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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP002082, 2017AP000634

KATHLEEN PAPA,
PROFESSIONAL HOMECARE
PROVIDERS, INC.,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,

Defendant-Appellant.

ON APPEAL FROM FINAL ORDERS
OF THE WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE KATHRYN W. FOSTER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT WISCONSIN DEPARTMENT OF HEALTH SERVICES

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INTRODUCTION

Professional Homecare Providers, Inc., an organization of Medicaid provider nurses in independent practice, and its past president, Kathleen Papa (collectively "PHP"), filed a Wis. Stat. § 227.40(1) declaratory judgment action against the Wisconsin Department of Health Services (DHS). PHP claims a provision from DHS's Medicaid Provider Handbook about program requirements for covered service, called Topic #66, is an unpromulgated administrative "rule." PHP also alleges that when DHS's Office of Inspector General (OIG) applies Topic #66 to its Medicaid recovery efforts it exceeds its statutory authority to recover improper Medicaid payments from its member nurses. PHP obtained summary judgment from the Waukesha County Circuit Court, but that decision was reversed by the court of appeals. That court determined, correctly, that Topic #66 is not a "rule." It properly explained that Topic #66 does not have the "force of law," as is required to be a rule. Instead, Topic #66 simply collects several existing state statutes and administrative code provisions as guidance for staff and providers. This decision should be affirmed on this basis.

PHP attempts to shift its challenge from Topic #66 to an amorphous so-called "Perfection Policy" in DHS's Medicaid recovery efforts. While the Court should not entertain this challenge, it would fail for two reasons if the Court should choose to address it. First, such a claim is not ripe. PHP has pointed to nothing more than hypothesized facts that would only entangle this Court in an abstract disagreement about DHS's Medicaid recovery authority. As a result, a decision would neither resolve the issue nor guide the parties or the public in defining the scope of DHS's authority. Second, PHP's claim alleging the so-called "Perfection Policy" is an invalid "rule" or "guidance document" fails on the merits. Contrary to PHP's

complaints, the alleged policy is not a "rule." DHS acts within its authority in recovering improper Medicaid payments, for the benefit of state taxpayers and in furtherance of its obligation to the federal government in exchange for receipt of Medicaid dollars. And, therefore, PHP's argument that this policy constitutes enforcement or implementation of a standard, threshold, or requirement that is not explicitly required or permitted by statute or rule, in violation of Wis. Stat. § 227.10(2m), adds nothing to its Wis. Stat. § 227.40 claim.

Finally, because it reversed the circuit court's summary judgment decision in favor of PHP, the court of appeals vacated the circuit court's post-judgment motions for attorneys' fees and supplemental relief. While this Court need not reach these issues, for the sake of completeness only, DHS notes that the fees and supplemental orders were flawed. The fees order was not allowed because of sovereign immunity and the supplemental relief order exceeded the circuit court's authority when a case is on appeal.

ISSUES PRESENTED

1. Does a summary guidance from a section of DHS's Medicaid Provider Handbook, labeled as "Topic #66," constitute a "rule" subject to challenge in a Wis. Stat. § 227.40(1) declaratory judgment action?

   The circuit court answered yes.

   The Court of Appeals answered no.

   This Court should answer no.

2. Alternatively, even if PHP could bring a declaratory judgment action under Wis. Stat. § 227.40(1) challenging a so-called "Perfection Policy" as a rule or guidance document, is the action ripe, is the policy a

"rule," and thus can DHS recovery efforts constitute enforcement or implementation of a standard, requirement, or threshold that is not explicitly permitted or required by statute or rule?

The circuit court answered yes to the first two questions.

The Court of Appeals did not address the issues.

This Court need not address the issues, but if it does, it should answer no to all.

3. Although this Court need not reach the issues, does sovereign immunity bar an order that DHS pay PHP's attorneys' fees and costs in bringing a motion for post-judgment supplemental relief, and did the circuit court exceed its authority under Wis. Stat. § 808.075 when it granted supplemental relief to PHP after the court record was transmitted to the court of appeals?

The circuit court answered no to both questions.

The Court of Appeals did not address the issues.

