

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CODY FLACK, SARA ANN
MAKENZIE, MARIE KELLY,
and COURTNEY SHERWIN,

Plaintiffs,

v.

Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,

Defendants.

DECLARATION OF PAMELA S. APPLEBY

I, **PAMELA S. APPLEBY**, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am employed as a Bureau Director for the Department of Health Services (DHS), Division of Medicaid Services (DMS), Bureau of Benefits Management. I have held this position since June 2019.

2. In my position as a Bureau Director, I provide policy direction, management, and oversight of the teams that implement non-institutional, acute and primary Medicaid benefits; monitor the BadgerCare Plus and SSI

HMO contracts; provide clinical policy direction and utilization management, including prior authorization; and advise on eHealth and quality.

3. This declaration is made in response to the Plaintiffs' Proposed Order Granting Permanent Injunctive and Equitable Relief. It is based on my personal knowledge and review of records maintained in the course of regularly-conducted business activities at DHS.

4. The Challenged Exclusion at issue in this case, Wis. Admin. Code DHS §§ 107.03(23)–(24), 107.10(4)(p), excludes surgery used to treat gender dysphoria, as well as any drugs associated with transsexual surgery or procedures. The Challenged Exclusion does not exclude treatments or procedures that are not pharmaceutical or surgical treatments, such as voice therapy, laser hair removal, and penile prosthetics.

5. Wisconsin Medicaid beneficiaries are provided medical assistance for various covered services. Individual approvals are subject to Wisconsin Medicaid's standard review, prior authorization procedures, and determinations for medical necessity under Wis. Admin. Code DHS § 101.03(96m), if prior authorization is otherwise required for that type of treatment or service. Giving any class of Medicaid beneficiaries a bypass of this approval process would be treating that class of beneficiaries differently from all other Medicaid participants.

6. It is DHS's objective to provide Wisconsin Medicaid beneficiaries with medically necessary covered services for the treatment of gender dysphoria. While DHS intends to review requests for these services under prevailing standards of care—such as those published in guidelines by the World Professional Association for Transgender Health (WPATH) and the Endocrine Society—it should not be limited to those two guidelines, and the unknown future versions of those guidelines. Wisconsin Medicaid providers and reviewers should be given the flexibility to make coverage decisions based on evolving standards of care and professional judgment, especially in the area of gender dysphoria.

7. In Section II(A)(3) of their proposed order, Plaintiffs propose that within 120 days, DHS publish clinical coverage criteria for gender-confirming treatments for use by DHS staff and Wisconsin Medicaid HMOs involved in making coverage determinations. This type of document is more accurately referred to as a coverage policy. DHS will formulate coverage policy for gender-confirming treatments previously excluded under the Challenged Exclusion.

8. In formulating coverage guidelines, DMS's Bureau of Benefits Management (BBM) would first request input from its clinical partners, including the contracted health plans, to ensure that the coverage policy is responsive to their needs. BBM would also conduct other research, including

review of various professional guidelines and standards of care, to develop the coverage policy. There are multiple levels of review and approval within DHS for publication of coverage policies as well. And while it would be possible to develop these guidelines within 120 days, it would take at least 180 days to fully integrate these coverage guidelines into the Medicaid program. This is because full integration would include changes to the program's coding system and electronic claims and financial systems, which must be done through an outside contractor.

9. BBM coverage policies are considered guidance documents and subject to the publication, notice, and public comment provisions in Wis. Stat. § 227.112. DHS should be able to accomplish these requirements within the 180 days needed to draft the coverage policies and fully operationalize these guidelines in the Medicaid program.

10. After the Court issued the preliminary injunction enjoining class-wide enforcement of the Challenged Exclusion in this case, on April 29, 2019, BBM Managed Care Section Chief Makalah Wagner sent an email to all BadgerCare Plus and Medicaid SSI HMO Contract Administrators notifying them of the Court's order. A true and accurate copy of that email is attached hereto as **Exhibit A**.

11. On May 9, 2019, a DMS HMO Contract Administrators Meeting was held at DHS. At this meeting, the BBM Associate Bureau Director,

Pamela Appleby, verbally addressed the Court's preliminary injunction order with these Medicaid HMOs contract administrators. A true and accurate copy of the agenda for this meeting is attached hereto as **Exhibit B**.

