly ignored it, and they will continue to do so in the future, then the subjective test has been met. *Id.* at 837-47.

Ms. Sundstrom and Ms. Fields plainly have shown a serious medical need and therefore have established the objective prong of the deliberate indifference standard. Courts consistently have found that transsexualism is a "serious medical need" under the Eighth Amendment. *Meriwether v. Faulkner*, 821 F.2d 408, 411-13 (7th Cir. 1987); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988). Both Ms. Sundstrom and Ms. Fields have long-standing diagnoses of GID, and the Department of Corrections medical personnel similarly have diagnosed both Plaintiffs with GID and treated them for it. (Sundstrom Decl. ¶¶ 3, 5; Fields Decl. ¶¶ 3, 4.)

In addition, Ms. Sundstrom and Ms. Fields have shown that Defendants have acted intentionally, or at least recklessly, in denying continued medical treatment to them without the exercise of medical judgment. Defendants are not terminating hormone therapy because a doctor has decided, in her medical judgment, and based on Plaintiffs' individual medical situations, that the therapy should be terminated, but solely because of the passage of Wis. Stat. § 302.386(5m). Furthermore, the therapy is being stopped contrary to the judgment of Department of Corrections' medical personnel that both Plaintiffs should be taking hormones. Prison officials' refusal to provide hormones based on a blanket rule against hormone therapy rather than on medical judgment, as Defendants do here, constitutes deliberate indifference. *De'lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (Virginia Department of Corrections' "policy . . . not to provide hormone therapy to prisoners, supports the inference that [defendant prison officials']

refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances" in violation of the Eighth Amendment); *Chance v. Armstrong*, 143 F.3d 698, 704 (2d Cir.1998) (medical treatment of inmates must be based on "sound medical judgment"); *Kosilek v. Maloney*, 221 F.Supp.2d 156, 183-92 (D.Mass. 2002) (denial of hormones to transgender inmate based on blanket policy, rather than individualized medical evaluation, constitutes deliberate indifference); *Barrett v. Coplan*, 292 F.Supp.2d 281, 286 (D.N.H. 2003) ("the Eighth Amendment does not permit necessary medical care to be denied to a prisoner because the care is expensive or because it might be controversial or unpopular…. A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment"), *Allard v. Gomez*, 9 Fed. Appx. 793 (9th Cir. June 8, 2001) (application of blanket hormone rule rather than individualized medical judgment to transgender inmate constitutes deliberate indifference).

Application of a blanket rule to transgender individuals who already are taking hormones is an even more blatant manifestation of deliberate indifference. *De'Lonta*, 330 F.3d at 634-35; *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001); *Phillips*, 731 F. Supp. at 800-01 (granting preliminary injunction requiring a prison to maintain preexisting hormonal levels, since withdrawal would "wreak havoc on plaintiff's physical and emotional state," and concluding that "[t]aking measures which actually reverse the effects of years of healing medical treatment . . . is measurably worse [than not providing care in the first place], making the cruel and unusual determination much easier").

2. Defendants' Withdrawal Of Plaintiffs' Medically Necessary Hormone Therapy Violates The Equal Protection Clause.

"Prisoners do not surrender their rights to equal protection at the prison gate." *Williams v. Lane*, 851 F.2d 867, 881 (7th Cir. 1988). "Unequal treatment among inmates, " even if the differential treatment is not racially based,[6] violates the equal protection clause unless "it bears a rational relation to [a] legitimate penal interest." *Id.* The Act is directed at one group of prisoners, those who are transgender, and denies them the kind of individualized medical judgment about necessary medical treatment that is received by all other prisoners with serious health conditions. A law which "impose[s] a broad and undifferentiated disability on a single named group" that is "discontinuous with the reasons offered for it" violates the equal protection clause. *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, the classification drawn in this statute is intended only to disadvantage transgender prisoners. The state's own medical experts, by their prior prescriptions to Plaintiffs, have shown that the classification imposed by the Act serves no medical interest at all, and there is no other possible penological interest that it could further. Such a classification violates the equal protection clause. *Id.; U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest'); *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996) ("the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority, absent at least a rational basis for the discrimination"). Like lesbians and gay men, transgender persons "are an identifiable minority subjected to discrimination in our society." *Id.*

Excluding transgender inmates from receiving health care does not rationally further any legitimate penological interest and therefore violates the Equal Protection Clause. Although the

[6] Race-based classifications in prison are subjected to strict scrutiny review. *Johnson v. California*, 543 U.S. 499 (2005).

state may save a small amount of money by refusing to provide certain forms of treatment to residents of DOC facilities,[7] that justification is not rationally related to, and does not explain, the state's choice of transgender persons alone to bear the burden of this exclusion. *City of Cleburne v. Cleburne Living Center*, 473 U.S.432, 446-50 (1985) (statute violates equal protection where there is no justification for where the government drew its line; lack of explanation for why city required special use permit of some group homes, but not others, meanss permit requirement was unconstitutional). The denial of medical treatment is not rendered constitutional if based on reasons other than medical judgment or penological interests. *Estelle*, 429 U.S. at 104-05 & n. 10 ("doctor's choosing the 'easier and less efficacious treatment' of throwing away the prisoner's ear and stitching the stump may be attributable to 'deliberate indifference . . . rather than an exercise of professional judgment'"); *White*, 849 F.2d at 325 ("[a]ctions without a penological justification may constitute an unnecessary infliction of pain").

