

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

CODY FLACK,  
SARA ANN MAKENZIE,  
MARIE KELLY, and  
COURTNEY SHERWIN,  
*individually and on behalf of all others  
similarly situated,*

Plaintiffs,

v.

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

Defendants.

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

**DECLARATION OF ABIGAIL A. MOATS**

I, Abigail A. Moats, hereby state as follows:

1. I am over the age of eighteen and have personal knowledge of the matters stated in this declaration.
2. I am a paralegal at the law firm Relman, Dane & Colfax PLLC, one of the firms representing the Plaintiffs in the above-captioned case. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment.
3. On February 6, 2019, Plaintiffs served subpoenas on 16 third-party managed care organizations ("HMOs") identified by Plaintiffs as offering Wisconsin Medicaid plans pursuant to contracts with the Wisconsin Department of Health Services ("DHS"). Specifically, Plaintiffs served subpoenas on the following HMOs: Blue Cross Blue Shield of Wisconsin; Care Wisconsin First, Inc.; Children's Community Health Plan, Inc.; Dean Health Plan, Inc.; Group Health Cooperative of Eau Claire; Group Health Cooperative of South Central Wisconsin;

Independent Care Health Plan; MercyCare Insurance Company; MHS Health Wisconsin; Molina Healthcare of Wisconsin, Inc.; Network Health Plan; Physicians Plus Insurance Corporation; Quartz Health Solutions, Inc.; Security Health Plan; Trilogy Health Insurance, Inc.; and UnitedHealthcare Community Plan (UnitedHealthcare of Wisconsin, Inc.).

4. Each subpoena included a request for “all documents reflecting denials of coverage for any treatment, service, or procedure (including medications) made by [the HMO] pursuant to the Challenged Exclusion [Wis. Adm. Code § DHS 107.03(23)-(24)] from January 1, 2014 to present, including but not limited to denied requests for prior authorization; correspondence and records of communications with DHS, medical providers, and/or Wisconsin Medicaid enrollees or their representatives relating to a full or partial denial of coverage; and all documents reflecting informal or formal grievances, appeals, or judicial proceedings related to any full or partial denial of coverage.” *See e.g.* Plaintiffs’ Subpoena to Molina Health Care of Wisconsin, Request No. 4 (attached as Exhibit 1). In addition, the HMOs identified as having served one or more of the Named Plaintiffs in this case were asked to produce documentation about those individuals.

5. Between February 28, 2019 and March 28, 2019, Plaintiffs’ counsel received 866 pages of documents from the HMOs responsive to this request, reflecting their denials of coverage pursuant to the Challenged Exclusion. Most of the HMOs provided the underlying denial documents and/or electronically-generated lists of procedures and services denied pursuant to the Challenged Exclusion, while some, with Plaintiffs’ consent, provided a summary of the denial incidents in lieu of those documents.

6. I reviewed all 866 pages and created a chart to summarize the following information: (1) the total number of denial incidents made pursuant to the Challenged Exclusion

by each HMO from 2014 through 2019; (2) the specific treatments denied pursuant to the Challenged Exclusion by each HMO from 2014 through 2019 grouped by (i) surgeries, (ii) hormones, (iii) other procedures, or (iv) unspecified services; and (3) total number of denial incidents for surgeries, hormones, or other procedures made pursuant to the Challenged Exclusion by each HMO from 2014 through 2019. The final chart summarizing the HMO denial incidents is attached as Exhibit 2.

7. In order to create the chart, I carefully reviewed each document and determined which HMO denied the treatment/service; what treatment/service the HMO denied (if specified); and whether that treatment/service was (i) a surgical procedure, (ii) a hormone treatment, (iii) some other treatment or service, or (iv) an unspecified denied service. I then recorded this information in the corresponding cell in the chart.

8. Some HMOs only provided the treatment code for the denied care, and not the description of the corresponding treatment. As the treatment codes provided align with the American Medical Association's Current Procedural Terminology ("CPT"), in those instances where the HMOs only provided the treatment codes, I looked up the description of the corresponding treatment using this website: <https://www.cms.gov>. I then included the description of the treatment in the corresponding cell in the chart.

9. While many of the documents provided by the HMOs explicitly reference the Challenged Exclusion in connection to the denial incident, others do not. As they were all provided in response to the subpoena, which specifically asked for denials made "pursuant to the Challenged Exclusion," I included all of the denial incidents in the summary.

