

**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 and
ANDREA PALM, in her official capacity as the
Acting Secretary of the Wisconsin Department
of Health Services,

Defendants.

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

PLAINTIFFS' PROPOSED REMEDIAL PLAN

As directed by the Court in its August 16, 2019 Opinion and Order [ECF No. 217], Plaintiffs respectfully submit their proposed permanent injunctive and equitable relief in the form of the accompanying proposed order. In support their proposed plan, Plaintiffs submit the accompanying brief and the following declarations:

- Fourth Declaration of Orly T. May, Esq.
- Second Supplemental Declaration of Courtney Sherwin
- Second Supplemental Declaration of Emma Grunenwald-Ries
- Declaration of Kristie Meier
- Declaration of Emily Smith, RN, BSN

Dated: September 10, 2019

Respectfully submitted,

/s/ Joseph J. Wardenski
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Judge William Conley

**[PROPOSED] ORDER GRANTING PERMANENT INJUNCTIVE
AND EQUITABLE RELIEF**

On August 16, 2019, this Court granted summary judgment to Plaintiffs Cody Flack, *et al.* (“Plaintiffs”), holding that Wisconsin Medicaid’s categorical exclusion on gender-confirming surgical and hormone treatments for gender dysphoria for transgender Medicaid beneficiaries, Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the “Challenged Exclusion”), violates Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116; the Medicaid Act’s availability requirement, 42 U.S.C. § 1396a(a)(10)(A); the Medicaid Act’s comparability requirement, 42 U.S.C. § 1396a(a)(10)(B); and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Op. & Order, Aug. 16, 2019, at 24, 32, 33, 37 [ECF No. 217] (“Summary Judgment Opinion”). The Court permanently enjoined Defendants Wisconsin Department of Health Services (“DHS”) and Acting Secretary of DHS Andrea Palm, in her official capacity (“Defendants”), from enforcing the Challenged Exclusion

against the named Plaintiffs and other members of the Class previously certified by the Court in this case. *Id.* at 38. The Court ordered the Parties to meet and confer regarding the scope of the permanent injunction and any other permanent relief, and to submit either a joint, proposed injunction or competing proposals for the Court’s consideration. The Parties submitted separate proposals. Having reviewed those proposals, the Court now orders the following permanent injunctive and equitable relief against Defendants.

IT IS ORDERED THAT:

I. DEFINITIONS

The following definitions apply to this Order:

- A. “Challenged Exclusion” refers to Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p).
- B. The “Class” is defined as all transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria.
- C. “Class Counsel” refers to Plaintiffs’ attorneys of record at Relman, Dane & Colfax PLLC, Davis & Pledl, S.C., and the National Health Law Program.
- D. “Class Member” refers to any member of the Class.
- E. “Endocrine Society Guidelines” refers to the Endocrine Society’s prevailing clinical practice guidelines on the treatment of gender dysphoria.¹

¹ The current version is *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline* (2017), available at <https://www.endocrine.org/guidelines-and-clinical-practice/clinical-practice-guidelines/gender-dysphoria-gender-incongruence>.

F. “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. It refers to the conditions currently referred to as Gender Dysphoria in Adolescents and Adults and Gender Dysphoria in Children in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-5”), and, for the purposes of this Order, also refers to related diagnoses in current, previous, or future editions of the Diagnostic and Statistical Manual of Psychiatric Disorders (“DSM”) and/or the International Classification of Diseases (“ICD”), including but not limited to the conditions referred to as “gender incongruence,” “gender identity disorder,” and “transsexualism.”

G. “Gender-confirming treatment” refers to any surgical procedure, hormone treatment, or related service for the treatment of gender dysphoria.

H. “Named Plaintiffs” refers to Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin, collectively and individually.

I. “Prevailing standards of care” refers to the standards of care for the treatment of gender dysphoria generally accepted by the medical community, which is defined to include the current WPATH Standards of Care and Endocrine Society Guidelines, and future versions of those documents.

J. “Wisconsin Medicaid” collectively refers to the joint federal and state program that provides health care coverage and other services to eligible Wisconsin residents, including each of the various Medicaid sub-programs under which such coverage is provided, and includes all fee-for-service Medicaid plans administered by Defendant DHS and all Medicaid plans administered by Wisconsin Medicaid HMOs.