This Court need not address the issues, but if it does, it should answer yes to both questions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for March 18, 2020 and publication of this Court's decision is warranted.

STATEMENT OF THE CASE

I. Relevant legal background.

This case involves Medicaid overpayments. "Medicaid is a cooperative federal-state program through which the

Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). "Medicaid is an exercise in so-called 'cooperative federalism,' whereby states voluntarily opt into the federal scheme and thereby bind themselves to abide by the rules and regulations imposed by the federal government in return for federal funding." *Gister v. Am. Family Mut. Ins. Co.*, 2012 WI 86, ¶ 14, 342 Wis. 2d 496, 818 N.W.2d 880. "[O]nce a state elects to participate [in Medicaid], it must abide by all federal requirements and standards as set forth in the Act." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 977 (7th Cir. 2012) (alteration in original).

"To qualify for federal assistance, a State must submit to the [federal government] and have approved a 'plan for medical assistance,' § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program." *Wilder*, 496 U.S. at 502 (citing 42 C.F.R. § 430.10 (1989)).

"The State of Wisconsin has joined the federal Medicaid system, and has consequently committed itself to following the federal law governing that system." *Gister*, 342 Wis. 2d 496, ¶ 14; Wis. Stat. § 49.45(1).[1] Therefore, the Legislature has directed and authorized DHS, as the state Medicaid agency, to comply with all federal Medicaid laws, including audit and recovery. *See* Wis. Stat. § 16.54(4) (state departments administering federal funds "shall . . . comply with the requirements of the act of congress making such appropriation and with the rules and regulations . . .

[1] Citations to statutes and administrative code provisions are to the current versions, unless otherwise noted.

prescribed"). "Absent a showing to the contrary, [this Court] presume[s] that Wisconsin follows the federal rules it has pledged to uphold." *Gister*, 342 Wis. 2d 496, ¶ 14 (citing *Rathie v. Ne. Wisconsin Tech. Inst.*, 142 Wis. 2d 685, 694, 419 N.W.2d 296 (Ct. App. 1987) (alteration in original) ("declin[ing] to render [a] federal [a]ct superfluous or put [a state] institution in the precarious position of choosing between violating [state law] . . . or losing presumably essential federal funding."). Consistent with that, state law authorizes DHS "to promulgate . . . rules as are consistent with its duties in administering [Medicaid]." Wis. Stat. § 49.45(10).

The Medicaid Integrity Program, 42 U.S.C. § 1396a(69), is administered by the Center for Medicare and Medicaid Services (CMS). Federal law requires the states to have a program to audit participating entities' records to ensure that proper payments are made under the Medicaid State Plan. 42 U.S.C. § 1396a(a)(42)(A). The states' Medicaid programs are subject to federal audits, as well. 42 U.S.C. § 1396a(a)(42)(A). Federal audits ensure that the states are recovering identified improper payments and refunding the federal share. 42 C.F.R. §§ 433.300–433.322. If the federal government, pursuant to an audit of Wisconsin's enforcement program, determines that the state is not, or has not been, adequately fulfilling its obligations, CMS can withhold federal funds if it finds that the state "fail[ed] to actually comply with a Federal requirement," such as enforcing record-keeping requirements "regardless of whether the plan itself complies with that requirement." 42 C.F.R. § 430.35(c).

In Wisconsin, DHS is charged with responsibilities relating to fiscal matters, eligibility for benefits, and general

supervision of the program.[2] Wis. Stat. § 49.45(2). It is mandated to cooperate with federal authorities to obtain the best financial reimbursement available to the state from federal funds. Wis. Stat. § 49.45(2)(a)1. and 7. DHS is required and authorized to set conditions of participation and reimbursement in contracts with providers, *see* Wis. Stat. § 49.45(2)(a)9., and is authorized to establish documentation requirements to verify provider claims for reimbursement, *see* Wis. Stat. § 49.45(3)(f). *See* 42 C.F.R. § 431.107(b). DHS is further authorized and required to audit and investigate, as necessary, in order to verify the provision of services, the appropriateness of provider claims, and the accuracy of provider claims. Wis. Stat. § 49.45(3)(g)1.

