

1 UNITED STATES DISTRICT COURT  
 2 SOUTHERN DISTRICT OF NEW YORK  
 -----x

3 ANGIE CRUZ, on behalf of  
 4 herself and all others  
 similarly situated,

5 Plaintiffs,

6 v. 14 CV 4456 (JSR)

7 HOWARD ZUCKER AS ACTING  
 8 COMMISSIONER -NY STATE DEPT.  
 OF HEALTH,

9 Defendant.

10 -----x

New York, N.Y.  
 October 17, 2016  
 4:10 p.m.

12 Before:

13 HON. JED S. RAKOFF,  
 14 District Judge

15 APPEARANCES

16 WILKIE FARR GALLAGHER  
 17 Attorneys for Plaintiffs  
 18 ARTHUR BILL  
 MARY JANE EATON

19 OFFICE OF THE ATTORNEY GENERAL, NEW YORK  
 20 Attorneys for Defendant  
 21 RODERICK ARZ  
 JOHN GASIOR

22  
 23  
 24  
 25

1 (Case called)

2 THE COURT: Good afternoon. We're here on the motion  
3 for reconsideration of the Court's July 5, 2016, summary  
4 judgment opinion and order where I held that while plaintiff  
5 had prevailed on a number of items, there were still disputes  
6 of material fact concerning some remaining items.

7 Now it appears that the parties are agreed that there  
8 are no longer any disputed issues of fact as a result of the  
9 defendant's notice of proposed rule making issued a couple  
10 weeks ago.

11 So the plaintiff says I should, on reconsideration  
12 now, grant summary judgment on the remaining issues in their  
13 favor, and the defense says that the Court should either deny  
14 reconsideration or at least delay ruling until a few months  
15 from now when it is expected that the proposed rules will be  
16 adopted thereby mooting the remaining claims.

17 So this is a curious situation to say the least. I'm  
18 trying to figure out what's really going on here. I'm  
19 wondering whether what's really going on here -- maybe I'm  
20 wrong -- is each side positioning themselves with respect to  
21 attorneys' fees. Maybe it's something else.

22 Anyway, it's plaintiffs' motion. So let me hear first  
23 from plaintiff.

24 MR. BILLER: Thank you, your Honor. Arthur Biller  
25 from Wilkie Farr Gallagher on behalf of the plaintiffs.

1 I'm just going to make a few points, and then I'm  
2 happy to answer any of the questions that the Court may have.  
3 First of all, as your Honor noted, there is no dispute on the  
4 merits of this motion.

5 Defendant has admitted that the treatments here in  
6 fact are medically necessary and that there is no policy  
7 regarding coverage of particular drug uses that bars their  
8 coverage.

9 There is no longer any dispute of material fact. So  
10 summary judgment here should be granted here as a matter of  
11 law, and defendant pretty much concedes as much in his letter  
12 brief.

13 So the only issue here, as your Honor pointed out, is  
14 one of timing. Defendant says the Court should delay decision  
15 and wait until some later unspecified time in the future to let  
16 the regulatory process work itself out.

17 He basically appeals to policy reasons saying that he  
18 shouldn't be penalized for reconsidering his position and  
19 basically taking some time to get things right.

20 This position has no factual support and no legal  
21 support, and the Court should reject this request for at least  
22 three reasons: Number one, it ignores the history of this  
23 case; number two, it's basically an end-run around plaintiffs'  
24 rights to declaratory and injunctive relief and other rights  
25 they would have as prevailing parties; and number three, it

1 unjustly subjects the class to continuing real harm while  
2 defendant continues to wait on the regulatory process.

3 First, as to the history of the case, this is not a  
4 case where --

5 THE COURT: Well, believe it or not, I know the  
6 history of the case.

7 MR. BILLER: Very well, your Honor.

8 THE COURT: In fact, last I checked, I was the judge  
9 throughout.

10 MR. BILLER: Absolutely.

11 THE COURT: And I know I look very old, but last I  
12 checked at least, my memory was intact, although maybe that's  
13 just my memory of my memory.