10. The HMOs also provided some documentation regarding a few incidents where the HMO initially approved the coverage, but later determined that the service or treatment was

erroneously covered. As such incidents ultimately amounted to denials based on the Challenged Exclusion, I included these incidents in the summary chart.

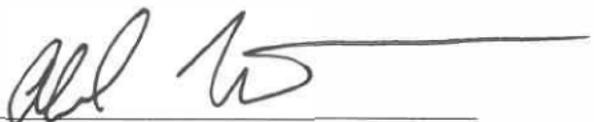
11. The summary was made to the best of my ability based on the documents provided by the 16 subpoenaed HMOs.

12. My review of the relevant documents showed that between 2014 and 2019, there were 552 total denial incidents made pursuant to the Challenged Exclusion. The denial incidents included 33 denials of coverage for surgical treatments for gender dysphoria; 64 denials of coverage for hormone treatments for gender dysphoria; 368 denials for other treatments, services or procedures (e.g. comprehensive metabolic panel, prostate cancer screening, office consultations, and psychotherapy); and 87 denials for unspecified treatments/services

13. Pursuant to Federal Rule of Evidence 1006, Plaintiffs will make the underlying documents from the subpoenaed HMOs available to the Court and Defendants upon request.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 23rd day of April, 2019.

  
\_\_\_\_\_  
Abigail A. Moats

# **EXHIBIT**

**1**

UNITED STATES DISTRICT COURT

for the

Western District of Wisconsin

Cody Flack, et al.

Plaintiff

v.

Wisconsin Department of Health Services, et al.

Defendant

Civil Action No. 3:18-cv-309

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS  
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Molina Healthcare of Wisconsin, Inc., Registered Agent, 8040 Excelsior Drive, Suite 400, Madison, WI 53717

(Name of person to whom this subpoena is directed)

**Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A.

<b>Place:</b> Electronically to Relman Dane & Colfax, PLLC, 1225 19th St NW, Ste. 600, Washington, DC 20036 (see attached instructions); or via hard copy to Davis & Pledl, S.C., 1433 N. Water St., Ste. 400, Milwaukee, WI 53202	<b>Date and Time:</b> 03/22/2019 10:00 a.m. CT
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**Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

<b>Place:</b>	<b>Date and Time:</b>
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The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/06/2019

CLERK OF COURT

OR



Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Cody Flack, et al., who issues or requests this subpoena, are:

Joseph Wardenowski, Relman Dane & Colfax PLLC, 1225 19th St. NW Ste. 600, Washington, DC 20036, jwardenski@relmanlaw.com, 202-728-1888

Notice to the person who issues or requests this subpoena

A notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:18-cv-309

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_ .

I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
\_\_\_\_\_ *Server's signature*

\_\_\_\_\_ *Printed name and title*

\_\_\_\_\_ *Server's address*

Additional information regarding attempted service, etc.:

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

## **ATTACHMENT A**

Please produce all documents, electronically stored information, or objects in the possession, custody, or control of Molina Healthcare of Wisconsin, Inc. (“Molina Healthcare” or “You”) in the categories listed below, in accordance with the following instructions and definitions.

**All documents produced by Molina Healthcare in response to this Subpoena containing personally identifiable information and/or protected health information may be marked by Molina Healthcare as CONFIDENTIAL and will be treated as CONFIDENTIAL by the parties to this Lawsuit pursuant to the Protective Order entered in this case by Judge William Conley on June 13, 2018 (attached as “Attachment B”).**

### **INSTRUCTIONS**

Please produce *electronically stored information* (“ESI”) (e.g., emails, Word documents, PDF files, spreadsheets) in either native format or in Bates-numbered PDF or TIFF files saved to a CD, DVD, or flash/jump drive, or transmitted via a secure online file-sharing system.<sup>1</sup> Any databases, spreadsheets, and media files (e.g., audio recordings, videos) shall be produced in native format only. To the extent a database is maintained in a format other than Microsoft Access or Microsoft Excel, it should be converted to a Microsoft Excel-compatible spreadsheet file.

Please produce *non-electronic documents* (i.e., files maintained in hard copy only) using one of the following options: (1) produce the originals for copying at the location specified on the Subpoena; (2) produce legible photocopies at the location specified on the Subpoena; or (3) produce legible scanned copies of the original hard copy documents in PDF or TIFF format saved to a CD, DVD, or flash/jump drive, or transmitted via a secure online file-sharing system.

