UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar and
Reid Olson;

Plaintiffs,

v.

Essentia Health,
Innovis Health, LLC, dba Essentia Health West,
HealthPartners, Inc., and
HealthPartners Administrators, Inc.;

Defendants.

Court File No. 16-cv-00100 (DWF/LIB)

MEMORANDUM IN OPPOSITION TO ESSENTIA DEFENDANTS' MOTION TO DISMISS OR STAY

INTRODUCTION

Plaintiff Brittany Tovar was an employee of Defendant Essentia[1], and she participated in the self-insured health care plan offered to all Essentia employees. Defendant HealthPartners[2] was the third-party administrator (TPA) for the plan. HealthPartners and Essentia together designed and implemented the plan. The plan contained a discriminatory categorical coverage exclusion for all health services related to gender transition, and Essentia and HealthPartners denied Plaintiff Reid Olson, Tovar's transgender son, coverage for medically necessary care under the terms of this plan.

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[1] Plaintiffs' Amended Complaint names Tovar's employer as Essentia Health and Innovis Health, LLC, dba Essentia Health West. (First Amended Compl., ECF 66.) This brief refers to these defendants collectively as "Essentia."

[2] For ease of reference throughout the brief, Plaintiffs refer to HealthPartners, Inc., and HealthPartners Administrators, Inc., collectively as "HealthPartners." When necessary to refer to these entities separately, Plaintiffs will refer to HealthPartners Administrators, Inc., as "HPAI" and will use the full name for HealthPartners, Inc.

Plaintiffs submit this memorandum in response to the motion to dismiss or stay filed by the Essentia defendants.

LEGAL ARGUMENT

I. SECTION 1557 MAKES IT ILLEGAL TO DISCRIMINATE ON THE BASIS OF SEX, INCLUDING GENDER IDENTITY

Essentia argues that Section 1557 does not reach the sex discrimination of a health insurance plan that excludes medically necessary care for transgender patients but provides coverage for the same procedures when patients need those procedures for other reasons. It points to anticipated revisions of agency regulations, and a handful of recent district court cases from the Northern District of Texas that attempt to push back against the strong weight of case law from multiple circuit courts supporting Plaintiffs' understanding of the scope of the Affordable Care Act's prohibition of sex discrimination. This Court should instead follow that case law and hold that Section 1557 prohibits discriminatory exclusions of health care for transgender patients.

A. The Weight Of Legal Authority Holds That Sex Discrimination Includes Gender Identity Discrimination.

Essentia argues that "the plain language of Section 1557 does not include discrimination on the basis of 'gender identity.'" (Essentia Mem. at 2.)[3] Essentia is correct that Section 1557's prohibition of discrimination does not on its own identify any protected classes. Instead, it identifies four other civil rights statutes and adopts their protected classes: Title VI, which prohibits discrimination on the basis of race, color, and national origin; Title

[3] Defendants Essentia Health And Innovis Health, LLC's Memorandum In Support Of Motion To Dismiss Or, In The Alternative, Motion To Stay, ECF 80, filed January 16, 2018.

IX, which prohibits discrimination on the basis of sex; the Age Discrimination Act, which prohibits discrimination on the basis of age; and section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability. 42 U.S.C. § 18116.

Since the prohibition against sex discrimination comes from Title IX, the relevant question here is what that prohibition means: "No person in the United States shall, on the basis of sex . . . be denied the benefits of, or be subjected to discrimination . . ." 20 U.S.C. sec. 1681.

This question has been considered repeatedly by courts. For years, Title IX cases have recognized that "sex" includes individuals who are perceived as not conforming to gender stereotypes and expectations. *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997) (holding that Title IX protects a transgender student subjected to discriminatory harassment because of her female gender identity); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) ("A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.").

Courts often look to Title VII's prohibition of sex discrimination when interpreting Title IX's similarly phrased prohibition. *See e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (rule that sexual harassment constitutes sex discrimination under Title VII applies equally to Title IX); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997). Title VII cases have been even more express regarding protection for transgender individuals. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 571-73 (6th Cir. 2004) (holding a fire department liable for sex discrimination after it threatened to terminate a lieutenant who

transitioned from male to female); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (finding that an employer violated Title VII when it terminated a transgender woman because she was undergoing a gender transition); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009) (Fletcher, McKeown, and Gorsuch, Circuit Judges) (holding that it is unlawful under Title VII for an employer to discriminate against a transgender person because he or she does not behave in accordance with the employer's gendered expectations); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-08 (D.D.C. 2008) (concluding that the Library of Congress was liable for withdrawing a job offer from an applicant who revealed she was completing a gender transition); *Macy v. Holder*, Agency No. ATF-2011-00751 at *11 (April 20, 2012) (following cases like *Smith* and *Schroer* to determine that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII.").

