

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

SOUTHAMPTON
COMMUNITY HEALTHCARE,
et al,

Plaintiffs,

vs.

ANDREW BAILEY,

Defendant.

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Cause No. 23SL-CC01673

Division 18

FILED

05/01/23

JOAN M. GILMER

CIRCUIT CLERK

ST. LOUIS COUNTY, MO

COURT ORDER

Before the Court is the Plaintiffs’ motion, made pursuant to Missouri Supreme Court Rule 92.02, requesting that this Court grant them a temporary restraining order which would enjoin Defendant Andrew Bailey, Attorney General of the State of Missouri, (“the Attorney General”) from implementing, enforcing or otherwise making effective the Missouri Attorney General’s recent emergency rule, (“the Emergency Rule”) codified at 15 CSR 60-17.010 and titled, “Experimental Interventions to Treat Gender Dysphoria.” The Emergency Rule is scheduled to be enforceable as early as 12:01 am on Thursday, April 27, 2023 and remain in effect for six months.

Parties appeared by counsel for hearing on Plaintiffs’ motion and Defendant’s opposition thereto. Following argument on April 26, 2023, the Court took the matter under submission and stayed the implementation of the Act until the Court ruled on the Motion for Temporary Restraining Order. The Court takes judicial notice of the court file. The Court considers the arguments of counsel, the pleadings, the authorities cited to it and the provisions of Rule 92.02. Being so advised, the Court enters its findings and orders relative to Plaintiffs’ requested temporary restraining order.

STATUTORY RULE-MAKING AUTHORITY:

1. Initially, the court notes that our state government divides its powers among three distinct departments – the legislative, the executive and the judicial.¹
2. The legislative power (the power to make laws, which are implemented by agencies through rule-making) rests with the Senate and the House of Representatives. Mo. Const. Art. III, § 1.
3. The supreme executive power is vested in the Governor. Mo. Const. Art. IV, § 1.
4. The Attorney General is a member of the executive department. Mo. Const. art. IV, § 12.
5. The judicial power is vested in the courts. Mo. Const. art. V, § 1.
6. On April 13, 2023, the Attorney General submitted the Emergency Rule to the Secretary of State, indicating that the planned effective date is April 27, 2023. *See* Ex. A to Petition.
7. Plaintiffs filed their Petition for a Temporary Restraining Order, Injunctive Relief and Declaratory Relief on April 24, 2023.
8. In adopting and issuing the Emergency Rule, the Attorney General utilized the emergency agency rule-making provision and procedures laid out in RSMo Section 536.025, and authorized in RSMo Section 536.021.

¹ “The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.” Mo. Const. art. II, § 1.

9. The Attorney General cited the Missouri Merchandising Practices Act (“MMPA”), [Chapter 407](#), RSMo. as the basis for his rule-making authority in promulgating the Emergency Rule at issue here.²
10. Section [407.020](#) lists forbidden unlawful practices³ in connection with the “sale or advertisement of any merchandise in trade or commerce...” The invocation of the MMPA as authority to implement the Emergency Rule for the explicit purpose of prohibiting or limiting medical care to patients of any age presents an issue of first impression for the courts.
11. [Chapter 536](#) RSMo. governs the procedures for agency rule-making and review.
12. The plain text of section 536.025.1(1) limits the use of this rule-making provision to “emergencies” and not for general rule-making purposes.⁴
13. However, an agency’s emergency rule-making authority is still constrained by the legislature, even if the emergency situation exists. Although the agency is relieved from the requirements of notice and comment if it finds that emergency action is required, under Sec. 536.025.1(2)-(4), the agency is still required to:
 - a. Follow procedures best calculated to assure fairness to all interested persons and parties under the circumstances;

² The Attorney General argues that the MMPA applies to “medical goods and services,” citing *Freeman Health System v. Wass*, 124 S.W.3d 501, 507 (Mo. App. 2004). That case involved a plaintiff who sought medical treatment and, upon admission, signed a form stating that he would be responsible for the costs of his medical care. Plaintiff did not remit any payment. Freeman Health System filed suit for the money owed. Plaintiff counterclaimed to contest the costs of his medical bills.

