

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK, *et al.*,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF  
HEALTH SERVICES, *et al.*,

Defendants.

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

**STIPULATED FACTS**

Plaintiffs Cody Flack, *et al.* (“Plaintiffs”) and Defendants Wisconsin Department of Health Services, *et al.* (“Defendants”) (collectively, the “Parties”) hereby stipulate to the following facts. These stipulations replace and supersede the Parties’ Stipulation to Findings of Fact [ECF No. 51] filed on July 6, 2018.

The Parties stipulate to the following facts:

1. Under 28 U.S.C. § 1391, venue is proper in the Western District of Wisconsin.
2. Defendant Wisconsin Department of Health Services (“DHS”) is the Wisconsin state agency charged with the administration of Wisconsin Medicaid.
3. DHS is a recipient of federal funds, including Medicaid funding for Wisconsin Medicaid.
4. Defendant Andrea Palm, sued in her official capacity, is the Secretary-Designee of DHS. As Secretary, she is responsible for implementing the Medicaid Act consistent with federal Medicaid requirements and state law. Wis. Stat. § 46.014.

5. Established in 1965 under Title XIX of the Social Security Act, Medicaid is a joint federal-state program that provides medical assistance to eligible low-income individuals. *See* 42 U.S.C. § 1396-1396w-5 (the “Medicaid Act”).

6. Medicaid enables states to furnish medical services to persons whose incomes and resources are insufficient to meet the cost of necessary medical services by reimbursing participating states for a substantial portion of the costs in providing medical assistance. 42 U.S.C. §§ 1396-1; 1396b.

7. Wisconsin, like every other state, participates in Medicaid. Defendant DHS is the Wisconsin state agency charged with the administration of Wisconsin Medicaid consistent with state and federal requirements. Wis. Stat. § 49.45.

8. DHS receives federal funding from the U.S. Department of Health and Human Services, including reimbursement of over half of the State’s Medicaid expenditures.

9. Wisconsin’s medical assistance statute, Wis. Stat. §§ 49.43-.65, and its implementing regulations, Wis. Admin. Code § DHS 101-09, govern Wisconsin Medicaid.

10. Wis. Adm. Code § DHS 107.03(23)-(24) (the “Challenged Exclusion”) was adopted as an amendment to the Medicaid regulations in 1996, and went into effect on February 1, 1997. *See* Wis. Dep’t of Health & Fam. Servs. (DHFS), Clearinghouse Rule 96-154, 1 (Dec. 11, 1996) (“CR 96-154”).

11. Defendants enforce the Challenged Exclusion through the present day.

12. Currently, Wisconsin Medicaid has approximately 1.2 million enrollees.

13. The current annual Wisconsin Medicaid budget is approximately \$9.7 billion.

14. The DHS regulations governing Wisconsin Medicaid do not define the term “transsexual surgery.”

15. DHS's website currently contains the following statement on a webpage entitled "LGBT Health – Transgender Persons," [www.dhs.wisconsin.gov/lgbthealth/transgender.htm](http://www.dhs.wisconsin.gov/lgbthealth/transgender.htm):

For people who need medical interventions such as hormones or surgery, these might be covered under private insurance plans. Currently, Wisconsin BadgerCare, BadgerCare Plus, Medicaid, and State of Wisconsin employee health insurance (ETF) do not cover gender reassignment surgery or drugs related to gender reassignment or hormone replacement. Please contact your health insurance company to learn more details about what services are covered by your insurance.

16. The DSM-5 defines and describes "gender dysphoria" as follows:

*Gender dysphoria* refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available. The current term is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se.

DSM-5 at 451. The Parties stipulate that ECF No. 21-1 is a true and correct copy of the Gender Dysphoria chapter of the DSM-5 and refer the Court to that document for a complete representation of its contents.

17. The DSM-5 contains the diagnostic criteria for Gender Dysphoria in Adolescents and Adults (302.85 (F64.1)) and the diagnostic features of this diagnosis. The Parties stipulate that ECF No. 21-1 is a true and correct copy of the Gender Dysphoria chapter of DSM-5 and refer the Court to that document for a complete representation of its contents.

18. Untreated gender dysphoria can result in psychological distress.

19. Mr. Flack's gender identity is male.

20. Mr. Flack has been diagnosed with gender dysphoria.

21. Mr. Flack receives Supplemental Security Income ("SSI") and is enrolled in Wisconsin Medicaid.

22. Mr. Flack legally changed his name to Cody Jason Flack.

23. Since 2015, Mr. Flack has seen a psychotherapist, Daniel Bergman, who has treated him for gender dysphoria and other mental health conditions.