The 8th Circuit has already indicated in *Hunter v. United Parcel Service, Inc.*, 697 F.3d 697 (8th Cir. 2012), that Title VII extends to transgender rights, and in doing so, it ruled consistently with other circuits. Many courts now hold that Title VII's bar on discrimination "because of sex" must extend to discrimination against trans individuals, either under a *per se* analysis or under a gender-stereotyping analysis like that mandated by *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). *Price Waterhouse* held that discrimination on the basis of sex under Title VII encompasses discrimination based on gender stereotyping. *Id.* at 250-52. Both the Second and the Eleventh Circuits have recently reaffirmed this interpretation of Title VII to cover gender identity discrimination. *See Fowlkes v. Ironworkers Local 40,* 790 F.3d

378 (2d Cir. 2015); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016).

The few federal courts that do not follow this reasoning object that when the Civil Rights Act of 1964 was enacted, legislators would not have understood discrimination "because of sex" to include discrimination against transgender individuals. However, federal courts have repeatedly rejected a narrow interpretation of sex discrimination. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (holding that sexual harassment by co-workers of the same sex is prohibited by Title VII and noting that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (noting that "[t]he evils against which [Title VII] is to be aimed are defined broadly"); *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (explaining that "the 'narrow view' of the term 'sex' in Title VII" in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982)[4], "'has been eviscerated by *Price Waterhouse*.'") (quoting *Smith v. City of Salem*, 378 F.3d at 573).

A court in this district has already applied these arguments and standards to Section 1557, holding that discrimination based on gender identity is prohibited under the statute. *Rumble v. Fairview Health Services*, 2015 WL 1197415 at *9-10 (D. Minn. Mar. 16, 2015).

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[4] *Sommers* is cited by Essentia for its argument that "sex" does not include gender identity in the 8th Circuit (Essentia Mem. at 10.), but of course this 1982 case predates the controlling case law Plaintiffs cite above, including *Price Waterhouse*, *Radtke* (which notes that *Sommers'* narrow view has been eviscerated), and *Hunter*.

Essentia cites to a Northern District of Texas case for the holding that no "controlling precedent" requires this interpretation of Section 1557. *Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 768 (N.D.TX. 2017). It is equally true that no controlling precedent establishes Essentia's position. This Court is no more obligated to follow the reasoning in *Baker* than the *Baker* court was obligated to follow the *Rumble* holding from this district. The *Rumble* decision persuasively recognizes and follows *Price Waterhouse* and its progeny from multiple circuits, while *Baker* simply ignores this.

B. Essentia Has Had Sufficient Notice.

Essentia argues that because Section 1557 was legislated by Congress under its spending power, the government must provide notice that by accepting federal funding, it became exposed to liability. (Essentia Mem. at 13-15.) But "Section 1557 has been in effect since its passage as part of the Patient Protection and Affordable Care Act (ACA) in March 2010, and covered entities have been subject to its requirements since that time." 81 FR 31430.

In 2012, over two years prior to the 2015 Plan at issue in this case, the Office of Civil Rights (OCR) explicitly stated that the ACA's Section 1557's prohibition of sex discrimination "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." Letter from Leon Rodriguez, Dir. of Office for Civil Rights, Dep't of Health & Human Services, to Maya Rupert, Fed. Pol'y Dir., Nat'l Center for Lesbian Rights (Jul. 12, 2012) (OCR Transaction No. 12-000800). As discussed in the letter, this was a clear application of then-existing civil rights

law to the framework of Section 1557. The weight of case law has only grown more compelling in the intervening years.

Section 1557 is not the only part of the ACA concerned with ensuring access to healthcare free from discrimination. The statute itself and regulations that have been issued relating to other aspects of the Act also create broad protections from discrimination in various aspects of healthcare. It is proper for this Court to be guided by these other provisions of the law, because when interpreting Section 1557, the Court should look to "the provision of the whole law, and its object and policy." *Hennepin Co. Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996) (quoting *U.S. Nat'l Bank of Oregon*, 508 U.S. at 455).

Regulations that the Department of Health and Human Services (DHHS) has issued in relation to other portions of the ACA also evidence the broad, anti-discriminatory sweep of this landmark healthcare law. For example, regulations prohibit a Qualified Health Plan under the insurance exchanges established by the Act from "discriminating on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation." 45 C.F.R. § 156.200(e). In regulations regarding State-run insurance exchanges, DHHS has dictated that "the State and the Exchange must [n]ot discriminate based on race, color, national origin, disability, age, sex, gender identity or sexual orientation." 45 C.F.R. § 155.120.

