

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

CODY FLACK, *et al.*,  
*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

**THIRD DECLARATION OF ORLY T. MAY, ESQ.**

I, Orly T. May, declare as follows:

1. I am an attorney for the Plaintiffs in the above-captioned case. I previously submitted two declarations [ECF Nos. 21, 166] in connection with Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Motion for Summary Judgment. I submit this third declaration in connection with Plaintiffs' Reply in Support of their Motion for Summary Judgment.

2. Exhibit 1 to this Declaration is a true and correct copy of an email from E. Loman to M. Mattke, K. Willing, and C. Cunningham, dated Feb. 14, 2019 (DHS000517-19), attaching a true and correct copy of the Wis. Dep't of Health Servs., Biennial Rule Review Document (DHS00520) (previously filed as ECF No. 166-13).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Executed this 4th day of June, 2019.



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Orly T. May

**EXHIBIT 1**

## RE: admin code

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**From:** "Loman, Emily - DHS" <emily.loman@dhs.wisconsin.gov>  
**To:** "Mattke, Marlia K - DHS" <marlia.mattke@dhs.wisconsin.gov>, "Willing, Krista E - DHS" <kristae.willing@dhs.wisconsin.gov>, "Cunningham, Curtis J - DHS" <curtis.cunningham@dhs.wisconsin.gov>  
**Cc:** "Loman, Emily - DHS" <emily.loman@dhs.wisconsin.gov>  
**Date:** Thu, 14 Feb 2019 15:22:10 -0600  
**Attachments:** F-02274 2018 Biennial Review DMS MASTER.DOCX (41.65 kB)

All,

Attached is an updated Biennial Rule Review list for DMS (F-02274) that contains BBM's re-revised list of priorities. The form requires a division administrator signature. Also, keep in mind that we could potentially be required to write scope statements for all of the proposed rule changes on this list if OLC agrees with our analysis. Even with this pared down list, it will be a considerable effort.

Please let me know if you approve the final list and how to go about obtaining the appropriate signature for submission to OLC.

Thanks,  
Emily

Emily K. Loman, J.D.  
Policy Initiatives Advisor  
Division of Medicaid Services, Administrator's Office  
Wisconsin Department of Health Services  
Phone: (608) 261-7838  
Email: [emily.loman@dhs.wi.gov](mailto:emily.loman@dhs.wi.gov)

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**From:** Loman, Emily - DHS  
**Sent:** Thursday, February 14, 2019 10:16 AM  
**To:** Mattke, Marlia K - DHS; Willing, Krista E - DHS; Cunningham, Curtis J - DHS  
**Subject:** FW: admin code

All,

This is the most up-to-date list that I received from BBM on Jan. 16<sup>th</sup>. Please let me know what I can do to help you respond to Whitney's request, if needed.

Thanks,  
Emily

Emily K. Loman, J.D.  
Policy Initiatives Advisor  
Division of Medicaid Services, Administrator's Office  
Wisconsin Department of Health Services  
Phone: (608) 261-7838  
Email: [emily.loman@dhs.wi.gov](mailto:emily.loman@dhs.wi.gov)

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**From:** Seibert, Susan R - DHS  
**Sent:** Wednesday, January 16, 2019 9:07 AM  
**To:** Loman, Emily - DHS  
**Cc:** Mattke, Marlia K - DHS  
**Subject:** RE: admin code

Emily  
Here is BBM's updated Admn. rule list. The only priority we have is writing rules for SUD/residential ADOA, we could accomplish that through the waiver and not write new rules at this time.

Susan

Susan Seibert  
Director of Operations  
Bureau of Benefits Management | Division of Medicaid Services  
Wisconsin Department of Health Services

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**From:** Loman, Emily - DHS  
**Sent:** Wednesday, January 16, 2019 8:37 AM  
**To:** Appleby, Pamela S - DHS  
**Cc:** Tyska, Steve B - DHS (CHSRA); Wiggins, Lora - DHS (CHSRA); Sager, Julie A - DHS; Seibert, Susan R - DHS  
**Subject:** Re: admin code

Yes, I will send out the template this afternoon after I have met with the Dept Admin Rules attorney and coordinator for more instruction on what is appropriate for the biennial review. Hopefully with that insight, we will be able to select the best candidates for immediate revision.

Thanks,  
Emily

On Jan 15, 2019, at 3:11 PM, Appleby, Pamela S - DHS <[Pamela.Appleby@dhs.wisconsin.gov](mailto:Pamela.Appleby@dhs.wisconsin.gov)> wrote:

Hi, Emily,  
Could you please send the completed version of the template to the medical directors so that they can see and comment on what has been drafted to date? Thanks.

Best,

Pam

**Pam Appleby**, Associate Director of Programs  
Bureau of Benefits Management | Division of Medicaid Services  
Room 350 | Desk Phone: 608-261-9423 | Mobile Phone: 608-509-1212

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**From:** Sager, Julie A - DHS  
**Sent:** Tuesday, January 15, 2019 12:57 PM  
**To:** Loman, Emily - DHS  
**Cc:** Tyska, Steve B - DHS (CHSRA); Wiggins, Lora - DHS (CHSRA); Appleby, Pamela S - DHS  
**Subject:** admin code

Hi Emily,

Dr. Wiggins didn't receive any requests regarding outdated admin code nor code which is outside our current operating standards.