K. “Wisconsin Medicaid HMO” refers to any managed care organization or health maintenance organization that administers Wisconsin Medicaid pursuant to a contract with Defendant DHS.

L. “WPATH Standards of Care” refers to the standards of care for the treatment of gender dysphoria published by the World Professional Association of Transgender Health (“WPATH”).²

II. PERMANENT INJUNCTIVE RELIEF

A. As ordered in Summary Judgment Opinion, Defendants are permanently enjoined from enforcing or applying the Challenged Exclusion against the named Plaintiffs and other members of the Class. Having found the Challenged Exclusion has violated federal law and the U.S. Constitution, and deprived transgender Wisconsin Medicaid beneficiaries of their rights under the law to access medically necessary care, and exercising this Court’s broad remedial powers to cure civil rights violations, the Court has determined that the following additional permanent injunctive relief is necessary to remedy these violations and further orders that:

1. Defendants are further permanently enjoined from adopting or enforcing any regulation, policy, practice, procedure, or guidance with the purpose or effect of categorically excluding coverage for any gender-confirming treatment recognized as a treatment for gender dysphoria by the prevailing standards of care (including, but not limited to, excluding coverage for any medically necessary treatment for gender dysphoria based on a designation of that treatment as “cosmetic”), or subjecting any such

² The current version is the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version* (2011), as supplemented by WPATH’s “Recommended Benefits Policy Document,” published June 28, 2018, available at https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/6_June/Transgender%20Medical%20Benefits.pdf.

treatment to more stringent review or prior authorization requirements than the same treatments when intended or used to treat any condition other than gender dysphoria.

2. Defendants shall ensure that Wisconsin Medicaid covers all gender-confirming treatments recognized by the prevailing standards of care for the treatment of gender dysphoria. A treatment will be presumed to be medically necessary for any beneficiary who meets the clinical eligibility criteria set forth in the prevailing standards of care for the requested treatment or service. Wisconsin Medicaid may not impose more onerous eligibility criteria for receiving a gender-confirming treatment than those contained in the prevailing standards of care for that treatment. Individual approvals will remain subject to Wisconsin Medicaid's standard prior authorization procedures, where applicable.

3. Within 120 days of this Order, Defendants will publish clinical coverage criteria for gender-confirming treatments for use by DHS staff and Wisconsin Medicaid HMOs involved in making coverage determinations, consistent with paragraphs II.A.1.-2. above, and will promptly disseminate those guidelines to all DHS staff involved in the administration of Wisconsin Medicaid and all Wisconsin Medicaid HMOs. Subsequently, Defendants will provide a copy of those guidelines to all new DHS employees involved in the administration of Wisconsin Medicaid and all new Wisconsin Medicaid HMOs.

4. DHS may, in its discretion, promulgate regulations, publish guidance, or issue other materials regarding coverage for gender-confirming treatments, provided that such regulations, guidance documents, or other materials are consistent with the terms of paragraphs II.A.1.-2. above. However, the issuance of such regulations or guidance

materials shall not delay the ability of Class Members to request and receive approval for necessary gender-confirming treatments.

5. To comply with this Order, DHS may amend and/or enter into new contractual agreements with Wisconsin Medicaid HMOs, provided that such contracts are consistent with the terms of paragraphs II.A.1.-2. above. However, the negotiation or execution of new or amended contracts with Wisconsin Medicaid HMOs shall not delay the ability of Class Members to request and receive approval for necessary gender-confirming treatments.

B. The permanent injunctive relief ordered herein shall apply to Defendants, their officials, employees, successors, agents, and contractors, including all Wisconsin Medicaid HMOs contracted by DHS to offer and administer Wisconsin Medicaid plans.

III. NOTICE REQUIREMENTS

A. No later than 15 days after the Court's entry of this Order, Defendants shall notify all current DHS employees involved in the administration of Wisconsin Medicaid benefits of the terms of this Order.