DHS is also mandated to recover improper Medicaid payments.[3] To carry out these federal requirements, a state statute requires DHS to generally "recover money improperly or erroneously paid or overpayments to a provider." Wis. Stat. § 49.45(2)(a)10.a. Another statute requires providers to "maintain records as required by the department for verification of providers claims for reimbursement," and allows DHS to "audit such records to verify actual provision of services and the appropriateness and accuracy of claims." Wis. Stat. § 49.45(3)(f)1. DHS is authorized to recover the value of payments that cannot be

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[2] For example, DHS is required to process 90% of provider claims within 30 days of the date of receipt of the Medicaid claim. 42 U.S.C. § 1396a(a)(37).

[3] Federal law requires states to identify and collect Medicaid overpayments and refund the federal share. 42 C.F.R. §§ 433.300–433.322.

verified through the record-keeping and audit procedure. Wis. Stat. § 49.45(3)(f)2.

DHS promulgated Wis. Admin. Code DHS § 106.02 to carry out its statutory authority to recover payments:

> [DHS] may refuse to pay claims and *may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records* or permit authorized department personnel to have access to records required under s. DHS 105.02 (6) or (7) and the relevant sections of chs. DHS 106 and 107 *for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services which are the subject of claims or for purposes of determining provider compliance with [Medicaid] requirements.*

Wis. Admin. Code DHS § 106.02(9)(g).

DHS publishes summaries of the Medicaid requirements through handbooks. Wis. Stat. § 49.45(2)(a)9.; Wis. Admin. Code DHS § 108.02(4). *See also* Wis. Admin. Code DHS §101.03(141). The Medicaid Provider Handbook, under "Covered and Noncovered Services: Covered Services and Requirements," contains "Topic #66," which reads in full:

> **Program Requirements**
>
> For a covered service to meet program requirements, the service must be provided by a qualified Medicaid-enrolled provider to an enrolled member. In addition, the service must meet all applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

(R. 10:2, 124,[4] P-App 036.)

II. Statement of facts.

DHS administers the Medicaid program in Wisconsin. (R. 1:5 ¶ 7; 3:2 ¶ 7.) Medicaid providers enter into a contract with DHS to provide healthcare services to eligible Medicaid enrollees and to be paid for those services. (R. 1:5 ¶ 8; 3:2 ¶ 8.) DHS may audit Medicaid providers up to five years after payment was made, to verify actual provision of Medicaid services and the appropriateness and accuracy of claims. (R. 1:6 ¶ 12; 3:2 ¶ 12.) DHS's Office of Inspector General (OIG) is responsible for conducting audits of Medicaid providers. (R. 1:6 ¶ 13; 3:2 ¶ 13.) Some PHP members have been the subject of OIG audits. (R. 1:6 ¶ 14; 3:2 ¶ 14.) During audits of private duty nurses, OIG auditors have alleged that services were "non-covered," and therefore subject to recoupment, due to alleged inadequate documentation or other shortcomings. OIG has at times characterized all the compensation a nurse received for services she provided to Medicaid patients for days, weeks, month, or even years as "overpayments" due to non-compliance. (R. 9:9.)

III. Procedural history.

A. Initial circuit court proceedings.

On December 14, 2015, PHP brought a Wis. Stat. § 227.40(1) declaratory judgment action alleging Topic #66 is an unpromulgated rule. (R. 1, P-App. 025–037.)

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[4] "R." refers to the record of Appeal No. 2017AP000634. DHS cites the blue docket numbers on the pages of this appellate record.

The complaint challenged DHS's alleged "'statement of general policy' that DHS may recoup payment from Medicaid providers for covered services that have been provided, and for which Medicaid has reimbursed, if a post-payment audit finds that the services fail to meet all applicable program requirements." (R. 1:6 ¶ 15, P-App. 028.) PHP identified that "statement of general policy" by attaching a copy of "Topic #66" to its complaint, which contains the language "meet all applicable program requirements." (R. 1:6 ¶ 15, Ex. A, P-App. 036.[5])

PHP filed a motion for summary judgment and supporting materials. (R. 8–19.) The court then held oral argument on PHP's motion. (R. 64.)