14 MR. BILLER: Fair. I don't mean to belabor the point,  
15 your Honor. I just think that it's worth noting that --

16 THE COURT: What I thought might be going on here --  
17 maybe this is just because I'm a cynic by nature -- is if I  
18 grant your motion now, you are the prevailing party.  
19 Therefore, though there's a discretionary element at all times,  
20 you would very likely be entitled to attorneys' fees, including  
21 for this further aspect of the case.

22 If I don't grant the motion and let the administrative  
23 process play out at its well-known speed and efficiency, this  
24 portion of the case would ultimately be rendered moot.

25 So maybe they would claim that their attorneys' fees

1 should not be awarded because in effect it was mooted because  
2 they did the right thing and they shouldn't be penalized for  
3 it, similar to the argument that they're making as to why I  
4 should allow the process to play out.

5 So I was wondering -- maybe I'm just being too  
6 cynical, whether that's a factor of what's going on here.

7 MR. BILLER: Well, I think the key here, your Honor,  
8 is that defendant is basically asking the Court and us to trust  
9 them that they're, number one, going to get it right; and,  
10 number two, that they're not going to revert to the prior  
11 unlawful conduct.

12 There is a line of cases where government defendants  
13 try to moot out claims, and courts have found that a voluntary  
14 cessation of conduct does not necessarily render a case moot.

15 One of the factors that the courts look at is whether  
16 defendant can show that it is absolutely clear, as the Second  
17 Circuit has put it, that the unlawful behavior will not recur.  
18 One of the reasons that's important is because without a  
19 judgment, defendant will be free, once the case is dismissed,  
20 to go back to the prior policy.

21 That's really what we're concerned about, more so than  
22 anything else. I think we are right to be concerned about  
23 this, and I think the Court should be concerned about it as  
24 well because, for one thing, they have refused to concede that  
25 the current regulation is unlawful.

1           We have also brought to their attention certain  
2 denials of coverage for people who are asking for the so-called  
3 "cosmetic" treatments who have been denied coverage for those  
4 treatments, and they've told us, we're not going to fix those.  
5 They can just wait until the next regulation is adopted and  
6 then reapply.

7           So, to me, this is not the type of conduct you would  
8 expect from a defendant who is definitely on the right path and  
9 not going to have a possibility of reverting to the prior  
10 unlawful conduct.

11           The other thing is we've seen that this issue has been  
12 politicized in the past. It's politicized in other places in  
13 the country, and there is no guarantee that when another  
14 administration comes in or if the political winds start  
15 shifting, that the coverage policy isn't going to shift.

16           That's not just something in the abstract. That's  
17 something real that we've seen with this very regulation. As  
18 your Honor knows, prior to 1998, these procedures were all  
19 covered by Medicaid in New York on a case-by-case basis.

20           Then the administration that was there in 1998 decided  
21 that they didn't want to cover it anymore, despite the fact  
22 that one of DOH's own experts said that the treatment for GD is  
23 safe and effective. They ignored that. They put the ban in  
24 place, which is what prompted this lawsuit.

25           Then more recently in 2011, the Medicaid redesign team

1 had before a proposal to cover GD under Medicaid. As soon as a  
2 single negative press article came out, that proposal was  
3 withdrawn.

4 So we've seen here that things can go back and forth.  
5 Unless we have a judgment here -- I should say a judgment here  
6 is the only security that the class members will have that the  
7 coverage policy is not going to revert after this case is  
8 dismissed.

9 THE COURT: Let me hear from defense counsel. Thank  
10 you.

11 MR. ARZ: Would your Honor prefer that I use the  
12 lectern?

13 THE COURT: Whichever you prefer.

14 MR. ARZ: Thank you, your Honor. I'll address a  
15 couple of these points, but I just wanted to frame what  
16 defendant's position is now. It is based on the fact that  
17 there are other aspects of this case beyond the motion for  
18 reconsideration on the age exclusion that are premature for any  
19 kind of final determination.