These other antidiscrimination provisions within the ACA and its regulations, which prohibit discrimination on a number of grounds including sex, gender identity, and sexual orientation, provide additional support for Plaintiffs' argument that this Court should reject Defendants' invitation to narrowly construe Section 1557's antidiscrimination protections.

In making its arguments, Essentia confusingly shifts focus between what notice the government must provide to Essentia and what notice Essentia must have that the actions it could be liable for are occurring. These are two separate but related concepts. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638-44 (1999). In *Davis*, the Supreme Court noted that Congress must be clear about what conduct is illegal under a spending clause statute before a private action for money damages is permitted. *Id.* However, this is not an extreme barrier. The Davis court concluded that the plain language of Title IX prohibiting discrimination on the basis of sex provided sufficient notice to federal educational funds recipients that they could be held liable for a student sexually harassing another student. *Id.* Turning to the concept of agency principles, the Supreme Court declined to apply a "should have known" standard to holding a federal funding recipient responsible for the harassment committed by a third party. *Id.* However, the entity's own intentional conduct, such as exercising deliberate indifference when it knew of harassment, would support liability. *Id.*

None of the agency principles discussed in *Davis* apply here. Tovar and Olson are claiming that the Defendants had a facially-discriminatory insurance plan, not that they were subject to harassment. The statute itself even without the regulations provides sufficient notice that insurance plans that discriminate against transgender patients are discriminatory.

II. THIS COURT SHOULD NOT STAY THIS CASE

Essentia and HealthPartners argue that this Court should stay proceedings to await further action in the *Franciscan Alliance* case and further agency action by DHHS. (Essentia Mem. at 15; HealthPartners Mem. at 31-32.) However, the stay issued in the *Franciscan Alliance* case and any action by DHHS relates to agency enforcement of the statute. Here,

Tovar is a private litigant bringing her case directly to this federal Court. DHHS has no involvement in this matter, and the only role that the stayed Rule or any forthcoming future Rule has would be based on deference for any parts of the statute that are ambiguous.

A. DHHS, Not This Court, Is The Only Entity Bound By The *Franciscan Alliance* Injunction.

Defendants request a stay of this matter in light of a preliminary injunction issued by Judge Reed O'Connor in *Franciscan Alliance, Inc. v. Burwell* on December 31, 2016, enjoining DHHS "from enforcing the Rule's prohibition against discrimination on the basis of gender identity." *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

"A stay is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Rarely will a litigant in one case "be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). The party seeking such a stay "must make out a clear case of hardship or inequity in being required to go forward." *Id.* Defendants cannot meet this high burden.

In May 2016, DHHS issued a final Rule implementing Section 1557, applicable to every health program or activity receiving federal financial assistance. 45 C.F. R. § 92.3. Among other things, the rule provides that discrimination "[o]n the basis of sex," includes "discrimination on the basis of . . . gender identity." Id. § 92.4.

In *Franciscan Alliance*, a case brought by religious providers who claimed religious objections to providing transition-related medical services to transgender patients[5], Judge O'Connor determined that no deference was due to the Section 1557 Rule under *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.,* 467 U.S. 837, 842 (1984), because "Section 1557 clearly incorporates Title IX's prohibition of sex discrimination," and he had "previously concluded [that] the meaning of sex in Title IX unambiguously refers to the 'biological and anatomical differences between male and female students as determined at their birth.'" *Franciscan Alliance*, 227 F. Supp.3d at 687 (internal citation omitted).

He had reached this previous conclusion a few months earlier in a case brought by a group of states challenging guidance documents interpreting Title IX and Title VII. *See Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) [hereinafter *Texas I*]. The *Texas I* plaintiffs challenged the agencies' view that the prohibitions of sex discrimination in Title IX and Title VII require that transgender people be permitted to use sex-segregated facilities that match their sex. *Id.* Judge O'Connor issued a preliminary injunction in *Texas I* purporting to bar the defendant agencies from relying on or using the challenged guidelines in any DHHS actions nationwide. (*See id.* at 836).

Nothing in the *Texas I* or *Franciscan Alliance* injunction orders suggest that these injunctions have any impact upon parties, other than the enjoined federal agencies, with Section 1557, Title VII, or Title IX claims pending in other courts. Neither *Franciscan Alliance* nor *Texas I* are binding on this Court, and they do not override this Court's own judgment of

[5] None of the Defendants in this matter have cited religious objections to compliance with the law.

the correct interpretation of Section 1557, nor its obligation to follow law from the 8th Circuit in *Hunter* and from the Supreme Court in *Price Waterhouse*.