24. Since August 2016, Mr. Flack has been receiving hormone therapy (testosterone) under the supervision of Dr. Amy DeGueme, an endocrinologist.

25. As a result of the testosterone, he has developed facial and body hair, a deeper voice, and a more masculine appearance.

26. In October 2016, Mr. Flack had a hysterectomy with bilateral salpingo-oophorectomy—the total removal of his uterus, cervix, fallopian tubes, and ovaries. These surgeries were performed primarily to treat two serious medical conditions: dysmenorrhea, a condition characterized by pelvic or lower abdominal pain during menstruation, and premenstrual dysphoric disorder (“PMDD”), a severe form of premenstrual syndrome. As Mr. Flack’s hysterectomy with bilateral salpingo-oophorectomy was necessary to treat his PMDD and dysmenorrhea, Wisconsin Medicaid covered the procedure.

27. In an effort to conceal his breasts from public view, Mr. Flack has engaged in a technique called “binding,” which flattens or reduces the appearance of breasts.

28. Mr. Flack finds binding extremely painful and, because of his disabilities, difficult to do himself. He has suffered respiratory distress, skin irritation, and sores as a result.

29. Mr. Flack has sought to obtain chest reconstruction surgery; specifically, a double mastectomy and male chest reconstruction.

30. Mr. Flack consulted with Dr. Clifford King, a plastic surgeon, about obtaining a double mastectomy and male chest reconstruction.

31. Mr. Flack provided Dr. King with letters of support from four medical providers—his primary care doctor, therapist, endocrinologist, and the physician who performed his hysterectomy and oophorectomy. In each of those letters, the provider stated that Mr. Flack has gender dysphoria and meets the criteria for surgery.

32. Dr. King determined that Mr. Flack was eligible for male chest reconstruction under the WPATH Standards of Care.

33. On July 18, 2017, Dr. Clifford King submitted a request for prior authorization to DHS for Wisconsin Medicaid coverage of the chest reconstruction surgery for Mr. Flack.

34. On August 2, 2017, DHS denied the prior authorization request made by Dr. King.

35. DHS's denial was based on the Challenged Exclusion.

36. In a letter from DHS to Dr. King, dated August 2, 2017, DHS stated that each surgical procedure sought by Mr. Flack—mastectomy simple complete and breast reconstruction—“is not a covered benefit.” The letter contained the following notation: “08/02/17: Per WI administrative code DHS 107.03(24) transsexual surgery is a non-covered service. BA.” The Parties stipulate that ECF No. 21-18 is a true and correct copy of the full August 2, 2017 letter from DHS to Dr. King, and refer the Court to that document for a complete representation of its contents.

37. In a letter from DHS to Mr. Flack, dated August 2, 2017, DHS stated that Mr. Flack's prior authorization requests for mastectomy simple complete and breast reconstruction were denied because, for each, “THE SERVICE REQUESTED IS NOT A COVERED BENEFIT. THE REQUEST DOES NOT MEET ONE OR MORE OF THE CRITERIA FOUND IN WISCONSIN ADMINISTRATIVE CODE.” DHS cited “DHS 107.03 WISCONSIN

ADMINISTRATIVE CODE” as “[t]he specific regulation(s) that support the reason for the denial/modification of your provider’s request for services.” The Parties stipulate that ECF No. 21-19 is a true and correct copy of that letter, and refer the Court to that document for a complete representation of its contents.

38. DHS considers the surgical procedures Mr. Flack is seeking (double mastectomy and male chest reconstruction) to be excluded by Wis. Adm. Code § DHS 107.03(24).

39. Mr. Flack administratively appealed DHS’s decision.

40. An administrative law judge denied Mr. Flack’s appeal of DHS’s denial of the preauthorization request on November 21, 2017. The administrative law judge denied Mr. Flack’s request for reconsideration on December 11, 2017.

41. The administrative law judge stated that he based his decision on the Challenged Exclusion. The Parties stipulate that ECF No. 21-20 is a true and correct copy of that decision, and refer the Court to that document for a complete representation of its contents.

42. A September 25, 2017 letter from Julie Sager, MD, Medical Director, Bureau of Benefits Management, Division of Medicaid Services, Wisconsin Department of Health Services, submitted to the Division of Hearing and Appeals as part of Mr. Flack’s administrative appeal of DHS’s denial of prior authorization for the requested surgeries (a true and correct copy of which was filed by Plaintiffs at ECF No. 21-22), stated the following:

Mr. Flack is seeking the aforementioned services [a bilateral complete mastectomy (service code 19303) and breast reconstruction (nipple graft-service code 19350)] as part of gender confirmation surgery. The primary diagnosis listed with the prior authorization request is transsexualism (F64.0). Mr. Flack also carries a diagnosis of gender dysphoria which is an accepted medical indication for the surgical treatment requested.