20 Because we're going to have to address all of those  
21 issues, as a matter of both economy and as a matter of  
22 federalism, it's appropriate to wait not an indefinite amount  
23 of time but a small, short amount of time to give this rule  
24 making time to play out.

25 THE COURT: I'm not sure I follow that. You say in

1 your papers as to the issues that are on reconsideration being  
2 sought, "There are no longer any disputed issues of fact."

3 So, if what you're interested in is efficiency, then  
4 why shouldn't I grant the motion and get those matters  
5 completed so that they're not hanging over anyone? Then if  
6 there still remain matters to be decided, we'll decide those.

7 MR. ARZ: That's a great question. The disputed  
8 issues that will need to be resolved are not fact issues. We  
9 agree there aren't fact issues that require a trial.

10 But, for example, the regulation that was the subject  
11 of the cosmetic exclusion ruling in summary judgment has now  
12 been changed. The current regulation now permits coverage of  
13 potentially cosmetic procedures if they're medically necessary.

14 That's a fundamental change to the regulation in what  
15 is a facial challenge to the language in the regulation. But  
16 to further underscore that those potentially cosmetic  
17 procedures shall be covered if they're medically necessary,  
18 this present notice of proposed rule making further revises the  
19 cosmetic portions of the regulation. So we'll need to address  
20 that at some point.

21 Your Honor brought up attorneys' fees. That's another  
22 issue that I'm sure we'll need to get litigated at a future  
23 point. The parties may disagree on that question. I don't  
24 know. It's premature right now. Obviously that will be  
25 something that the parties will engage in negotiations about if

1 that's possible.

2 That's yet another dimension of this case, not a fact  
3 one, but a dimension of this case that will need to be  
4 addressed. So all of that is to say that rather than what  
5 plaintiffs are saying, which is the defendants are saying, oh,  
6 trust them. That's not what we're saying.

7 We're not coming here today with an application that  
8 the age-exclusion provisions are moot. We're not making that  
9 application. We're not saying you need to trust us.

10 We're saying you need to let this legally required  
11 public comment period come to a close so that the department  
12 can comply with its obligations under the State Administrative  
13 Procedures Act to address those comments.

14 THE COURT: If they are entitled, as a matter of law,  
15 in this case substantially federal constitutional law, to a  
16 determination in their favor on issue X, Y, or Z, then what  
17 does it matter whether the state administrative process plays  
18 itself out or not?

19 MR. ARZ: Well, your Honor, because at that point --

20 THE COURT: That would be a little bit like saying if  
21 a party in the wake of Brown v. Board of Education, if the  
22 state Board of Education had said, we now agree that  
23 integration is appropriate. We propounded regulations to that  
24 effect. They will be noticed. We will hear from the people of  
25 our community, and then we will thereafter, depending on those

1 comments, fashion an appropriate plan, a federal court would  
2 have said, give me a break. Put those children in the school  
3 now. That's what the Supreme Court has said. I don't see why  
4 this is different.

5 MR. ARZ: Well, one distinguishing feature of this  
6 situation, your Honor, is the fact that the department has  
7 indicated what it believes should be the proposed rule. We  
8 have an active rule-making process.

9 THE COURT: So you should be delighted if that is now  
10 reinforced by a judicial judgment.

11 MR. ARZ: Well, your Honor, as I was going to say, if  
12 the department receives no public comments, then the proposed  
13 rule would go into place.

14 THE COURT: Suppose the department receives public  
15 comment hypothetically that says, your rule is nonsense. Your  
16 rule is a terrible mistake. Don't do this, etc. Then you  
17 would have to reconsider whether or not to change your mind.  
18 Right?