Franciscan Alliance on its face relates only to the enforcement actions of the defendant agency, DHHS. *Franciscan Alliance*, 227 F. Supp. 3d at 696 ("Defendants are hereby enjoined from enforcing the Rule's prohibition . . ."). Judge O'Connor's order does not attempt to bind non-parties nor control how other district court judges interpret the law.

Other courts have rejected the *Texas I* injunction. Decisions following on the heels of the *Texas I* injunction further demonstrate this foundational principle of our federal court system. Since *Texas I* was issued in August of 2016, many federal courts have issued rulings that apply Title IX to protect transgender students. *See Carcaño v. McCrory*, No. 16-cv-236, 203 F. Supp. 3d 615 (M.D.N.C. 2016); *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-cv-943, 2016 U.S. Dist. LEXIS 136940 (E.D. Wis. Oct. 3, 2016) (subsequently upheld, 841 F.3d 730 (7th Cir. 2017)); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 U.S. Dist. LEXIS 150011 (N.D. Ill. Oct. 18, 2016). As the Ohio district court explained:

> [T]o construe [the scope of *Texas I* otherwise] would prevent other district courts and courts of appeals from weighing in on the important issues presented in this case, which would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."

Bd. of Educ., 208 F. Supp. 3d. at 878 n.16 (quoting *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984)). The court went on: "Allowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit" would "squelch the circuit disagreements that can

lead to Supreme Court review." *Id.* (quoting *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002)). The same reasoning applies here.

B. The *Rumble* And *Robinson* Stays Are Not Persuasive Because They Primarily Rely on *Gloucester County*, Not *Franciscan Alliance*.

Essentia next cites to stays in two other district court cases, *Rumble* and *Robinson*, to support its request for a stay in this case. (Essentia Mem. at 19.) Essentia's reliance on these other stays is misplaced. Both stays rely on a case then-pending at the Supreme Court—a far different proposition than a stay issued based on the Texas district court injunction in *Texas I* or *Franciscan Alliance*. At the time, the Supreme Court had granted certiorari in *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016). *Gloucester County* questioned whether a school's bathroom policy segregating transgender students violated the prohibition of sex discrimination in Title IX. *See Gloucester Cnty.*, 822 F.3d 709, 714-15 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016). Had this case been decided on the merits at the Supreme Court within a few months of the *Rumble* and *Robinson* stays, as anticipated, it would have controlled the *Rumble* and *Robinson* courts on the correct interpretation of Title IX. This was a much more persuasive rationale for a stay than the non-binding opinion of a fellow District Court judge in *Franciscan Alliance*.

But in the meantime, the Supreme Court has remanded *Gloucester County* to the 4th Circuit for reconsideration. *Gloucester Cnty.*, 137 S. Ct. 1239. With no new binding precedent imminent, Defendants' case for a stay in this matter is greatly weakened and should be rejected.

C. This Court Need Not Wait For New Regulations Or Consider The Effect Of Vacated Rules In Order To Interpret Section 1557.

Essentia also argues that this Court is bound by the *Franciscan Alliance* stay because it vacated the Rules issued by DHHS for Section 1557, or that this Court should wait for a new Rule that may be forthcoming from the DHHS under the Trump administration. (Essentia Mem. at 17-18.) But this Court should instead base its decision on the long line of cases, cited above, that lead inexorably to the conclusion that Plaintiffs urge here.

When DHHS enacted the Rule for Section 1557 it relied on the existing case law Plaintiffs cite above. That case law even more strongly supports Plaintiffs' position now. Even without any regulations from DHHS, that case law would be persuasive. And if DHHS issues a new Rule, in an era where agency interpretation swings back and forth under our increasingly polarized politics, this Court should not ignore case law to blindly follow the new regulations. Under the test for *Chevron* deference to agency action, a court need not defer to unreasonable agency interpretations that contradict established case law. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 845 (1984).

Defendants invite this Court to ignore the current regulations and case law and put this case on hold, hoping that new regulations more to their liking will be put in place. This is an invitation to disregard all court precedent and have parties endlessly wait to adjudicate issues until the next Presidential administration rewrites the rules. It is not a compelling rationale for this Court to impose an indefinite stay of unknown duration. This Court should instead rely on case law to interpret Section 1557 and reject Defendants' request for a stay.

CONCLUSION

The Court should reject Essentia's motion to dismiss or stay this case.

Dated: February 6, 2018

Respectfully submitted,

GENDER JUSTICE

By: *s/Christy L. Hall*

Lisa C. Stratton (MN No. 236858)
Christy L. Hall (MN No. 392627)
550 Rice Street, Suite 105
St. Paul, MN 55103
Phone: 651-789-2090
Fax: 651-789-2093
lisa.stratton@genderjustice.us
christy.hall@genderjustice.us
ATTORNEYS FOR PLAINTIFF