### **DEFINITIONS**

For purposes of this Subpoena, the following terms are defined as follows:

- “DHS” refers to the Wisconsin Department of Health Services, its current and former secretaries, and all of its current and former officers and employees.
- “Documents” refers to any document, hard copy file, or electronic file (including, but not limited to, letters, emails, text messages, other correspondence, contracts, agreements, manuals, bulletins, guidelines, invoices, spreadsheets, databases, PDF files, word processing documents, and other files).

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<sup>1</sup> Upon request, we will provide you a secure Box.com link to upload documents. Please contact Mark Vandenberg or Brittany Lee at (202) 728-1888 to request a link.

- “Gender dysphoria” refers to the diagnosis of “Gender Dysphoria in Adolescents and Adults” in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-5”), and the previous diagnoses known as gender identity disorder and transsexualism.
- “Challenged Exclusion” refers to Wis. Adm. Code § DHS 107.03(23)-(24) and its exclusions on coverage for “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics” and “[t]ranssexual surgery.”
- “Wisconsin Medicaid” refers to all health care assistance programs offered through the DHS, including but not limited to Wisconsin Medicaid, BadgerCare Plus, Medicaid SSI, and other health care plans offered through DHS’s ForwardHealth program.

### REQUESTED DOCUMENTS

1. All documents relating to Molina Healthcare’s policies, practices, and procedures for covering, not covering, partially covering, or otherwise making determinations related in any way to considering prior authorizations for coverage for medical treatments and services (including surgeries and medications) to treat gender dysphoria for individuals enrolled in any Wisconsin Medicaid plan offered by Molina Healthcare for the period January 1, 2014 to present.
2. All documents reflecting communications, policy or guidance documents, or other materials received from DHS or sent to DHS from January 1, 2014 to present relating or referring in any way to (a) the Challenged Exclusion, and/or (b) Wisconsin Medicaid coverage, non-coverage, or partial coverage for medical treatments and services (including surgeries and medications) to treat gender dysphoria.
3. All documents identifying medical treatments, services, and procedures fully or partially excluded from coverage under any Wisconsin Medicaid plan offered by Molina Healthcare because of the Challenged Exclusion, for the period January 1, 2014 to present.
4. All documents reflecting denials of coverage for any treatment, service, or procedure (including medications) made by Molina Healthcare pursuant to the Challenged Exclusion from January 1, 2014 to present, including but not limited to denied requests for prior authorization; correspondence and records of communications with DHS, medical providers, and/or Wisconsin Medicaid enrollees or their representatives relating to a full or partial denial of coverage; and all documents reflecting informal or formal grievances, appeals, or judicial proceedings related to any full or partial denial of coverage. For the purposes of this request, Molina Healthcare should not release any protected health information (“PHI”), but should de-identify any PHI and substitute individual re-identifying numbers for each patient in accordance with 45 CFR § 164.514.

# **ATTACHMENT**

**B**

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

CODY FLACK and  
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF  
HEALTH SERVICES and  
LINDA SEEMEYER, in her official capacity  
as Secretary of the Wisconsin Department of  
Health Services,

Defendants.

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

**STIPULATED PROTECTIVE ORDER**

Based on the Stipulation of Plaintiffs Cody Flack and Sara Ann Makenzie (“Plaintiffs”) and Defendants Wisconsin Department of Health Services (“DHS”) and Linda Seemeyer, in her official capacity as Secretary of DHS (“Defendants”) (collectively, the “Parties”), and the factual representations set forth therein, the Court finds that exchange of confidential, sensitive, or personally identifiable information between or among the Parties and/or third parties, other than in accordance with this Protective Order, may cause unnecessary damage and injury to the Parties or to others. The Court further finds that the terms of this Protective Order are fair and just and that good cause has been shown for entry of a protective order governing the confidentiality of documents produced in discovery, answers to interrogatories, answers to requests for admission, and deposition testimony.

IT IS THEREFORE ORDERED THAT, pursuant to Fed. R. Civ. P. 26(c):

**A. DESIGNATION OF INFORMATION AS CONFIDENTIAL, PERSONALLY IDENTIFIABLE INFORMATION, OR FOR ATTORNEYS' EYES ONLY.**

Designation of information under this Protective Order must be made by placing or affixing on the document or material, in a manner that will not interfere with its legibility, the words CONFIDENTIAL or ATTORNEYS' EYES ONLY.