The circuit court granted PHP's motion for summary judgment in an oral ruling. The court held that the case presented a justiciable controversy; declared that Topic #66 is a "rule" not properly promulgated under Wis. Stat. § 227.10(3); and declared that DHS exceeds its authority to recover Medicaid payments. (R. 63, Tr. 26:15–25, Aug. 12, 2016; *see also* R. 35:4, P-App. 017.)

Then, through a September 27, 2016, written order, the circuit court ordered three broad remedies (hereafter "Original Order"). (R. 35, P-App. 014–020.)

First, it declared that DHS's authority under Wis. Stat. § 49.45(2)(a)10. and (3)(f) to recover payments from Medicaid providers is limited to claims for which either DHS is unable to verify from a provider's records that a

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[5] PHP realized it had attached an incorrect version of Topic #66 to its complaint and thus submitted the version at R. 10:2, 124, P-App 036, at summary judgment. This makes no difference because the language of the two versions is identical.

service was actually provided or for which an amount claimed was inaccurate or inappropriate for the service that was provided. (R. 35:6, P-App. 019.)

Second, the court declared that DHS's policy of recovering payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. § 49.45(3)(f), imposes a "Perfection Rule" that exceeds DHS's authority. It held that this so-called recovery policy, including the standards set forth in Topic #66, was a rule not properly promulgated under Wis. Stat. § 227.10(1). (R. 35:6, P-App. 019.)

Third, the court enjoined DHS from applying or enforcing the so-called the "Perfection Rule." The court ordered that DHS may not recover payments made to Medicaid-certified providers for medically-necessary, statutorily-covered benefits based solely on the providers' noncompliance with Medicaid policies where the documentation verifies that the services were provided. (R. 35:6–7, P-App. 019–20.)

DHS filed its notice of appeal on October 20, 2016, which the court of appeals docketed as No. 2016AP2082. (R. 38.) On January 9, 2017, the circuit court record was filed with the court of appeals.

B. Post-judgment proceedings in the circuit court.

A few days later, on January 12, 2017, PHP returned to circuit court and filed a motion for supplemental relief, or in the alternative, for contempt sanctions, against DHS. (R. 43–45.) In an oral ruling on February 14, 2017, the circuit court granted PHP's motion for supplemental relief, but did not issue a finding of contempt. (R. 65 Tr. 41:16–23, Feb. 14, 2017.)

In its subsequent written order filed March 24, 2017 (hereafter "Order for Supplemental Relief"), the circuit court granted PHP's motion "[t]o restate and give effect to the declaratory judgment and injunction previously entered by [the] Court." (R. 55:1,[6] P-App. 021.) The Order for Supplemental Relief broadly enjoined DHS from issuing a "notice of intent to recover Medicaid payments" from *any* Medicaid provider or proceeding with *any* agency action, including any administrative proceeding currently underway in which [DHS] "seeks to recoup Medicaid payments from a Medicaid provider, if the provider's records verify that the services were provided and the provider was paid an appropriate amount for such services, notwithstanding that an audit identified other errors or noncompliance with Department policies *or rules*." (R. 55:1–2 ¶¶ 2–3 (emphasis added), P-App. 022.) This order also directed DHS to pay PHS's attorneys' fees and costs incurred in bringing the motion. (R. 55:2 ¶ 3, P-App. 022.)

The circuit court also entered a separate "Order on Costs and Attorneys' Fees" which specifically directed DHS to pay PHP $25,284.50, representing its costs and attorneys' fees associated with bringing the motion for supplemental relief, within 30 days. (R. 54.)[7] DHS later paid the costs and fees.

On April 5, 2017, DHS filed a notice of appeal as to these two post-judgment March 24, 2017 orders. (R. 59.) The court of appeals docketed appeal No. 2017AP0634.

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[6] R. 55 and R. 56 appear to be duplicates of the March 24, 2017 order for supplemental relief. DHS will cite only R. 55.

[7] This order was not part of Appellants' appendix, so Respondent has included it in a supplemental appendix.