³ 407.020(1) provides: “1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice.”

⁴ Section 536.025.1(1) provides that the agency may only use the emergency procedure if it “(f)inds that an immediate danger to the public health, safety or welfare requires emergency action or the rule is necessary to preserve a compelling governmental interest that requires an early effective date as permitted pursuant to this section.”

- b. Follow procedures which comply with Missouri and United States Constitutional protections and
- c. Limit the scope of such rule to the circumstances which have created the emergency and require emergency action.

14. An emergency rule is of limited duration.⁵ In this case, the Emergency Rule states that it is to expire on February 6, 2024. *See* Ex. A to Petition.

15. An emergency rule is not renewable.⁶

16. An emergency rule is subject to judicial review.⁷

THE EMERGENCY RULE:

17. Section 536.025(1) requires that the Attorney General state the basis for his finding that “an immediate danger to the public health, safety or welfare requires emergency action or the rule is necessary to preserve a compelling governmental interest that requires an early effective date...” Thus, the Emergency Rule contains a an “Emergency Statement.” *See* Ex. A to Plaintiff’s Petition.

18. Following its review, the Court finds that most of the Emergency Statement warns of the lack of data to support the efficacy of the medical treatments; that “[i]n recent years, the use of other forms of interventions, often without any talk therapy at all, has accelerated exponentially. These include life-altering pubertal suppression, cross-sex hormone therapy, and gender transition surgery—all of which pose very serious

⁵ “Emergency rules shall not be in effect for a period exceeding one hundred eighty calendar days or thirty legislative days, whichever period is longer. For the purposes of this section, a ‘legislative day’ is each Monday, Tuesday, Wednesday and Thursday beginning the first Wednesday after the first Monday in January and ending the first Friday after the second Monday in May, regardless of whether the legislature meets.” Sec. 536.025(7).

⁶ “A rule adopted under the provisions of this section shall not be renewable, nor shall an agency adopt consecutive emergency rules that have substantially the same effect, although a state agency may, at any time, adopt an identical rule under normal rulemaking procedures.” Sec. 536.025(8).

⁷ “Rules adopted under the provisions of this section shall be known as ‘emergency rules’ and shall, along with the findings and conclusions of the state agency in support of its employment of emergency procedures, be judicially reviewable under section 536.050 or other appropriate form of judicial review.” Sec. 536.025(6).

side effects.” See *paragraph 2*. The statement explains that there is not sufficient evidence to support gender transition interventions, arguing they “lack a solid evidentiary foundation and pose very serious side effects, they are unlawful under Missouri law absent sufficiently protective guardrails.” See *paragraph 3*.

19. The Attorney General argues the emergency is based on “the recent immense increase”⁸ in these treatments which “makes this issue time-sensitive”:

This emergency rule is necessary to protect the public health, safety, and welfare, and also to protect a compelling governmental interest as the attorney general is charged with protecting consumers, including minors, from harm and investigating fraud and abuse in the state’s health care payment system. Among other reasons, the recent immense increase in the use of these life-altering interventions, which have serious side effects, as well as the recent acknowledgment that these interventions are used in circumstances not supported by solid evidence, makes this issue time sensitive. Further, and independently, a whistleblower has issued a sworn affidavit, alleging that a prominent provider of these interventions in Missouri is systemically failing to comply with the medical standard of care, and an investigation has revealed that some providers in Missouri prescribe gender transition interventions without any individualized assessment, contrary to safeguards established in scientific literature and by medical organizations.

20. Finally, in *paragraph 6*, the Attorney General states, without further specific detail or elaboration:

*As a result, the attorney general finds that this emergency action is needed because of a compelling governmental interest and a need to protect the public health, safety, and welfare. The scope of this emergency rule is limited to the circumstances creating the emergency and complies with the protections extended in the **Missouri and United States Constitutions**. The Attorney General believes this emergency rule is fair to all interested persons and parties under the circumstances. This emergency rule was filed April 13, 2023, becomes effective April 27, 2023, and expires February 6, 2024.*

21. The Rule promulgated by the Attorney General states specifically, “This rule does not contain an exhaustive list of the practices that violate the Act”. This leaves

⁸ The Rule’s Summary of Fiscal Impact estimates about 300 new interventions per year at the Pediatric Transgender Center at Washington University, which the Attorney General’s Office reports to have the highest patient total in the state. Across Missouri, the Attorney General estimates about 600-700 individuals would begin a new intervention within the next 12 months.

significant room for interpretation of what would and would not be covered by the Act, creating confusion for those tasked with the enforcement of the Rule and those required to comply.