19 MR. ARZ: Your Honor, it doesn't require that the  
20 department has to change anything. It has to respond.

21 THE COURT: Well, it has to respond, but surely you're  
22 not telling me that you have a public comment period as a  
23 mirage, as a fraud on the public, and that regardless of the  
24 comments received, your mind is made up and all you do is issue  
25 some rote response.

1           You're not saying that, are you?

2           MR. ARZ: Of course not, your Honor.

3           THE COURT: Then in theory at least, you would take  
4 seriously any comments that were made, and they might cause  
5 you, as a matter of your discretion, to change your mind. That  
6 would mean that the prospective ruling of this Court as a  
7 matter of law would be undercut, and we would be off to the  
8 races again.

9           Why should that happen?

10          MR. ARZ: Well, your Honor, because what the  
11 department is asking is not that we engage in speculation about  
12 what will happen when that public comment period expires and  
13 the department takes action but to wait.

14          THE COURT: I'm still missing the point. Either the  
15 public comments make no difference, in which case the only  
16 point of waiting is potentially to deny some people who are  
17 eligible for reimbursement right now the swift reimbursement of  
18 their necessary treatment, or the public comment does raise the  
19 possibility of a change in your position, in which case that,  
20 in effect, the whole schedule of the Court's ruling on the now  
21 undisputed facts would be potentially delayed, if not undercut.

22           Either way you logically put it, I don't see the  
23 benefit of waiting.

24          MR. ARZ: Well, your Honor, as I was saying, there are  
25 other aspects of this case that need to be addressed in advance

1 of any ruling on a final judgment or final reconsideration.

2 THE COURT: Partial summary judgment is, of course,  
3 standard, indeed specifically referred to, in the federal  
4 rules. In fact, the federal rules encourage a judge to issue  
5 partial summary judgment on all undisputed claims.

6 Let's say I rule tomorrow, for the sake of hypothesis,  
7 granting the plaintiffs' motion. We can then move immediately,  
8 can we not, to whatever else still remains?

9 MR. ARZ: Well, your Honor, we would need to address  
10 the effect of the change in the existing regulation with regard  
11 to cosmetic procedures. Given that that as well is part of  
12 this proposed rule making, it would make sense to do that --

13 THE COURT: Excuse me. What about that would we have  
14 to address?

15 MR. ARZ: We would have to address the fact that the  
16 regulation upon which your Honor granted summary judgment is no  
17 longer in effect. The regulation regarding cosmetic procedures  
18 in effect today is different.

19 THE COURT: We don't need a regulation if I rule that  
20 they're entitled to what your new regulation, if it's adopted,  
21 will grant them. If I rule that they're already entitled to  
22 that as a matter of law, then the regulation is just simply an  
23 after-the-fact way of making the regulations correspond to the  
24 Court's ruling.

25 MR. ARZ: If there were no further relief sought on

1 the cosmetic claims and it was just the summary judgment  
2 opinion standing alone, I would agree with your Honor, but that  
3 gets to my second branch which is federalism.

4 This is an ex parte Young exception case. There has  
5 to be an ongoing and continuing violation of federal law that  
6 requires the federal court to issue additional remedial relief.

7 With respect to that cosmetics provision, your Honor,  
8 I would respectfully submit that that's not the case. It has  
9 now changed. So, to determine what, if any, relief is  
10 available through the ex parte Young exception is going to  
11 require briefing and applications. Similarly, the ACA claims  
12 have not been --

13 THE COURT: All you would need presumably is one  
14 single individual who wants this relief now rather than waiting  
15 an indefinite time for your regulation to take effect.

16 MR. ARZ: Perhaps I'm not being clear, your Honor. I  
17 apologize. The existing regulation, the one that is now on the  
18 books which was changed by a notice of adoption which was dated  
19 August 31, by notice of adoption dated August 31, 2016, copies  
20 of which were supplied to the parties and the Court, the  
21 regulation regarding cosmetic procedures has changed, full  
22 stop. That will need to be addresses.