C. Proceedings on appeal.

On April 25, 2017, the court of appeals consolidated appeal nos. 2016AP2082 and 2017AP0634.

After original, substitute, and supplemental briefing, the court of appeals issued its decision. *Papa v. DHS*, 2019 WI App 48, 388 Wis. 2d 474, 934 N.W.2d 568 (unpublished). First, the court explained the scope of PHP's action: "This is a challenge to a specific statement alleged to constitute an unlawful rule—Topic #66." *Id.* ¶ 14. Second, looking at this handbook provision, it opined that "Topic #66 reads like a summary, not a legal directive." *Id.* ¶ 16. The court found Topic #66 as more informational than setting "law-like pronouncements," stating that "[b]y its terms, Topic #66 directs the reader to other sources of law and does not read like a directive having the force of law." *Id.* ¶ 16–17. It explained that Topic #66 merely "synthesizes and summarizes the existing law, whose authority is found in other statues or administrative rules." *Id.* ¶ 17. The court held that Topic #66 is "not intended to have the effect of law" and therefore not a "rule" within the meaning of Wis. Stat. § 227.01(13). *Id.* ¶ 16. The court of appeals also pointed out, "nowhere has PHP shown or demonstrated that Topic #66 itself—rather than the myriad of statutes and rules underlying the summary—is being used by DHS to interpret or guide enforcement of any documentation requirements." *Id.* ¶ 17 & n.12.

The court of appeals unanimously held that Topic #66 is not a "rule" requiring promulgation. *Id.* ¶¶ 2, 17–19 (majority), ¶ 20 (dissent). It reversed the circuit court's summary judgment decision, remanded the case to the circuit court for judgment in favor of DHS, and vacated all other orders. *Id.* ¶ 17.

PHP filed a petition for review on August 30, 2019, which this Court granted on December 10, 2019.

STANDARDS OF REVIEW

This Court reviews a circuit court's decision on summary judgment independently. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶ 25 n.11, 345 Wis. 2d 122, 824 N.W.2d 457. "[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," summary judgment must be rendered. Wis. Stat. § 802.08(2). "If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor." Wis. Stat. § 802.08(6).

Whether an agency's action constitutes a rule under Wis. Stat. ch. 227 is reviewed de novo. *Homeward Bound Servs., Inc. v. Office of the Ins. Comm'r*, 2006 WI App 208, ¶ 27, 296 Wis. 2d 481, 724 N.W.2d 380.

"Determining whether a suit is . . . ripe is a legal inquiry separate and distinct from determining whether to grant or deny declaratory relief on the merits." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 32 n.5, 309 Wis. 2d 365, 749 N.W.2d 211. This Court reviews a circuit court's determination that a case is ripe de novo. *Id.* ¶ 32.

ARGUMENT

I. PHP challenges only Topic #66 as an invalid "rule," and Topic #66 is not a "rule."

This case is about PHP's declaratory judgment challenge under Wis. Stat. § 227.40(1) to Topic #66, a provision in the Medicaid Provider Handbook. PHP's complaint alleged that Topic #66 is an unpromulgated administrative "rule" that exceeds the agency's authority to recover improper Medicaid payments from nursing service providers. The text of Wis. Stat. § 227.40 and PHP's complaint make that clear. This case is *not* a challenge to a so-called "Perfection Policy"—"PHP's catchy phrase for DHS's recoupment policies writ large." *Papa*, 388 Wis. 2d 474, ¶ 14. And it is *not* a challenge to Topic #66 as a "guidance document."

The court of appeals succinctly and correctly addressed the issue presented. Topic #66 is not a "rule," at all. It has no independent force of law but rather is a simple summary statement of state statutes and administrative code provisions. The court of appeals decision should be affirmed.

A. PHP challenges only Topic #66 as an invalid "rule" and nothing more.

PHP claims that this case is a section 227.40 challenge to a so-called DHS "Perfection Policy" as an invalid rule or, alternatively, guidance document. (*See, generally*, PHP's Br.) As the court of appeals realized, however, that is incorrect.