B. No later than 30 days after the Court's entry of this Order, Defendants shall provide Class Counsel drafts of the following documents:

1. a notice to be sent to all Wisconsin Medicaid HMOs to notify them of the terms of this Order and their obligation to immediately comply with the Order, to direct them to approve prior authorization requests for gender-confirming treatments for Wisconsin Medicaid beneficiaries when medically necessary under the prevailing standards of care, and to inform

them that DHS will issue written coverage guidelines for gender dysphoria treatments within 120 days of entry of this Order;

2. a *ForwardHealth Update* to Wisconsin Medicaid providers, health centers, and HMOS clarifying the August 2019 *ForwardHealth Update*, No. 2019-20, titled “Transgender Surgery Policy,” which, at minimum, will
 - (a) rename the document “Policy for Surgical and Hormone Treatments for Gender Dysphoria”; (b) reflect the Court’s issuance of the permanent injunction and this Order; (c) clarify that program members are eligible to submit prior authorizations to request coverage for gender-confirming treatments, and that coverage for gender-confirming treatments recognized by the prevailing standards of care may not be excluded from coverage or treated as “cosmetic” when medically necessary for individual beneficiaries; (d) ensure the documentation requirements contained in the update are consistent with the terms of this Order; and (e) state that DHS will develop clinical coverage criteria for gender dysphoria treatments no later than 120 days after entry of this Order and make those published criteria available to DHS staff involved in the administration of Wisconsin Medicaid, Wisconsin Medicaid HMOs, and Wisconsin Medicaid’s participating providers; and
3. a notice to Wisconsin Medicaid participating medical providers, as well as the medical providers and social service organizations identified by Plaintiffs as serving transgender Medicaid beneficiaries in Wisconsin (listed in Appendix A to this Order), of the terms of this Order, including

notifying each such provider/organization that their patients, clients, or constituents are eligible to seek coverage for gender-confirming treatments and services that were previously excluded from coverage, and previously may have been denied, under the Challenged Exclusion, and to inform them that DHS will issue written coverage guidelines for gender dysphoria treatments no later than 120 days after entry of this Order.

- C. If Plaintiffs, through Class Counsel, provide any comments to the documents listed in paragraph III.B.1.-3. above, Defendants shall confer with Class Counsel to attempt to voluntarily resolve any disputes and, if necessary, seek the Court's assistance if an amicable resolution cannot be reached.
- D. No later than 45 days after the Court's entry of this Order, Defendants shall issue the final versions of the documents listed in paragraph III.B.1.-3. above.
- E. Within 60 days of the Court's entry of this Order, Defendants shall:
 - 1. identify (a) all current Wisconsin Medicaid beneficiaries denied coverage for one or more gender-confirming treatments by DHS and/or a Wisconsin Medicaid HMO since January 1, 2014; and (b) all medical providers who submitted prior authorization requests for Wisconsin Medicaid coverage for a gender-confirming treatment that were denied by DHS and/or a Wisconsin Medicaid HMO since January 1, 2014; and
 - 2. using the form notices attached as Appendix B to this Order, notify each such beneficiary and provider in writing, through their preferred contact method (i.e., mail, email), of: (a) the terms of this Order; (b) the right of the individual and/or provider to submit prior authorization requests for gender-confirming treatments that

were previously denied; (c) the individual's right to seek the assistance of counsel regarding the individual's rights under this Order; and (d) the contact information for Class Counsel.

F. Defendants shall notify all new Wisconsin Medicaid HMOs of the terms of this Order, and each such HMO's obligation to comply with the terms in this Order, before the HMO begins offering or administering a Wisconsin Medicaid plan.

IV. REPORTING AND COMPLIANCE REQUIREMENTS

A. No later than 180 days after entry of this Order, Defendants shall file a written report ("First Compliance Report") with the Court including the following:

1. a detailed summary of the actions taken by Defendants to comply with their obligations under Sections II and III of this Order, including a statement that the actions specified in Section II.A.3 and III.A.-C. above have been taken;
2. a copy of the published coverage guidelines for gender-confirming treatments required by paragraph II.A.3. of this Order;
3. a copy of all DHS policies, guidelines, bulletins, and other materials regarding Wisconsin Medicaid coverage for gender-confirming treatments, including all such materials issued to Wisconsin Medicaid HMOs;
4. a copy of the notice sent to the medical providers and social service organizations required by paragraph III.B.3. above, and a list of all providers/organizations to which the notice was sent;
5. a statement of the number of (a) individuals, and (b) providers to whom the notice required by paragraph III.E.2. above was sent.