23 Right now the regulation regarding cosmetic procedures  
24 provides coverage for those procedures. To the extent there  
25 was an individual who was denied coverage, that would be a

1 question of individual issues that would be appropriately  
2 determined in an administrative fair hearing, in a state  
3 Article 78 proceeding. That would be an individual case  
4 because right now there is no categorical exclusion to  
5 potentially cosmetic procedures.

6 Your Honor articulated a rule of never-say-never. The  
7 existing rule never says never with regard to potentially  
8 cosmetic procedures, and the proposed rule for which the public  
9 comment period will expire next month never says never with  
10 regard to treatments for minors.

11 So, given that there are these multiple dimensions of  
12 the case, it makes sense, I would submit --

13 THE COURT: Of course, if you think about it, the  
14 phrase "never-say-never" is a logical fallacy, but that's not  
15 your point. I get your point.

16 MR. ARZ: Yes, your Honor. The categorical nature of  
17 bans and language in the regulation was the required feature of  
18 these claims. It's no longer in the existing regs for cosmetic  
19 procedures. It's not in the proposed regulation.

20 We should address all of these issues comprehensively  
21 with full briefing on these complex questions of federal  
22 jurisdiction, mootness doctrine, etc.

23 Why not do it on a record of what the department did  
24 in response to public comment, not hypotheticals about what the  
25 department may do on public comment. We're not asking to wait

1 an inordinate amount of time.

2 THE COURT: Are you going to be contending that the  
3 plaintiff is not the prevailing party here when it comes to  
4 attorneys' fees?

5 MR. ARZ: I don't know yet, your Honor. I can't say  
6 that here today. It's premature. There's been no application  
7 for attorneys' fees. I assume that that will be an issue that  
8 will need to be addressed before we can finally resolve all the  
9 issues in this case. It's certainly something, once we get an  
10 application, we will take a look at and determine a position  
11 from there.

12 THE COURT: So that was an excellent and fair  
13 nonresponse to my question.

14 Let me hear from plaintiffs' counsel.

15 MR. BILLER: Thank you, your Honor. Just to respond  
16 to a couple of the points there. One, Mr. Arz mentioned the  
17 SAPA procedures. I think that's an interesting point because  
18 they had the option of pushing this regulation faster if they  
19 had wanted to. SAPA, Section 202.6 provides for emergency  
20 adoption of a regulation that takes place immediately upon  
21 publication.

22 The Department of Health had the option here to pass  
23 this proposed rule make --

24 THE COURT: He's saying, if I understand it, that  
25 right now if someone in the class you represent gets the relief

1 you sought, it could theoretically change after the public  
2 notice process, but it doesn't mean they aren't going to be  
3 reimbursed now. Maybe I misunderstood him, but I thought  
4 that's what he was saying.

5 MR. BILLER: I'm not sure I fully understand the  
6 question, your Honor. I'm sorry.

7 THE COURT: He says this is not going to be endless  
8 delay. Under the notice period, it's a few months' delay. So  
9 the question is how are you and the people you represent  
10 injured during that period.

11 MR. BILLER: I see. The people are injured because  
12 they don't have access to the care that they need. It's not a  
13 question of --

14 THE COURT: Maybe I misunderstood. Maybe I should  
15 clarify with defense counsel. I thought he was saying that  
16 they do get that relief now.

17 Did I misunderstand?

18 MR. ARZ: Your Honor, there is a distinction between  
19 the subclass members who seek coverage for what would have been  
20 called potentially cosmetic procedures and those who seek  
21 coverage for treatment in minors, those who are under 18.

22 THE COURT: Right.

23 MR. ARZ: What I indicated was that today there is in  
24 the existing regulation coverage for those so-called  
25 "cosmetic" --

1 THE COURT: I understand. Not for minors.

2 MR. ARZ: It is correct that the existing regulation  
3 does not permit coverage for minors.

4 THE COURT: So then I come back to you because I  
5 misunderstood what you were saying.

6 So, in order to demand immediate relief, why do they  
7 have to have more than a single minor who can say, I am  
8 entitled, as a matter of law, to this coverage now? Why should  
9 I have to wait three months?