This request was denied by DMS as Wis. Admin. Code DHS 107.03(24) specifically lists ‘transsexual surgery’ as a non-covered service under medical assistance.

The medical necessity of the services requested was not taken into account as reimbursement by Medicaid for this type of surgery is currently excluded by DHS regulations.

Furthermore, please take notice of the attached federal court decision staying enforcement of Section 1557 of the Affordable Care Act regulations related to gender identity.

The Parties stipulate that ECF No. 21-22 is a true and correct copy of this letter, and refer the Court to that document for a complete representation of its contents.

43. Ms. Makenzie is enrolled in Wisconsin Medicaid.
44. Ms. Makenzie receives Supplemental Security Income (“SSI”).
45. Ms. Makenzie’s gender identity is female.
46. Ms. Makenzie has been diagnosed with gender dysphoria.
47. Ms. Makenzie legally changed her name to Sara Ann Makenzie.
48. Ms. Makenzie began seeking medical treatments and therapy for gender dysphoria in approximately 2012.
49. Since 2013, Ms. Makenzie has been on hormone therapy to treat gender dysphoria.
50. In 2014, Ms. Makenzie consulted with her primary care physician, Dr. Trisha Schimek, about obtaining genital reconstruction surgery. Dr. Schimek told Ms. Makenzie that Wisconsin Medicaid would not cover the surgery.
51. Ms. Makenzie’s medical providers have recommended that she obtain genital reconstruction in the form of a bilateral orchiectomy and vaginoplasty, which would create female-appearing external genitalia.

52. In February 2018, on the referral of her primary care doctor, Dr. Beth Potter, Ms. Makenzie consulted with Dr. Katherine Gast, a plastic surgeon, about obtaining genital reconstruction surgery.

53. Dr. Gast informed Ms. Makenzie that Wisconsin Medicaid would not cover this procedure.

54. DHS considers the surgical procedures Ms. Makenzie was seeking (bilateral orchiectomy and vaginoplasty) to be excluded by Wis. Adm. Code § DHS 107.03(24).

55. Transgender people have a gender identity that is different from their assigned sex (i.e., the sex designation recorded on an infant's birth certificate, sometimes referred to as "natal sex"). A transgender man is a man whose assigned sex was female but has a male gender identity. A transgender woman is a woman whose assigned sex was male but has a female gender identity.

56. Gender dysphoria is the clinically significant distress or impairment in social, occupational, or other areas of function associated with the incongruence between a transgender person's gender identity and assigned sex.

57. Untreated or inadequately treated gender dysphoria is associated with serious mental health harms, including serious mental distress, depression, anxiety, self-harm, and suicidality.

58. The World Professional Association of Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version* (2011) are clinical guidelines for the treatment of gender dysphoria.

59. Under the World Professional Association of Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th*

*Version* (2011), accepted treatment options for gender dysphoria include psychotherapy, hormone therapy, and various surgical procedures.

60. The American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, and other major medical organizations take the position that gender-confirming surgeries are medically accepted, safe, and effective medical treatments for gender dysphoria.

61. For many transgender people with gender dysphoria, hormone therapy is a medically necessary treatment for gender dysphoria.

62. Wis. Adm. Code § DHS 107.03(23) categorically excludes Wisconsin Medicaid coverage for “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics.” DHS interprets the Challenged Exclusion to apply only to beneficiaries age 21 and above.

63. Wis. Adm. Code § DHS 107.03(24) categorically excludes Wisconsin Medicaid coverage for “[t]ranssexual surgery.” DHS interprets the Challenged Exclusion to apply only to beneficiaries age 21 and above.

64. DHS interprets “transsexual surgery” to mean any surgical procedure intended to treat gender dysphoria.

65. DHS does not currently interpret the Challenged Exclusion to apply to beneficiaries under age 21. Instead, DHS considers requests for coverage by such beneficiaries that otherwise would be affected by the Challenged Exclusion under the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) provisions. *See* 42 U.S.C. §§ 1396a(a)(10)(A); 1396d(a)(4)(b); Wis. Admin. Code § DHS 107.22.