1. One who produces information, documents, or other material may designate them as CONFIDENTIAL when the person in good faith believes they contain trade secrets or nonpublic confidential technical, commercial, financial, personal, or business information.

2. One who produces information, documents, or other material may designate them as ATTORNEYS' EYES ONLY when the person in good faith believes that they contain particularly sensitive trade secrets or other nonpublic confidential technical, commercial, financial, personal, or business information that requires protection beyond that afforded by a CONFIDENTIAL designation.

3. Except for information, documents, or other materials produced for inspection at the party's facilities, the designation of confidential information as CONFIDENTIAL or ATTORNEYS' EYES ONLY must be made prior to, or contemporaneously with, their production or disclosure. In the event that information, documents or other materials are produced for inspection at the party's facilities, such information, documents, or other materials may be produced for inspection before being marked confidential. Once specific information, documents, or other materials have been designated for copying, any information, documents, or other materials containing confidential information will then be marked confidential after copying but before delivery to the party who inspected and designated them. There will be no waiver of confidentiality by the inspection of confidential information, documents, or other materials before they are copied and marked confidential pursuant to this procedure.

4. Portions of depositions of a party's present and former officers, directors, employees, agents, experts, and representatives will be deemed confidential only if designated as such when the deposition is taken or within 10 days of receipt of the deposition transcript.

5. If a party inadvertently produces information, documents, or other material containing CONFIDENTIAL or ATTORNEYS' EYES ONLY information without marking or labeling it as such, the information, documents, or other material shall not lose its protected status through such production and the parties shall take all steps reasonably required to assure its continued confidentiality if the producing party provides written notice to the receiving party within 10 days of the discovery of the inadvertent production, identifying the information, document or other material in question and of the corrected confidential designation.

**B. DISCLOSURE AND USE OF CONFIDENTIAL AND PERSONALLY IDENTIFIABLE INFORMATION.**

Information, documents, or other material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY under this Protective Order must not be used or disclosed by the Parties or counsel for the Parties or any persons identified in subparagraphs B.1. and B.2. below for any purposes whatsoever other than preparing for and conducting the litigation in which the information, documents, or other material were disclosed (including appeals). Nothing in this Protective Order prohibits a receiving party that is a government agency from following its routine uses and sharing such information, documents or other material with other government agencies or self-regulatory organizations as allowed by law.

1. CONFIDENTIAL INFORMATION. The Parties and counsel for the Parties must not disclose or permit the disclosure of any information, documents or other material designated as CONFIDENTIAL by any other party or third party under this Protective Order, except that disclosures may be made in the following circumstances:

a. Disclosure may be made to employees of counsel for the Parties who have direct functional responsibility for the preparation and trial of the lawsuit. Any such employee to whom counsel for the Parties makes a disclosure must be advised of, and become subject to, the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

b. Disclosure may be made only to employees of a party required in good faith to provide assistance in the conduct of the litigation in which the information was disclosed who are identified as such in writing to counsel for the other parties in advance of the disclosure of the confidential information, documents or other material.

c. Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making copies of documents or other material. Before disclosure to any such court reporter or person engaged in making copies, such reporter or person must agree to be bound by the terms of this Protective Order.

d. Disclosure may be made to consultants, investigators, or experts (collectively, "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit. Before disclosure to any expert, the expert must be informed of and agree to be subject to the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

e. Disclosure may be made to deposition and trial witnesses in connection with their testimony in the lawsuit and to the Court and the Court's staff.

f. Disclosure may be made to persons already in lawful and legitimate possession of such CONFIDENTIAL information.

g. Disclosure may be made to the court in this case consistent with the procedures set forth in Section C.2.

h. With respect to any medical records or other documents reflecting Plaintiffs' diagnoses of and treatments for gender dysphoria that are designated as CONFIDENTIAL, the Parties may, consistent with this Protective Order, identify such diagnoses and treatments for gender dysphoria (including identifying the name/diagnostic code for specific procedures and services sought or obtained; date(s) of treatment; and treating provider(s)) in pleadings, depositions, or court hearings. If specific medical records or other documents marked CONFIDENTIAL are attached as exhibits to a court filing, the exhibits should be filed under seal unless the Parties agree otherwise.