10 MR. ARZ: Your Honor, I can address that. SAPA does  
11 provide a limited exception for emergency rule making, but that  
12 exception doesn't apply here. The exception speaks of issues  
13 of public health.

14 THE COURT: Now you are not answering my question, or  
15 maybe I'm just doing a very poor job of framing the question.

16 My original belief, having read the papers, was that  
17 one effect of your proposed delay would be that if there was  
18 any minor who sought coverage and reimbursement now, they would  
19 not get it. At least they would not get it automatically as a  
20 matter of law.

21 I misunderstood what you had said before. I thought  
22 you were saying that they would get it, but now I see they're  
23 not. So now that we're agreed that they would not get it, why  
24 isn't that a basis for, assuming there's anyone who fits that  
25 category, for moving ahead right now?

1           MR. ARZ: Your Honor, that time frame is established  
2 and required by the State Administrative Procedures Act.

3           THE COURT: This is not before me because of any  
4 question of compliance with or noncompliance with state  
5 administrative procedures. I'm not saying it's irrelevant. As  
6 you point out, it's appropriate where possible, where  
7 reasonably possible, to accommodate the natural order of state  
8 administrative procedures.

9           Where someone is, as a matter of federal law, entitled  
10 right now to certain relief and would be denied it for at least  
11 several months if the Court did not act, I don't see why I  
12 should wait for the administrative procedure to play itself  
13 out.

14           That's why I raised before the perhaps not very  
15 perfect analogy of segregation. If, as a matter of  
16 constitutional law, a black child was entitled to be admitted  
17 to the schools of Little Rock, Arkansas, after the Brown v.  
18 Board of Education decision, the Arkansas legislature could  
19 not, I think with a straight face, say, we'll wait till our  
20 procedure plays itself out.

21           The constitutional law had been determined, and they  
22 were entitled to immediate relief, and they would suffer real  
23 harm if they didn't get that immediate relief.

24           Why is that not the situation here?

25           MR. ARZ: Well, two things, your Honor: One is the

1 earlier distinguishing point I raised about the fact that this  
2 is not the state saying, well, we need to look into this. We  
3 need to appoint a committee. The state has indicated what it  
4 believes the rule should be subject to the public comment  
5 period.

6 THE COURT: Yes, but that assumes that the public  
7 comment is an irrelevancy. Surely you don't want me to assume  
8 that.

9 MR. ARZ: I do not, your Honor.

10 THE COURT: So, if the public comment period is not an  
11 irrelevancy, that means that under state law you could change  
12 your mind if the comments persuaded you not to pursue the  
13 proposed regulation.

14 So that's all fine as a matter of state law. If as a  
15 matter of federal law they're entitled to the relief now, why  
16 should I wait around to see what you do in response to public  
17 comments?

18 MR. ARZ: Well, again, your Honor what we're asking  
19 for is a brief stay to let that play out so that we can know  
20 what the department does in the face of the public comment  
21 period rather than speculate on it. The application here today  
22 is solely under Rule 60.

23 THE COURT: If they're entitled as a matter of law to  
24 the relief they seek, then as a matter of federal law, it  
25 doesn't matter what the public comments are. It matters in the

1 normal case where it's just a matter of state law, state  
2 administrative law no less. Public comments of course need to  
3 be taken account of, and they will, in appropriate cases,  
4 change one's position.

5 But that's not the situation here. The situation  
6 here, at least on their theory, is they're entitled to this  
7 relief right now as a matter of federal law.

8 MR. ARZ: Your Honor, I would address that by pointing  
9 out that federal law also recognizes, as a matter of  
10 federalism, that states generally have the first attempt to  
11 remedy any issues. I would also say we're not here on --

12 THE COURT: Within limits, that's true. But this  
13 lawsuit has been pending since 2014. Your adversary was going  
14 to give me the whole long history of it, but I want to go to  
15 dinner tonight. It's not like the state hasn't had plenty of  
16 time to reflect on the claims made here.