B. Plaintiffs Do Not Have An Adequate Remedy At Law And Will Suffer Irreparable Harm If Their Hormone Therapy Is Not Restored.

"In saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).

According to Dr. Frederick Ettner, "stopping Ms. Sundstrom's hormone therapy places her health in a perilous situation" because of the physical and psychological impact that it will

[7] It is not certain that Defendants will save by terminating Plaintiffs' hormone therapy, since there will be a cost to Defendant to provide the additional medical and psychological care, as well as staff time, that will likely be necessary to protect Defendants against suicide, self-harm, and other medical complications inflicted on Plaintiffs by the abrupt elimination of the therapy.

have on her. (F. Ettner Decl. ¶ 3.) "[A]ll endocrine functions and organ systems are affected." Dr. Ettner describes in detail the likely effects of the Defendants' actions:

- Cardiovascular system: Ms. Sundstrom is more likely to suffer from hypertension, edema (an excessive accumulation of watery fluid in cells, tissue, and body cavities), and potentially, heart failure.

- Metabolic function: Ms. Sundstrom is at a heightened risk of obesity, diabetes, muscle wasting, osteopenia/osteoporosis, and dyslipidemia (an abnormal concentration of lipids in the blood, which increases the risk of coronary heart disease).

- Gonadal function: In addition to increased risks of obesity and edema, Ms. Sundstrom will be more lethargic and asthenic (weak and suffering from a lack of strength).

- Pancreatic function: Ms. Sundstrom is likely to develop insulin resistance and consequently, diabetes.

- Adrenal function: Ms. Sundstrom will deal with stress more poorly, because ceasing her hormonal therapy disregulates cortisol production, one of the body's internal combatants against stress.

(F. Ettner Decl. ¶ 4.)

In addition, "[t]he drastic chemical changes also will affect Ms. Sundstrom's psychological state. Chemical changes will make Ms. Sundstrom's depression more acute; will increase her blood pressure and the potential for sleep dysfunction; and will accelerate suicide ideation." (F. Ettner Decl. ¶ 5.) Dr. Ettner's comments about the medical and psychological effects of hormone cessation are of equal applicability to Ms. Fields, who has been receiving hormone therapy for her entire adult life.

Dr. Ettner compares the use of hormones for someone with GID to insulin for the treatment of diabetes and concludes that, based on his experience treating transgender persons, "[s]topping Ms. Sundstrom's hormone therapy is likely to result in premature death," since "many GID patients are likely to commit suicide rather than live with the extreme psychological

distress and physical pain cased by the cessation of hormone therapy." (F. Ettner Decl. ¶ 6.) Similarly, Dr. R. Nick Gorton concurs that "failure to treat patients with GID may result in 'disastrous consequences' including depression, substance abuse, suicidality, and genital self-mutilation." (Gorton Decl. ¶ 7) (quoting *Treatment of Psychiatric Disorders*, Third Ed. (American Psychiatric Association, Washington, D.C. 2001).) "[P]atients with GID who are 'treated only with psychotherapy and antidepressants may fail to respond, as the source of their depression is rooted more in the primary diagnosis of GID than in the secondary diagnosis of major depressive disorder.'" (Gorton Decl. ¶ 8) (quoting *Treatment of Psychiatric Disorders*, Third Ed. (American Psychiatric Association, Washington, D.C. 2001).) Even if the substantial risk of suicide were the only harm to Plaintiffs, antidepressants alone are highly unlikely to be successful treatment, given the complex role that hormones play and the extremely dangerous effects of decreasing and stopping them. (R. Ettner ¶ 5.) Of course, Defendants already made that medical judgment with respect to Plaintiffs when Defendants decided that hormone therapy was medically necessary.

C. The Balance Of Harms Weighs Heavily For The Continuation Of Plaintiffs' Hormone Therapy And The Public Interest Will Be Served By Granting Their Request For Injunctive Relief.

Both Plaintiffs have been receiving hormone therapy at OCI without harm to Defendants or any others. The only burden that Defendants can assert is the continued cost of the hormones, a cost that they had borne until the passage of the Act. However, the denial of medical care because of cost concerns without the exercise of medical judgment constitutes a violation of the Eighth Amendment. *Estelle*, 429 U.S. at 104-05 & n. 10; *White*, 849 F.2d at 325. Furthermore, the public interest will be served by granting a preliminary injunction here and "safeguarding Eighth Amendment rights in the prisons in [Wisconsin]." *Phillips*, 731 F. Supp. at 801.

II. Immediate Injunctive Relief Is Necessary.

Defendants already have reduced the dosage of Plaintiffs' hormones, with immediate harmful physical and psychological effects on them. Those effects only will escalate and become more life-threatening unless immediate relief is entered. The Court should enter at least a temporary restraining order to preserve the lives and health of Ms. Sundstrom and Ms. Fields pending a future hearing on this motion for preliminary injunctive relief.

CONCLUSION

The actions of Defendants in reducing Plaintiffs' hormone dosage, with the stated intention of terminating Plaintiffs' hormone therapy entirely, in direct contradiction of the medical judgment of Defendants' own medical personnel and without consideration of the medical impact that the cessation will cause Plaintiffs violates the Eighth and Fourteenth Amendments. Plaintiffs have shown that preliminary relief is warranted. They respectfully request immediate entry of a temporary restraining order and the subsequent entry of a preliminary injunction restoring their hormone therapy at the dosage administered to each of them prior to January 12, 2006.

Dated this 23rd day of January, 2006.

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