A petitioner in a section 227.40 rule challenge must clearly state the type of challenge being made, such as whether the alleged rule exceeds the agency's statutory authority or was not properly promulgated. *Liberty Homes, Inc. v. Dep't of Industry, Labor & Human Relations*, 136 Wis. 2d 368, 377, 401 N.W.2d 805 (1987). Further, the

Legislature requires the plaintiff seeking the declaratory judgment to identify "*the* rule or guidance document" it challenges and to assert its alleged invalidity in its complaint. Wis. Stat. § 227.40(1) and (3)(ag). It also must give the Legislature notice of the rule challenge action. A copy of the plaintiff's pleading must be served upon its joint committee for review of administrative rules. Wis. Stat. § 227.40(5).

Here, applying this law to PHP's pleading results in seeing PHP's action for what it is—a section 227.40(1) declaratory judgment challenge to Topic #66 as an invalid "rule," and nothing more. PHP's complaint alleges that Topic #66 is an unpromulgated rule that exceeds DHS's statutory authority to recover Medicaid payments.[8] (R. 1:9–10, ¶¶ 34–49, P-App. 031–33.) PHP's complaint does *not* challenge or even mention a "Perfection Policy." Nor does it allege that either a "Perfection Policy" or Topic #66 is a guidance document. Rather, PHP expressly alleges that it is "challenging the validity of [DHS's] statement of general policy regarding Medicaid reimbursement" and it "[a]ttached . . as Exhibit A . . . a true and correct copy of DHS's 'statement of general policy.'" (R. 1:3, 6 ¶ 15, 8 ¶¶ 26–28, 30, 9 ¶¶ 31–33, 35–36, 10 ¶¶ 41, 45, 13 ¶ 2, P-App. 025, 028.) That exhibit is an excerpt from the Medicaid Provider Handbook entitled "Topic #66." (R. 1:14, P-App. 036.) And PHP served a copy of this complaint and exhibit—nothing

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[8] Despite PHP's references in its brief to the taking of money from private citizens (PHP's Br. 3, 17), its constitutional takings claim was rejected by the circuit court (R. 35:6, P-App. 019; PHP's Br. 12) and then abandoned on appeal, *Papa v. Wisconsin Dep't of Health Services*, 2019 WI App 48, ¶ ¶ 7 n.7, 388 Wis. 2d 474, 934 N.W.2d 568 (unpublished).

else—upon the Legislature's joint committee on legislative organization, as required by Wis. Stat. § 227.40(5). (R. 2, 6.)

PHP, therefore, challenged only Topic #66 as an unpromulgated "rule" that exceeds the agency's authority to recover Medicaid payments, and noticed only this specific rule challenge to the Legislature. PHP did not bring a valid challenge to any alleged "Perfection Policy" as an invalid rule or guidance document.

PHP's more recent argument that a so-called "Perfection Policy" is an invalid "guidance document" must be rejected for three additional reasons. First, an unwritten policy cannot possibly be a "guidance document." A "guidance document" is a formal or official "*document or communication* issued by an agency, including a manual, handbook, directive, or informational bulletin." Wis. Stat. § 227.01(3m)(a). As described by PHP, a so-called "Perfection Policy" is not a "document or communication" from any "manual, handbook, directive, or informational bulletin," unlike Topic #66, which is an excerpt from a published handbook.[9]

Second, while it is true that the Legislature amended Wis. Stat. § 227.40(1) to permit a person to challenge the validity of a "guidance document," in 2017 Wisconsin Act 369 §§ 31 and 65, this change occurred after PHP had commenced its "rule" challenge action. DHS agrees that Act 369's amended definition of a "rule" applies retroactively to PHP's action. PHP, however, offers no legal authority that would allow its "rule" challenge action to expand into a "guidance document" claim while on appeal. Despite its

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[9] DHS concedes that Topic #66 is a guidance document because it has identified and adopted the handbook as a guidance document.

argument for retroactive application of Act 369 (PHP's Br. 33–36), PHP does not explain how any of the case law cited—but not actually discussed—allows this Court to entertain *an entirely new claim* on appeal that PHP never plead.