17 MR. ARZ: I would just underscore that those are  
18 issues that are outside of the present application which is  
19 only under Rule 60 for reconsideration. Those would need to be  
20 fully briefed.

21 There are other elements that they would need to  
22 establish to demonstrate the need for that relief, if it were  
23 so applied for, which it has not been. That again cautions  
24 for -- this public comment period ends on November 21.

25 The reasonable period thereafter, as required, to

1 assess the public comment period -- as your Honor indicated, if  
2 the department has done something completely different, then we  
3 can be back here figuring out what needs to happen based on  
4 that rather than speculating about it.

5           It makes sense to do it comprehensively on full  
6 briefing with all of the issues so that we can get to a final  
7 decision, a final order, in this case.

8           THE COURT: Let me hear anything further from  
9 plaintiffs' counsel.

10           MR. BILLER: Just a couple quick things, your Honor.  
11 First of all, when Mr. Arz says states usually have first  
12 attempt maybe; maybe not. We're on attempt number four here,  
13 two years into the litigation.

14           This isn't a case where defendant gets sued, honestly  
15 revisits its policy, and issues something that provides  
16 complete relief. We're 2 1/2 years into this litigation. This  
17 is attempt number four at amending.

18           THE COURT: In fact, one might make the argument it's  
19 only when the Court has pushed this case forward that they have  
20 reconsidered their previous positions.

21           MR. BILLER: That's absolutely true, your Honor. I  
22 won't go through the history. Your Honor knows it. I would  
23 say, if your Honor lines up those amendments, you'll see that  
24 it does track the development of the litigation. Other courts  
25 have found that to be an important factor when deciding

1 mootness applications.

2           The other thing I'll say, which your Honor picked up  
3 on, is we have a current violation of federal law that is  
4 ongoing. So what the defendant is asking here for is not just  
5 a delay, but in fact they're asking for the Court's imprimatur  
6 on the continuing violation of federal law.

7           Your Honor's example of *Brown v. Board* I think was  
8 very apt. You know that there's a violation of federal law  
9 that's ongoing. There's no need to wait for any sort of state  
10 rule-making process to work its way out, which we won't even  
11 necessarily know when it will end and how it will end.

12           Your Honor was confronted with this very same issue on  
13 summary judgment. After the April 2016 notice of proposed rule  
14 making that they put out, they made an application to the Court  
15 to either moot our claims or stay the case until that rule  
16 making was adopted.

17           Your Honor correctly found that the notice of proposed  
18 rule making was not final. It was not binding on DOH, and to  
19 continue to delay the case when it has been pending for so long  
20 is simply unfair to the parties and the public. I think that  
21 reasoning applies just as much now as it did then, if not more  
22 so.

23           The last thing I'll say is the harm that the class  
24 members are suffering is a real and grave harm. As our experts  
25 have shown and other documentary evidence that's in the record,

1 this is a condition where people are subject to severe  
2 emotional and psychological distress. They are subject to  
3 discrimination. The minors are subject to bullying at school.  
4 School is in session now. It goes so far as suicide, and the  
5 suicide rates are rather staggering among this population.

6 So, for them to say, let's just wait it out, this  
7 population has already been waiting. They've been waiting for  
8 at least the 2 1/2 years that this case has been pending,  
9 waiting since 1998 when the ban was first put in place. I just  
10 don't see any reason on this record to continue waiting.

11 THE COURT: Well, I thank both sides for those helpful  
12 arguments. I will get you an at least bottom-line decision,  
13 either with an accompanying opinion or with an opinion to  
14 follow, no later than a week from today. This matter is taken  
15 sub judice until then.

16 MR. BILLER: Thank you, your Honor.

17 MR. ARZ: Thank you, your Honor.

18 (Adjourned)

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