12. DHS also updated its "LGBT Health-Transgender Persons" web page after the Court issued its April 23, 2019 preliminary injunction, found at www.dhs.wisconsin.gov/lgbthealth/transgender.htm. Any reference to the Challenge Exclusion was removed from this web page.

13. BBM staff also continues to field and respond to individual questions from HMOs regarding coverage for gender-confirming surgery since the Court issued its preliminary injunction. BBM consistently advises these HMOs that it must not deny transgender surgeries solely on the basis of the Challenged Exclusion and that they must make their own medical necessity determination for requested services.

14. When DHS implements a new covered service or benefit, DHS includes BadgerCare Plus and Medicaid SSI HMOs in the distribution of Forward Health provider updates regarding the implementation of the benefit, including coverage guidelines. When coverage policy for the provision of gender confirming services previously excluded under the Challenge Exclusion is completed by BBM, it will be distributed to contracted BadgerCare Plus and Medicaid SSI HMOs. Distribution of coverage policy through Forward Health provider updates to enrolled Forward Health

providers and contracted health plans is an established DMS process. In addition, the Forward Health online provider handbook is updated as coverage policy changes. The online provider handbook is an available reference to any member of the public with access to the internet. Thus, it is unnecessary to provide a separate notice of the coverage policy to new Medicaid HMOs.

15. In Sections II(A)(3) and III(B)(2) of their proposed order, Plaintiffs request that “DHS staff involved in the administration of Wisconsin Medicaid” be notified of any new clinical guidelines for the treatment of gender dysphoria. DMS and various offices within DHS involved in the administration of Wisconsin Medicaid number approximately 1000 employees. There are hundreds of those employees whose daily work does *not* involve benefits administration. For example, DMS employees conducting Medicaid eligibility determinations or processing federal payment requests would have no reason to be advised of a change in coverage for gender-confirming treatments, as these employees do not work with or advise on Medicaid benefits. As such, notice of any coverage policies should only be provided to DHS staff involved with Medicaid benefits administration.

16. *ForwardHealth Update* is an electronic service administered by DHS that provides program policy and billing information for Wisconsin Medicaid providers. It would take approximately 120 days to issue a

ForwardHealth Update. This is because these updates are the product of a collaborative effort across several sections and Divisions that require multiple resources and pass various levels of internal review. It is also likely that the update would be considered a guidance document that would have to go through the process outlined in Wis. Stat. § 227.112.

17. *ForwardHealth Update*, No. 2019-20, titled “Transgender Surgery Policy” was developed by June of 2019. It provides information regarding the Court’s preliminary injunction order. Because this update was considered a guidance document, it came under the publication and public comment requirements of Wis. Stat. § 227.112. Document records show a Legislative Reference Bureau (LRB) publication date of July 8, marking a beginning of a 21-day public comment period before certification under Wis. Stat. § 227.112. The update was held until processes were established for public comment.

18. The August 2019 *ForwardHealth Update* contains fee-for-service policy and applies to services members receive on a fee-for-service basis. All Wisconsin Medicaid HMOs are required to provide at least the same benefits as those provided in this *ForwardHealth Update* under fee-for-service arrangements. (See Dkt. 227-2.)

19. In Section III(E)(1) of their proposed order, Plaintiffs request an order that DHS identify all Wisconsin Medicaid beneficiaries denied coverage

for gender-conforming treatments, along with all medical providers who submitted prior authorization requests for coverage of these treatments. However, most of these individuals and medical providers are unknown to DHS, because this activity occurs through Medicaid HMOs and does not come to the attention of DHS, except for fee-for-service beneficiaries, those involved in the DHS grievance process, or those specifically brought to the attention of DHS through other means.

20. It would be difficult to identify individuals previously denied coverage under the Challenged Exclusion because there was no universally-applicable way to flag requests these types of requests, i.e., that a person was seeking a specific procedure as treatment for gender identity disorder, gender dysphoria, transsexualism, etc., versus some other reason. While we are aware that some of these past requests had been flagged as related to “gender identity” or “transsexualism,” there was no requirement that the provider submit the prior approval request in that way.

21. It is likely that the notices requested by the Plaintiff in Section III of their proposal meet the definition of a “guidance document” in Wis. Stat. § 227.01(3m), triggering the notice, publication, and public comment requirements in Wis. Stat. § 227.112. If they are guidance documents, DHS would require at least 90 days after these notices were drafted to complete the requirements in Wis. Stat. § 227.112.