I know you are working on putting together a DHS priority list. Could we also weigh in?

**Julie**

Julie Sager MD  
Medical Director  
Bureau of Benefits Management  
Division of Medicaid Services  
Wisconsin Department of Health Services

T: (608) 267-7827  
F: (608) 266-1096

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DEPARTMENT OF HEALTH SERVICES  
Office of Legal Counsel  
F-02274 (01/2018)

STATE OF WISCONSIN

**BIENNIAL RULE REVIEW: Division of Medicaid Services (DMS), Proposed Findings**

Rule	I.A	II.A	III.A	IV.A	V.A	Citations	Rationale	Actions
DHS 65						s. 46.985	Per DMS JCRAR Report Findings There are eight potential conflicts between the current DHS 90 and the 2011 Part C Regulations 34 CFR 303 (Further details are provided in an additional document comparing DHS 90 with 34 CFR 303): * 34 CFR 303.420 Screening procedures and requirements---DHS 90 does not include all the procedures to protect parental rights such as written prior notice of the reason for the screening and parental consent prior to conducting a screening. * 34 CFR 303.209(d) Transition plan requirements---DHS 90 does not include the timeline requirement for the transition plan to be developed. * 34 CFR 303.209(b)(1)(i-iii) Referral to the Local Education Agency (LEA)---DHS 90 does not include the timeline requirement, the confirmation documentation requirements or the process and requirements for late referrals to the county Birth to 3 Program including the relationship of the late referral to the transition activities. * 34 CFR 303.416(b) Destruction with permanent record---DHS 90 does not outline, as the Part C	Repeal entire chapter
DHS 90			X			227.11 (2) (a) Stats. And 51.44 (1m) and (5) (a), (am) and (b)		Add new eligibility groups and policies covered only by policy handbooks.

DHS000520



regulations do, the limited information that can be maintained by the Birth to 3 Program after destruction of records occurs.

\* 34 CFR 303.405(c) Parental authority requirement---DHS 90 indicates that if a Birth to 3 Program has been "advised" that a person does not have parental rights, the program can deny access to the parent to review their child's record. The Part C regulations state the Birth to 3 Program needs documentation that the parent does not have the authority under applicable State laws governing such matters as custody, foster care, guardianship, separation, and divorce before denying access to records.

\* 34 CFR 303.405(a) Parental access to records requirement---DHS 90 contradicts the Part C regulations in the number of days (from 15 to 10) a Birth to 3 Program has to provide a parent access to their child's records.

\* 34 CFR 303.437(b-c) Due Process Hearing timeline---DHS 90 contradicts the Part C regulations in the number of days (from 45 to 30) in which the lead agency must render a decision.

\* 34 CFR 303.431(b)(2) Mediator assignment---DHS 90 states that mediators can be chosen by the parties, whereas the Part C Regulations state that mediators must be randomly assigned.



DHS 103.04(7)(d)				X	42 CFR 435.603	Under federal modified adjusted gross income rules, an 18-year-old's eligibility is based on the tax filing and relationship status of the 18-year-old and his parents. In most cases, the 18-year-old must have his or her eligibility determined with his or her parents. The admin rule describes a less restrictive policy in which the 18-year-old may choose whether to have his or her eligibility determined with the parents or separately from them.	Strike this portion of the rule.
DHS 103.085(6)				X	ss. 49.471(4)(a)4.b.	The admin rule describes an obsolete policy in which current members may remain eligible at annual renewal as long as their income does not exceed 200% FPL. (At the time, the income limit at application was 185% FPL.) This is less restrictive than the current policy authorized in the citation, in which parents and caretakers are subject to an income limit at application and renewal of 100% FPL.	Strike this portion of the rule.
DHS 103.085(3)(b)2			X		42 CFR 457.10 and 42 CFR 457.570	States have authority under 42 CFR 457 to establish eligibility lock-out periods for non-payment of premiums, as long as they are no more than 90 days and as long as they can be remedied by payment of owed premiums. Under previous state policy, in which lock-out periods were longer than 3 months and could not be remedied by payment of owed premiums, we ended such lock-out periods if a parent or caretaker relative left the home. This policy was discontinued in 2014 but is still described in the admin rule.	Strike this portion of the rule.
DHS 103.085(1)(d)5				X		This is not an eligibility concern but an administrative issue: we have discontinued the practice of allowing advance payment of premiums	Strike this portion of the rule.