22. The Emergency Rule begins with a definition: (1) “Covered Gender Transition Intervention” or “Intervention” means the provision or prescription of any puberty-blocking drugs, cross-sex hormones, or surgery, for the purpose of transitioning gender, decreasing gender incongruence, or treating gender dysphoria.⁹ On its face, the Emergency Rule clearly applies to both adults and minors as it provides no limitations based on the age of the person or patient. Additionally, the Attorney General’s Office admitted in oral argument that, under the text of the Rule, these issues do not end when a person reaches the age of 18 years old.
23. The Emergency Rule states there is a Private Cost to private entities less than \$599,400 to \$699,300 and Public Costs of less than \$500 during the time the Rule would be in effect.
24. As noted above, the Attorney General’s statement indicates there are 12,400 people in the State who identify as transgender. According to the U.S. Census there are 6,177,957 residents in the State of Missouri as of July 2022. The Statement says that they believe 600-700 people in the state would begin intervention within the next 12 months, with about 450-525 people estimated to begin intervention during the duration of the Emergency Rule.

⁹ The Rule does not include certain diagnoses and provides for continuing treatment under certain circumstances: “(A) Treatment for a genetically or biochemically verifiable disorder of sex development such as 46, XX DSD; 46, XY DSD; sex chromosome DSDs; XX or XY sex reversal; or Ovotesticular disorder; (B) Treatment for precocious puberty; or (C) For subparagraphs (2)(C)–(K), continuing prescription or provision of a specific intervention that has already begun, so long as the person or health organization promptly seeks to initiate the treatments and assessments called for by these subparagraphs.”

25. The heart of the Emergency Rule is in section (2): “It is an unfair, deceptive, fraudulent, or otherwise unlawful practice for any person or health organization to provide a covered gender transition intervention to a patient (or refer a patient for such an intervention) if the person or health organization” either:

- a. Fails to ensure that the patient has exhibited a medically documented, long-lasting, persistent and intense pattern of gender dysphoria for at least the last three (3) years;
- b. Fails to obtain informed consent by disclosing, using “language materially identical to each point” listed (in three ways – on its website, in writing and orally to the patient), twenty-three (23) references to various studies and warnings, without providing specific citation or attribution to any;¹⁰ or
- c. Fails to ensure that the patient has received certain listed screenings or assessments;¹¹ or
- d. Fails to track/maintain data about adverse effects from the treatment for at least fifteen years; or

¹⁰ The court is unable to find any citations or sourcing in any of the 23 listed items that the Emergency Rule requires treatment providers to post warnings about and obtain consent for. While certain agencies are mentioned, such as a “scientific article in the Journal of Infant, Child and Adolescent Psychotherapy” in ¶6, there is no date of attribution for the quote and no method for the reader to understand the sourcing or context, other than to do an independent internet search. In paragraph 7, referring to a “recent” declaration from Sweden’s National Board of Health and Welfare, there is no date for the declaration or other sourcing. In paragraph 8, “[a] A systematic review of the evidence by researchers in Europe regarding natal boys concluded that there is ‘insufficient evidence to determine the efficacy or safety of hormonal treatment’ and that certain hormonal interventions can potentially cause or worsen depression.” The same is true for paragraph 16: “A summary of available evidence written by medical societies ‘from around the globe’ found that ‘there are no proven methods to preserve fertility in early pubertal transgender adolescents.’” The court is unable to find citations or specific sourcing in *any* of the 23 listed items that the Emergency Rule requires treatment providers to post and obtain informed consent for, other than what is mentioned in the Attorney General’s responsive brief filed after oral argument was finished.

¹¹ Any treatment provider is required to ensure that the patient has 1. received a full psychological or psychiatric assessment of at least 15 hours; 2. Been screened for autism; 3. Been screened for social media addiction; 4. Been screened for “social contagion” (not otherwise defined) regarding gender identity.