B. One year after the filing date of entry of the First Compliance Report, Defendants shall file a written report to the Court containing any new and updated information in the categories specified in Section IV.A. above (the “Second Compliance Report”), or a statement that no such information exists.

C. Plaintiffs, through Class Counsel, may request, and Defendants shall promptly provide, other documents or information needed to monitor and enforce Defendants’ compliance with this Order.

V. RETENTION OF JURISDICTION

This Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

ENTERED this ____ day of _____, 2019.

William M. Conley
United States District Court Judge

APPENDIX A

Medical Providers and Social Service Organizations Serving Transgender Wisconsin Medicaid Beneficiaries

- ABC for Health, Inc., 32 N Bassett St, Madison, WI 53703, (608) 261-6939.
- Diverse & Resilient, 2439 N. Holton Street, Milwaukee, WI 53212, (414) 390-0444.
- Fair Wisconsin Inc., 122 East Olin Avenue, Suite 100, Madison, WI 53713, (608) 441-0143.
- FORGE, P.O. Box 1272 Milwaukee, WI 53201, (414) 559-2123.
- The Froedtert & Medical College of Wisconsin Inclusion Health Clinic, Sargeant Health Center, 840 N. 87th St., Milwaukee, WI 53226, (414) 805-2018.
- Greater Milwaukee Center for Health and Wellness, Inc., 4655 N. Port Washington Road, Suite 325, Glendale, WI 53212, (414) 269-8282.
- LGBT Center of SE Wisconsin, 1456 Junction Ave, Racine, WI 53403, (262) 664-4100.
- LGBT Community Center of the Chippewa Valley, 1708 Westgate Rd #8, Eau Claire, WI 54703, (715) 552-5428.
- Milwaukee Health Services, Inc., 2555 N. Dr. Martin L. King Jr. Dr., Milwaukee, WI 53212, (414) 760-3900.
- Milwaukee LGBT Community Center, 1110 N. Market Street, 2nd Floor, Milwaukee, WI 53202, (414) 271-2656.
- Oriel Medicine, SC, 5005 University Avenue, Madison, Wisconsin 53705, (608) 238-0100.
- OutReach LGBT Community Center, 2701 International Lane, Suite 101, Madison, WI 53704, (608) 255-8582.
- Positive Voice, Inc., P.O. Box 1381, Green Bay, WI 54305-1381.
- Top Surgery Midwest. 2275 Deming Way, Suite 200, Middleton, WI 53562, (608) 821-4004.
- UW Health Transformations Clinic and Transformations Surgery Center, Inc., 2349 Deming Way, Middleton, WI 53562, (608) 836-9990.
- UW Health Pediatric and Adolescent Transgender Health (PATH) Clinic, American Family Children's Hospital, 1675 Highland Ave., Madison, WI 53792 (608) 263-6420
- Wisconsin Transgender Health Coalition, University Crossing Building, c/o Jay Botsford, Rm 262-E, 749 University Row, Madison, WI 53705, witranshealth@gmail.com.

APPENDIX B

Form Letters to Class Members Denied Wisconsin Medicaid Coverage for Gender-Confirming Treatments Since January 1, 2014 and their Providers

I. Letter to Class Members Denied Coverage for Gender-Confirming Treatments Since January 1, 2014

NOTICE: A CLASS ACTION LAWSUIT MAY AFFECT YOUR RIGHT TO RECEIVE MEDICAL SERVICES THROUGH MEDICAID.

Dear [FIRST NAME] [LAST NAME]:

We are writing to you on behalf of the Wisconsin Department of Health Services (“DHS”), the state agency responsible for administering Wisconsin Medicaid, also known as BadgerCare Plus. The U.S. District Court for the Western District of Wisconsin (the “Court”) issued an order in *Flack v. Wisconsin Department of Health Services, et al.*, No. 3:18-cv-309 (W.D. Wis.) (“*Flack*”) requiring DHS to send you this notice. *Flack* is a class action lawsuit filed on behalf of “[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria” (the “Class”).