22. Plaintiffs submit that at least three UW Health patients were denied coverage for gender-confirming surgeries by their Medicaid HMO, based on the HMO's own policies excluding coverage. (*See* Dkt. 231 ¶ 6.) BBM may not have details of these HMO members' requests, as HMOs are not required to report to DHS when they deny a member's prior authorization request. DHS becomes aware of these denials only through the appeals process.

23. Since the Court's preliminary injunction order in this case, DHS has overturned an HMO's denial of gender-confirming surgery, and there is currently a fair hearing scheduled for a service denial for gender-confirming surgery from another HMO. There was one denial of gender-confirming surgery from an HMO that was upheld by DHS and the Division of Hearings and Appeals due to a lack of medical necessity documentation from the provider.

24. I have reviewed the Declaration of Kristie M. Meier stating that Quartz will continue to apply its own medical policies and exclusions in making coverage determinations for Medicaid beneficiaries in the absence of DHS policy on coverage of services for members with gender dysphoria. Ms. Meier goes on to state that Quartz will follow DHS guidance upon issuance. I have also reviewed the declaration of Ms. Courtney Sherwin, whose declaration includes the Quartz coverage criteria for coverage of gender

dysphoria treatment. The criteria from Quartz include a list of services, identified as not exhaustive, that are not covered because they are considered cosmetic. A pre-determined list of excluded services is not in accordance with DHS intent when providing guidance that health plans should make individualized determinations of the medical necessity of services for a Medicaid member. *ForwardHealth Updates* contains fee-for-service policy, but also note that that Medicaid HMOs “are required to provide at least the same benefits as those provided under fee-for-service arrangements.” (Dkt. 227-2:3.)

25. DHS-contracted BadgerCare Plus and Medicaid SSI HMOs may develop coverage policy that differs from fee-for-service coverage policy. But the application of these coverage policies may not result in less coverage than fee-for-service. DMS has contract oversight of health plans and second-tier review of coverage decisions. If a Medicaid HMO improperly denies coverage to a Medicaid beneficiary, DHS will overturn the denial through the grievance process, which includes a second-tier review.

I declare under penalty of perjury that the forgoing is true and correct.
Executed on September 24th, 2019.

s/ Pamela S. Appleby

Pamela S. Appleby

From: [Wagner, Makalah - DHS](#)
To: [Miller, Fratney L - DHS](#)
Subject: FW: [NCI] Distribution of April 23rd Court Order to Medicaid HMOs
Attachments: [Flack Expanded PI Motion Ruling.pdf](#)
Importance: High

For your records – this was sent to all BC+ and Medicaid SSI HMOs.