66. Currently, the following managed care organizations offer one or more Wisconsin Medicaid plans: Blue Cross Blue Shield of Wisconsin; Dean Health Plan, Inc.; Care Wisconsin Health Plan; Children's Community Health Plan; Group Health Cooperative of Eau Claire; Group Health Cooperative of South Central Wisconsin; Independent Health Care Plan; MercyCare Insurance Company; MHS Health Wisconsin; Molina Healthcare of Wisconsin; Network Health Plan; Quartz Health Solutions, Inc.; Security Health Plan; Trilogy Health Insurance, Inc.; and UnitedHealthcare Community Plan.

67. Managed care organizations that offer Wisconsin Medicaid plans are primarily responsible for enforcing the Challenged Exclusion for beneficiaries enrolled in their respective plans, including denying requests for prior authorization for treatments and services excluded by the Challenged Exclusion.

68. DHS has not provided formal guidance to managed care organizations offering Wisconsin Medicaid regarding the definition of the phrases "transsexual surgery" and "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics" contained in the Challenged Exclusion.

69. DHS has not provided formal guidance to managed care organizations offering Wisconsin Medicaid on what treatments and services are specifically excluded from coverage by the Challenged Exclusion.

70. DHS is not aware of information indicating that when the Challenged Exclusion was promulgated, the determination by the Wisconsin Department of Family and Health Services (DHFS) that the services to be excluded by the Challenged Exclusion were not medically necessary was based on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services conducted by or on behalf of DHFS.

71. DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or its predecessor, the Wisconsin Department of Family and Health Services (DHFS), that any or all of the excluded services were experimental.

72. DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or its predecessor, the Wisconsin Department of Family and Health Services (DHFS), that any or all of the excluded services were unsafe.

73. DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or its predecessor, the Wisconsin Department of Family and Health Services (DHFS), that any or all of the excluded services were ineffective at treating gender dysphoria or, as the condition was known at that time, gender identity disorder.

74. DHS is not aware of information indicating that between February 1, 1997 and April 29, 2018, DHS (including its predecessor, Wisconsin Department of Family and Health Services (DHFS)) undertook any study or review of the fiscal impact of enforcing, amending, or eliminating the Challenged Exclusion.

75. From April 30, 2018 to present, DHS has not undertaken any study or review of the fiscal impact to Wisconsin Medicaid, DHS, or the State of Wisconsin of enforcing, amending, or eliminating the Challenged Exclusion other than the reports of David Williams prepared and submitted to the Court in connection with this lawsuit, dated August 22, 2018 and November 16, 2018.

76. DHS is not aware of information indicating that between February 1, 1997 and April 29, 2018, DHS (including its predecessor, Wisconsin Department of Family and Health Services (DHFS)) undertook any study or review of the safety or efficacy of medical or surgical treatments for gender dysphoria.

77. From April 30, 2018 to present, DHS has not undertaken any study or review of the safety or efficacy of medical or surgical treatments for gender dysphoria, other than the reports of Lawrence Mayer, Chester Schmidt, Daniel Sutphin, and Michelle Ostrander prepared for and/or submitted to the Court in connection with this lawsuit.

78. DHS is not aware of information indicating that between February 1, 1997 and April 29, 2018, DHS (including its predecessor, Wisconsin Department of Family and Health Services (DHFS)) undertook any study or review of the public health effects of enforcing, amending, or eliminating the Challenged Exclusion.

79. Surgical treatments for gender dysphoria that are categorically excluded from coverage by Wis. Adm. Code § DHS 107.03(23)-(24) (the “Challenged Exclusion”), regardless of whether prior authorization is required for the procedure, include penectomy, orchiectomy, vaginoplasty, feminizing genitoplasty, breast reconstruction, chondrolaryngoplasty, phalloplasty, metoidioplasty, masculinizing genitoplasty, mastectomy, reduction mammoplasty, hysterectomy, oophorectomy, salpingo-oophorectomy, intersex surgery (male to female), and intersex surgery (female to male). DHS only applies the Challenged Exclusion to these procedures for Wisconsin Medicaid beneficiaries age 21 and over.

80. Pursuant to the Challenged Exclusion, it is Wisconsin Medicaid’s policy that some hormone therapy treatments for gender dysphoria are excluded from coverage, regardless of whether prior authorization is otherwise required for the treatment.

81. Pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude from coverage certain medical services, treatments, and/or procedures when deemed medically necessary by a beneficiary's medical provider to treat gender dysphoria, but to cover the same procedures when they are deemed medically necessary by a beneficiary's medical provider to treat certain conditions other than gender dysphoria.