You are receiving this letter because, as a result of this lawsuit, you may have the right to receive coverage for medical treatments or services that were previously denied to you. On or after January 1, 2014, a request for Wisconsin Medicaid coverage for a surgical or hormone treatment for gender dysphoria was denied based on Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the “Exclusion”), a state regulation that categorically prohibited DHS from covering certain gender dysphoria treatments.

On August 16, 2019, the Court ruled in *Flack* that the Exclusion violated federal law and the United States Constitution and permanently barred DHS from enforcing the Exclusion against any member of the Class. On [DATE], 2019, the Court further ordered Wisconsin Medicaid to cover surgical and hormone treatments for gender dysphoria when medically necessary under the prevailing standards of care for the treatment of gender dysphoria.

If you are still seeking the treatment(s) that were previously denied because of the Exclusion, your medical provider may now resubmit the request(s) for coverage to Wisconsin Medicaid. This letter does not guarantee that you will receive coverage for the requested treatment(s), but notifies you that Wisconsin Medicaid may not deny coverage for treatments for gender dysphoria solely based on the Exclusion. Now, requests must be reviewed to determine whether the services requested are medically necessary under the prevailing standards of care for the treatment of gender dysphoria.

Please send any questions regarding your Wisconsin Medicaid coverage to [CONTACT] at DHS at [CONTACT INFORMATION]. Any questions about your rights under the *Flack* lawsuit may be directed to the following attorneys, who are counsel for the Class:

Joseph Wardenski
Orly May
Relman Dane & Colfax PLLC
(202) 728-1888
jwardenski@relmanlaw.com
omay@relmanlaw.com

Robert Theine Pledl
Davis & Pledl, S.C.
(919) 968-6308
rtp@davisandpled.com

Sincerely,

[DHS official]

II. Letter to Providers Who Submitted Prior Authorization Requests for Gender-Confirming Treatments Denied Since January 1, 2014

Dear [FIRST NAME] [LAST NAME]:

We are writing to you on behalf of the Wisconsin Department of Health Services (“DHS”), the state agency responsible for administering Wisconsin Medicaid, also known as BadgerCare Plus. The U.S. District Court for the Western District of Wisconsin (the “Court”) issued an order in *Flack v. Wisconsin Department of Health Services, et al.*, No. 3:18-cv-309 (W.D. Wis.) (“*Flack*”) requiring DHS to send you this notice. *Flack* is a class action lawsuit filed on behalf of “[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria” (the “Class”).

Our records indicate that between January 1, 2014 and the date of this letter, you submitted one or more prior authorization requests on behalf of a Wisconsin Medicaid beneficiary seeking coverage of a medical service to treat gender dysphoria., and that the request was denied based on Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the “Exclusion”), a state regulation that categorically prohibited DHS from covering certain gender dysphoria treatments.

On August 16, 2019, the Court ruled in *Flack* that the Exclusion violated federal law and the United States Constitution and permanently barred DHS from enforcing the Exclusion against any member of the Class. On [DATE], 2019, the Court further ordered Wisconsin Medicaid to cover surgical and hormone treatments for gender dysphoria when medically necessary under the prevailing standards of care for the treatment of gender dysphoria.

This letter notifies you that, if your patient is still seeking the previously denied services, you may now resubmit the prior authorization request(s). This letter does not guarantee that the requested treatment will be covered, but notifies you that Wisconsin Medicaid may not deny coverage for medically necessary care solely based on the Exclusion. Now, requests must be reviewed to determine whether the services requested are medically necessary under the prevailing standards of care for the treatment of gender dysphoria.

You may direct inquiries regarding Wisconsin Medicaid coverage to [CONTACT] at DHS at [CONTACT INFORMATION]. Inquiries about the *Flack* lawsuit may be directed to the following attorneys, who are counsel for the Class:

Joseph Wardenski
Orly May
Relman Dane & Colfax PLLC
(202) 728-1888
jwardenski@relmanlaw.com
omay@relmanlaw.com

Robert Theine Pledl
Davis & Pledl, S.C.
(919) 968-6308
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Sincerely,

[DHS official]