From: Wagner, Makalah - DHS

Sent: Monday, April 29, 2019 4:38 PM

To: Akotia, Dennis; Aksamitauskas, Milda - DHS; Anderson, Gina M - DHS; Antholine, Kulie; Appleby, Pamela S - DHS; Avery, Kelsey; Bakken, Erik C - VEDS; Barachy, Rachelle; Beck, Ralph; Benzik, Mary Ellen; Bocanegra, Jose C - DHS; Brandel, Shelly; Brock, Kari L - DHS; Brostowitz, Jill; Candy, Landwehr; Compliance, UHC WI; Corcoran, Amy; Cunningham, Curtis J - DHS; Darin, Dwight D - DHS; Devries, Harrison - VEDS; DHS Trilogy Contract Admin; Di Meo, Nicholas P - DHS; Donisch, Jack; Dyck, Jon - LEGIS; Eimers, Ken; Ellenbecker, Joan E - DHS; Fahey, Emily; Felsing, Bill; Fisher, Jill; Fox, Mike; Francis, Ginger; Froelich, Brooke S - DHS; Gaecke, Matt; Gaines, Carola; Haack, Ryan; Hanrahan, Edward; Harcus, Amanda; Harris, Jeff; Hartwig, Jennifer; Haymon, Lori M - DHS (CHSRA); Hays, April; Heidenreich, Neil; Henderson, Melissa; Her, Pungnou J - DHS; Hietpas, Heather; Hintz, Laurie; Hiveley, Jim; Holden, Lisa; Huber, Corey; Husa, Sherry; Johnson, Rich; Joyce, Jodi; Kahl, Diane; Kamal, Raj - DHS (CHSRA); Kezer, Keith M - DHS; Kiernan, Daniel C - DHS; Klink, Jenny; Kupkovits, Scott; Lillethun, Chad W - DHS; Lorenz, Katarina; Lucier, Paula; Lueth, Teresa - DHS; Maffitt, Kay; Mahloch, Sarah; Mandel, Sabrina - DHS; Mattke, Marlia K - DHS; McAtee, Rebecca - DHS; McConaughy, Christina; McConnell, Diana; McDermott, Caty; McNeely, Chryshanee; Meerschaert, John; Melendez-Prodoehl, Mitzi - DHS; Mender, Jodie J - DHS; Michael Boeder; Moran, Christian T - DHS; Mrozinski, Derrick M - DHS; Nerad, Benjamin M - DHS; Nevel, Josh L - DHS; Nguyen, Phong; Nytes, Travis; Osthelder, Theodore; Pagliaro, Nicole; Park, Kevin; Perrone, Brenda K - DHS (Spherion); Pirlot, RJ; Prost, Michelle M - DHS1; Rakowski, Mark; Ramsay, Rob; Rice, Sharon; Rosales, Nelson G - DHS; Rummells, Danielle; Ryan, Daniel; Seibert, Susan R - DHS; Sexton, Ellen; Shermo, Jennifer; Slowik, Don; Stuller, Guy; Thomas, Christopher W - DHS; Thorson, Erika; Townsend, Janette; Tufto, Matthew A - DHS; Vandermause, Emily; Wagner, Makalah - DHS; Walker, Amanda K - DHS; Wallace, Julie; Walsh, Andrew D - DHS; Warman, Andrea - VEDS; Warner, Bonnie; Way-Messer, Sara; Wenzel, Nancy; Whitens, Andrew P - VEDS; Wiggins, Lora - DHS (CHSRA); Willing, Krista E - DHS; Winter, Elise - DHS (Deloitte); Wolff, David M.; Woods, Anthony; Yang, Daniel - DHS; Zachary, Monica; Zurawik, Deborah

Subject: [NCI] Distribution of April 23rd Court Order to Medicaid HMOs

Importance: High

BadgerCare Plus & Medicaid SSI HMO Contract Administrators:

Attached is the April 23 order from the Western District of Wisconsin which grants the motion to certify class and enjoins the enforcement of Wis. Admin. Code § DHS 107.03(23)-(24)) during the pendency of this lawsuit. Please review with your legal counsel.

DHS will be working through system, coding, and policy changes to ensure FFS compliance as well. This may take some time, so in the interim, you may receive denials if you submit encounters to DHS for services you paid regarding the Challenged Exclusion. DHS will provide additional guidance to HMOs as it becomes available on how we'll work together through the implementation of this injunction.

Makalah Wagner
Managed Care Section Chief
Bureau of Benefits Management

Exhibit A

Department of Health Services

Makalah.Wagner@wi.gov

608-266-9248

NOTICE: This email and any attachments may contain confidential information. Use and further disclosure of the information by the recipient must be consistent with applicable laws, regulations and agreements. If you received this email in error, please notify the sender; delete the email; and do not use, disclose or store the information it contains.

Tony Evers
Governor

Andrea Palm
Secretary



State of Wisconsin
Department of Health Services

Division of Medicaid Services
HMO Contract Administrators Meeting Agenda

May 9, 2019
1:00 p.m. – 3:00 p.m.
Department of Health Services
1 W. Wilson St., Madison, WI
Room 751

DIVISION OF MEDICAID SERVICES

1 WEST WILSON STREET
PO BOX 309
MADISON WI 53701-0309

Telephone: 608-266-8922
Fax: 608-266-1096
TTY: 711

[Join Skype Meeting](#)

Join by Phone: (844) 341-6885 Participant code: 8608149 [Help](#)

- 1:00 – 1:10 p.m. **Welcome & Updates – DHS Staff**
- Medicaid Director’s Updates – Jim Jones**
- 1:10 – 1:30 p.m. **Rate-setting & Encounter Updates – Ben Nerad & Chris Thomas,**
 Bureau of Rate Setting
- 1:30 – 1:45 p.m. **Benefits Policy Updates – Bureau of Benefits Management staff**
- Electronic Visit Verification (EVV) project update
 - Injunction notification
 - ForwardHealth Provider Updates
- 1:45 – 3:00 p.m. **Quality Updates & Discussion**
- 2018 External Quality Review technical report – *Laurie Hintz, MetaStar*
 - 2017 P4P results & lead results – *Raj Kamal, BBM*
 - 2019 PPR updates
- 3:00 p.m. **Adjourn**