- e. Fails to obtain and keep on file informed written consent from the patient or parents/guardians for minors.
26. The Court has reviewed the affidavits of A.S., N.F., Logan Casey and Kelly Storck.
27. The Court has reviewed the declarations of Aron Janssen, M.D. and Daniel Shumer, M. D.
28. In the Attorney General’s response to the Motion they encourage the Court to take a deeper look at the science behind the decision to issue this Emergency Rule which cannot be accomplished on this record. The question for this Court is what should occur during the pendency of this legal challenge – to allow the Rule to go into effect as written or to continue with the current practices.
29. The other unknown is what will happen to those patients they seek to protect when this Emergency Rule expires and how that will impact their treatment.
30. The Court incorporates each affidavit and declaration, as if fully set forth herein.

LEGAL STANDARDS:

31. Rule 92.02 provides that “The court shall not grant a temporary restraining order unless the party seeking relief demonstrates that immediate and irreparable injury, loss, or damage will result in the absence of relief.”
32. “Temporary restraining orders and preliminary injunctions ‘merely seek to maintain the status quo between the parties and therefore are not final judgments on the merits.’ *Pomirko v. Sayad*, 693 S.W.2d 323, 324 (Mo.App.1985). Consequently, the denial of a request for a temporary restraining order or a preliminary injunction is interlocutory in nature and is not appealable. *Id.* at 324–25; *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 646 (Mo.App.1995). See also *Coursen v. City of Sarcoxie*,

124 S.W.3d 492, 498 (Mo.App.2004). *Salau v. Deaton*, 433 S.W.3d 449, 453 (Mo. Ct. App. 2014).

33. Through their affidavits and declarations, Plaintiffs have met their burden to show that they will be subjected to immediate and irreparable loss, damage or injury if the Attorney General is permitted to enforce the Emergency Rule, and its broad, sweeping provisions were implemented without further fact-finding or evidence. At a minimum, without further court action, Plaintiffs (the current patients) are at high risk of having their medical care interrupted for an unknown length of time; once the Rule goes into effect, they may lose access to medical care through their current providers until such time as the provider can come into compliance with the Rule's requirements. Even if the patient is "grandfathered in" and can continue care, under the text of the Rule, the treatment provider is still required to promptly comply with the "informed consent" provisions of the Rule. Thus, Plaintiffs (the health care providers) will risk ethics violations because they will be required to obtain "informed consent" from their patients (e.g. providing medical advice) using unsourced medical information without knowing or being able to find out if that science is medically supported. This creates both an ethical risk and a practical risk to the medical treatment plaintiffs; the healthcare providers can be sued for medical negligence for giving unsourced medical advice couched as "informed consent," which may or may not fall below the standard of care that they were required to give under the terms of this Emergency Rule, whether or not they agree with it.
34. The Court finds that the Plaintiffs have met their burden regarding their likelihood of success on the merits, as this is novel use of the Attorney General's power to promulgate emergency rules under ~~for~~ the Missouri Merchandising Practices Act that

has never previously been subjected to judicial scrutiny and may impermissibly invade a function reserved to the legislature.

35. For the reasons stated above and in the Verified Petition, Motion for a Temporary Restraining Order, and the Supporting Memorandum, Defendants, and all of their agents, servants, representatives, employees, attorneys, and those persons in active concert or participation with them, are temporarily restrained and prohibited from, directly or indirectly implementing, enforcing, or applying any provision of the Emergency Rule.
36. Pursuant to Mo. Sup. Ct. R. 92.02(e), this Order shall be binding upon those persons in active concert or participation with Defendant who receive actual notice of the order by personal service or otherwise.
37. Plaintiffs are ORDERED to post a bond of \$500.00 in this matter, as required by Rule 92.02.
38. This Temporary Restraining Order shall expire on May 15, 2023, unless otherwise extended by this Court. Cause set for the Preliminary Injunction Hearing on May 11, 2023 at 1pm.

SO ORDERED:



Judge

Division 18

May 01, 2023

cc: to all parties, through counsel of record, via the court's electronic filing system.