2. ATTORNEYS' EYES ONLY INFORMATION. The Parties and counsel for the Parties must not disclose or permit the disclosure of any information, documents, or other material designated as ATTORNEYS' EYES ONLY by any other party or third party under this Protective Order to any other person or entity, except that disclosures may be made in the following circumstances:

a. Disclosure may be made to counsel and employees of counsel for the Parties who have direct functional responsibility for the preparation and trial of the lawsuit. Any such employee to whom counsel for the parties makes a disclosure must be advised of, and become subject to, the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

b. Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making copies of documents or other material. Before disclosure to any such court reporter or person

engaged in making copies, such reporter or person must agree to be bound by the terms of this Protective Order.

c. Disclosure may be made to consultants, investigators, or experts (collectively, “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit. Before disclosure to any expert, the expert must be informed of and agree to be subject to the provisions of this Protective Order requiring that the information, documents, or other material be held in confidence.

d. Disclosure may be made to deposition and trial witnesses in connection with their testimony in the lawsuit and to the Court and the Court’s staff.

e. Disclosure may be made to persons already in lawful and legitimate possession of such ATTORNEYS’ EYES ONLY information.

f. Disclosure may be made to the court in this case consistent with the procedures set forth in Section C.2.

g. With respect to any medical records or other documents reflecting Plaintiffs’ diagnoses of and treatments for gender dysphoria that are designated as ATTORNEYS’ EYES ONLY, the Parties may, consistent with this Protective Order, identify such diagnoses and treatments for gender dysphoria (including identifying the name/diagnostic code for specific procedures and services sought or obtained; date(s) of treatment; and treating provider(s)) in pleadings, depositions, or court hearings. If specific medical records or other documents marked ATTORNEYS’ EYES ONLY are attached as exhibits to a court filing, the exhibits should be filed under seal unless the Parties agree otherwise.

**C. MAINTENANCE OF CONFIDENTIALITY.**

Except as provided in Section B above, counsel for the Parties must keep all information, documents, or other material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY that are received under this Protective Order secure within their exclusive possession and must place such information, documents, or other material in a secure area.

1. All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as "copies") of information, documents, or other material designated as confidential under this Protective Order, or any portion thereof, must be immediately affixed with the words CONFIDENTIAL or ATTORNEYS' EYES ONLY if not already containing that designation.

2. To the extent that any answers to interrogatories, transcripts of depositions, responses to requests for admissions, or any other papers filed or to be filed with the Court reveal or tend to reveal information claimed to be confidential, these papers or any portion thereof must be filed under seal by the filing party with the Clerk of Court utilizing the procedures set forth in General L. R. 79(d). If a Court filing contains information, documents, or other materials that were designated CONFIDENTIAL or ATTORNEYS' EYES ONLY by a third party, the party making the filing shall provide notice of the filing to the third party.

**D. CHALLENGES TO CONFIDENTIALITY DESIGNATION.**

The designation of any material or document as CONFIDENTIAL or ATTORNEYS' EYES ONLY is subject to challenge by any party. The designating party bears the burden of proving that the information, documents, or other material at issue are properly designated as confidential. The following procedure shall apply to any such challenge.

1. Meet and Confer. A party challenging the designation of Confidential must do so in good faith and must begin the process by conferring directly with counsel for the designating party. In conferring, the challenging party must explain the basis for

its belief that the confidentiality designation was not proper and must give the designating party an opportunity to review the designated material, to reconsider the designation, and, if no change in designation is offered, to explain the basis for the designation. The designating party must respond to the challenge within five (5) business days.

2. Judicial Intervention. A party that elects to challenge a confidentiality designation may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements of this procedure. The burden of persuasion in any such challenge proceeding shall be on the designating party. Until the Court rules on the challenge, all parties shall continue to treat the materials as confidential under the terms of this Order. The Court may award the party prevailing on any such motion actual attorney fees and costs attributable to the motion.

**E. CONCLUSION OF LITIGATION.**

At the conclusion of the litigation, a party may request that all information, documents, or other material not filed with the Court or received into evidence and designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY under this Protective Order must be returned to the originating party or, if the Parties so stipulate, destroyed, unless otherwise provided by law. Notwithstanding the requirements of this paragraph, a party may retain a complete set of all documents filed with the Court, subject to all other restrictions of this Protective Order.

SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

---

U.S. District Judge

**From:** wiwd\_ecf@wiwd.uscourts.gov  
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**Subject:** Activity in Case 3:18-cv-00309-wmc Flack, Cody et al v. Wisconsin Department of Health Services et al Text Only Order  
**Date:** Wednesday, June 13, 2018 12:48:34 PM

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**U.S. District Court**

**Western District of Wisconsin**

**Notice of Electronic Filing**

The following transaction was entered on 6/13/2018 at 11:47 AM CDT and filed on 6/13/2018

**Case Name:** Flack, Cody et al v. Wisconsin Department of Health Services et al  
**Case Number:** [3:18-cv-00309-wmc](#)  
**Filer:**  
**Document Number:** 42(No document attached)

**Docket Text:**

**\*\* TEXT ONLY ORDER \*\***

The court is in receipt of the parties' stipulated protective order. (Dkt. #[41]-1.) The court **ACCEPTS** this stipulation and **ENTERS** it as the court's order with one modification: the reference to "General L. R. 79(d)" is replaced with "Administrative Order #337." Accordingly, the first sentence of § C.2 shall read: "To the extent that any answers to interrogatories, transcripts of depositions, responses to requests for admissions, or any other papers filed or to be filed with the Court reveal or tend to reveal information claimed to be confidential, these papers or any portion thereof must be filed under seal by the filing party with the Clerk of Court utilizing the procedures set forth in Administrative Order #337." Signed by District Judge William M. Conley on 6/13/2018. (kwf)

**3:18-cv-00309-wmc Notice has been electronically mailed to:**

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**3:18-cv-00309-wmc Notice will be delivered by other means to::**

# **EXHIBIT**

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## Summary of HMO Denial Incidents Pursuant to the Challenged Exclusion (2014-Present)

Health Management Organization (HMO)	Surgeries Denied	Number of Surgeries Denied	Hormones Denied	Number of Hormones Denied	Other Denied Treatments, Services, or Procedures	Number of Other Treatments Denied	Number of Denials for Unspecified Services	Total Number of Treatments Denied
Blue Cross Blue Shield of Wisconsin	Information not provided by HMO						47	47
Care Wisconsin	Mastectomy with nipple/areola reconstruction	4						4
Children's Community Health Plan	Mastectomies with nipple reconstruction	2	Leuprolide; testosterone; estradiol	57	Anesthesia for reconstruction of breast; blood collection; radiology exams; propofol; comprehensive metabolic panels; lipid panels; drug tests; assays (lab tests to measure targeted hormone / nutrient); blood counts; STD tests; vaccines; therapy; injections; outpatient visits; male condom	331	40	430
Dean Health Plan	Mastectomies; reduction mammoplasties; orchiectomy	6			Orchiectomy consult; vaginoplasty consult	2		8
Group Health Cooperative of Eau Claire	Mastectomy; mammoplasty	2	Histrelin implant	1	Referrals for surgery to treat gender dysphoria; referrals for hormone replacement	5		8
Group Health Cooperative of South Central Wisconsin	Repair clitoris and vagina	1						1
Independent Care Health Plan	Breast reductions; mastectomy and nipple grafting; excision procedures on the testis	6	Leuprolide	1	Prostate cancer screening; colorectal cancer screening; anesthesia for procedures on male genitalia	7		14

Health Management Organization (HMO)	Surgeries Denied	Number of Surgeries Denied	Hormones Denied	Number of Hormones Denied	Other Denied Treatments, Services, or Procedures	Number of Other Treatments Denied	Number of Denials for Unspecified Services	Total Number of Treatments Denied
MercyCare Insurance Company					care physicians; consultations with endocrinologists; consultation with plastic surgeon	6		6
MHS Health Wisconsin	Breast reduction; mastectomy with nipple grafting	2	Testosterone; thyroid stimulating hormone	3	Blood collection; outpatient visits; vaccines; urinalysis; blood tests; lipid panels; general health panels; comprehensive metabolic panel; laparoscopic procedure on uteri	17		22
Molina Healthcare of Wisconsin	Unspecified breast surgery; reduction mammoplasty; mastectomy	3	Leuprolide; unspecified hormone therapy	2				5
Network Health Plan								0
Physicians Plus Insurance Corporation								0
Quartz Health Solutions	orchiectomy; penile removal/inversion; vaginoplasty and bilateral breast augmentation	3						3
Security Health Plan								0
Trilogy Health Insurance								0
UnitedHealthcare Community Plan	Mastectomy; mammoplasties	4						4
<b>TOTALS</b>		<b>33</b>		<b>64</b>		<b>368</b>	<b>87</b>	<b>552</b>