82. Wisconsin Medicaid covers mastectomy, reduction mammoplasty, and breast reconstruction for Medicaid beneficiaries when medically necessary to treat conditions other than gender dysphoria, but pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude those services from coverage for beneficiaries 21 and over when they are deemed medically necessary by the beneficiary's medical provider to treat gender dysphoria.

83. Wisconsin Medicaid covers hysterectomy, oophorectomy, salpingo-oophorectomy for Medicaid beneficiaries when medically necessary to treat conditions other than gender dysphoria, but pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude those services from coverage for beneficiaries 21 and over when they are deemed medically necessary by the beneficiary's medical provider to treat gender dysphoria.

84. Wisconsin Medicaid covers orchiectomy, penectomy, and vaginoplasty for Medicaid beneficiaries when medically necessary to treat conditions other than gender dysphoria, but it is Wisconsin Medicaid's policy to exclude those services from coverage for beneficiaries 21 and over when they are deemed medically necessary by the beneficiary's medical provider to treat gender dysphoria.

85. DHS is not aware of information indicating that from February 1, 1997 to March 22, 2010, DHS (including its predecessor, the Wisconsin Department of Family and Health Services) formally considered amending or eliminating the Challenged Exclusion.

86. DHS is not aware of information indicating that from March 23, 2010 to July 17, 2016, it formally considered amending or eliminating the Challenged Exclusion.

87. DHS is not aware of information indicating that it undertook any review or consideration of the applicability of the Challenged Exclusion to medical treatments for gender dysphoria following the publication of the World Professional Association of Transgender Health's Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (WPATH Standards of Care), Version 7, in 2011.

88. DHS is not aware of information indicating that it undertook any review or consideration of the applicability of the Challenged Exclusion to medical treatments for the diagnosis of Gender Dysphoria in Adolescents and Adults in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) following the publication of DSM-5 in 2013.

89. Wisconsin Medicaid coverage for medical and surgical treatments for gender dysphoria has been denied by DHS and/or by one or more of the managed care organizations that offer Wisconsin Medicaid pursuant to the Challenged Exclusion since the implementation of the exclusion, including since the preliminary injunction entered in this case on July 25, 2018.

90. The Court has jurisdiction over the claims asserted in this lawsuit under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4).

91. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

92. Plaintiff Cody Flack is an adult resident of Green Bay, Brown County, Wisconsin.

93. Plaintiff Sara Ann Makenzie is an adult resident of Baraboo, Sauk County, Wisconsin.

94. Plaintiff Marie Kelly is an adult resident of Milwaukee, Wisconsin.

95. Plaintiff Courtney Sherwin is an adult resident of Janesville, Rock County, Wisconsin.

96. Wisconsin Medicaid covers oral/sublingual estradiol, medroxyprogesterone acetate (Provera), micronized progesterone, and testosterone cypionate when medically necessary to treat one or more medical conditions other than gender dysphoria.

Dated: April 23, 2019

Respectfully submitted,

/s/ Joseph J. Wardenski  
Joseph J. Wardenski  
Jennifer I. Klar  
Orly May  
Alexa Milton  
RELMAN, DANE & COLFAX PLLC  
1223 19th Street, NW, Suite 600  
Washington, DC 20036  
Telephone: (202) 728-1888  
Facsimile: (202) 728-0848  
jwardenski@relmanlaw.com  
jklar@relmanlaw.com  
omay@relmanlaw.com  
amilton@relmanlaw.com

Joshua L. Kaul  
Attorney General of Wisconsin

/s/ Steven C. Kilpatrick  
Steven C. Kilpatrick  
Assistant Attorney General  
State Bar #1025452

Jody J. Schmelzer  
Assistant Attorney General  
State Bar #1027796

Colin T. Roth  
Assistant Attorney General  
State Bar #1103985

Robert Theine Pledl  
DAVIS & PLEDL, S.C.  
1433 N. Water Street, Suite 400  
Milwaukee, WI 53202  
(414) 488-1354  
rockpled@gmail.com

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-1792 (SCK)  
(608) 266-3094 (JJS)  
(608) 264-6219 (CTR)  
(608) 267-2223 (Fax)  
kilpatricksc@doj.state.wi.us  
schmelzerjj@doj.state.wi.us  
rothct@doj.state.wi.us

Abigail Coursolle  
Catherine McKee  
NATIONAL HEALTH LAW PROGRAM  
200 N. Greensboro Street, Suite D-13  
Carrboro, NC 27510  
Telephone: (919) 968-6308

*Attorneys for Defendants*

Facsimile: (919) 968-8855  
coursolle@healthlaw.org  
mckee@healthlaw.org

*Attorneys for Plaintiffs*