								because it is costly and administratively complex to manage refunds. In anticipation of implementing premium obligations for childless adults, we seek to remove this provision in the admin rule, as it would require us to allow advanced premium payments for that group.		104.01(3) 42 CFR Part 2 allows the member to determine who receives their records. The member is allowed to specify on a written consent form specifically who the records may be delivered to. The impacts of 42 CFR Part 2 need to be considered for this rule.
DHS 104					X			104.01	Duplicative, Superseded or Conflicting	
DHS 105					X			DHS 105.02	Duplicative, Superseded or Conflicting	105.02(5) The Covered Outpatient Drugs Final Rule (CMS-2345-FC) instructs state Medicaid agencies to perform a cost of dispensing survey.
DHS 105					X			DHS 105.22	Duplicative, Superseded or Conflicting	This section has been superseded by Wis. Stat. 49.45(30f)
DHS 105					X			DHS 105.23	Duplicative, Superseded or Conflicting	This section has been superseded by Wis. Stat. 49.45(30f)
DHS 107					X			DHS 107.03	Duplicative, Superseded or Conflicting	107.03(12) restricting consultations has been superseded by Stat. 49.45(29y) which authorizes

mental health consultations for students.	<p>107.06(4)(e)As a result of 2005 Wisconsin Act 25, the 2005-07 biennial budget, effective immediately, a second surgical opinion is no longer required by Wisconsin Medicaid.</p> <p>107.06 (4)(c) WI Act 59 established a mental health clinical consultation is a communication from a mental health for a BadgerCare Plus or Medicaid beneficiary, who is a student under 21 years of age with an established mental health diagnosis.</p> <p>Mental health clinical consultations are reimbursable services when provided by enrolled mental health providers currently allowed to render outpatient mental health services to any of the following:</p> <ul style="list-style-type: none"> <li>•Educator teams</li> <li>•Individual educators</li> <li>•School staff</li> </ul> <p>Mental health clinical consultations may be provided via telephone or face-to-face interviews.</p> <p>107.06(5)-Mental</p>
	<p>Duplicative, Superseded or Conflicting</p>
	<p>DHS 107.06</p>
	<p>X</p>
DHS 107	

								health clinical consultations not related to the member's diagnosis or treatment for mental illness are considered noncovered services.
DHS 107						DHS 107.10(4)(p)	Duplicative, Superseded or Conflicting	107.10(4)(p) Conflicts with federal law. Section 1557 of the Affordable Care Act prohibits discrimination based on gender identity. There are an estimated 1.4 million adults in the US that identify as transgender. It is more acceptable today for a person to identify as a different sex than what they were born as. Major medical associations in the US have described transition-related surgeries as "medically necessary" for both the physical and mental health of transgender people. More and more insurance plans and Medicare are covering these surgeries. As these surgeries become more frequent, the rule has become outdated by not allowing coverage for these types of

								drugs. Section 1557 of the Affordable Care Act prohibits discrimination based on gender identity. Recommendation is to delete this rule or revise the rule to allow coverage of drugs for transsexual surgeries or alteration of sexual anatomy or characteristics
DHS 107						X		WI Act 27 Laws of 1995 Section 3002m. changed the requirement. Under §49.45 (42) Wis. Stat. Statutes, PA for PCS is required after 50 hours of service have been provided in a calendar year. DHS 107.112(2)(a) needs to change to 50 hours per calendar year.
							DHS 107.112	Duplicative, Superseded or Conflicting
DHS 107								DHS 107.06(3)(b)1. is incorrect. Federal law prohibits the coverage of hysterectomies when the sole purpose is for sterilization.
							DHS 107.21	Duplicative, Superseded or Conflicting
DHS 107								107.24(2)(c) 1. Occupational therapy assistive or adaptive equipment. This is medical equipment used in a recipient's home to assist a disabled person to adapt to
							DHS 107.24	Duplicative, Superseded or Conflicting

the environment or achieve independence in performing daily personal functions. Examples are adaptive hygiene equipment, adaptive positioning equipment and adaptive eating utensils.								
107.24(2)(c)4. Other home health care durable medical equipment. This is medical equipment used in a recipient's home to increase the independence of a disabled person or modify certain disabling conditions. Examples are patient lifts, hospital beds and traction equipment.	Duplicative, Superseded or Conflicting							
107.24(2)(c)5. Oxygen therapy equipment. This is medical equipment used in a recipient's home for the administration of oxygen or medical formulas or to assist with respiratory functions. Examples are a nebulizer, a respirator and a liquid oxygen system.	Duplicative, Superseded or Conflicting							
107.24(2)(c)6. Physical therapy splinting or adaptive equipment. This is	Duplicative, Superseded or Conflicting							



								medical equipment used in a recipient's home to assist a disabled person to achieve independence in performing daily activities. Examples are splints and positioning equipment.
DHS 109				X			DHS 109.03	Duplicative, Superseded or Conflicting
								109.03(12) Incorrect payment information; may open the state up to lawsuits for monies owed.
DHS 109				X			DHS 109.51	Duplicative, Superseded or Conflicting
								109.51(3) 42 CFR Part 2 allows the member to determine who receives their records. The member is allowed to specify on a written consent form specifically who the records may be delivered to. The impacts of 42 CFR Part 2 need to be considered for this rule.
DHS 251.03(13)							DHS 251.03(13)	Per DMS JCRAR Report Findings
								Regarding tribal affairs. This provision is a definition. All provisions containing the defined term should be reviewed.



SIGNATURE – Administrator	Date Signed
Date Due to Office of Legal Counsel	Date Submitted