Finally, even if PHP could challenge a so-called "Perfection Policy" as a guidance document, it would fail for the reasons explained more fully below. At bottom, PHP's guidance document argument is really just a reiteration of its rule argument: both assert that DHS lacks authority to do what Topic #66 summarizes. Putting that argument in terms of a "guidance document" adds nothing. *See infra* Section ___.

The court of appeals rightly rejected PHP's attempt to repackage and expand its Wis. Stat. § 227.40(1) declaratory judgment rule challenge. Instead, it confirmed, "This is a challenge to a specific statement alleged to constitute an unlawful rule—Topic #66." *Papa*, 388 Wis. 2d 474, ¶ 14. This Court also should reject PHP's effort to proceed with its amorphous "attack on DHS recoupment policies generally," *id.* ¶ 12, unmoored from the claim it pled. This case is about PHP's challenge to Topic #66 as an invalid "rule," nothing more.

B. Topic #66 is not a "rule" at all.

The court of appeals unanimously held that Topic #66 is not a "rule." This Court should affirm.

Wisconsin Stat. § 227.01 defines a "rule":

> "Rule" means a regulation, standard, statement of policy or general order of general application *that has the force of law* and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.

Wis. Stat. § 227.01(13).[10] *See also Cholvin v. DHFS*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118.

DHS "rules" exist in the administrative code, but DHS also issues summary guidance that does not fall within this definition and, therefore, does not need to be promulgated. In *Tannler v. Wis. Department of Health & Social Services,* 211 Wis. 2d 179, 564 N.W.2d 735 (1997), this Court distinguished "rules" that are subject to the administrative rulemaking requirements from—as relevant here—Medicaid policies and guidance. *Id.* at 187–88. This Court held that "[DHS] may use policies and guidelines to assist in the implementation of administrative rules provided they are consistent with state and federal legislation governing [Medicaid]. As long as the document simply recites policies and guidelines, without attempting to establish rules or regulations, use of the document is permissible." *Id.* (citing Wis. Stat. § 49.45(34)).

As the court of appeals correctly explained, to be considered a "rule," a statement of policy must have the "force of law." *Papa*, 388 Wis. 2d 474, ¶ 15 (citing Wis. Stat. § 227.01(13).) The language of a provision will usually – determine whether it has the force of law. "Materials developed by an agency as a reference aid for its staff that are 'couched . . . in terms of advice and guidelines rather than setting forth law-like pronouncements' are not a 'rule' within the meaning of Wis. Stat. § 227.01(13) because they are not intended to have the effect of law." *Cty. of Dane v.*

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[10] The definition of "rule" in PHP's brief is the former definition, which used the phrase "effect of law," rather than the current phrase "force of law." (PHP's Br. 20.)

Winsand, 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885.

Like the Medicaid handbook provision challenged in *Tannler*, Topic #66 "simply recites policies and guidelines, without attempting to establish rules or regulations." 211 Wis. 2d at 187. Topic #66 reads in full:

> **Program Requirements**
>
> For a covered service to meet program requirements, the service must be provided by a qualified Medicaid-enrolled provider to an enrolled member. In addition, the service must meet all applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

(R. 10:2, 124.) Because the text of this handbook topic does not attempt to establish rules or regulations, but rather simply refers to other requirements, *Tannler* controls the outcome here.

The following chart makes clear that DHS's guidance simply recites Medicaid law. The left column tracks the language of Topic #66 and the middle column cites the statutes and promulgated rules in support. For added support, the third column cites federal law:

Topic #66 language	State statutory and administrative code provisions	Federal laws
For a covered service to meet program requirements,	DHS § 106.02: "Providers shall comply with the following general conditions for participation as providers . . . ." DHS § 107.02(2) and (2)(a) state that services that fail to meet program requirements or state or federal statutes, rules and regulations are not reimbursable by Medicaid.	42 U.S.C. § 1396a; 42 C.F.R. § 430.0; 42 C.F.R. Part 440 Subpart A; 42 C.F.R. Part 440 Subpart B.
the service must be provided by a qualified Medicaid-enrolled provider	DHS § 106.02(1): "A provider shall be certified."	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 455.410; 455.412; 447.45(f).
to an enrolled member.	DHS § 106.02(2): reimbursement for covered services only. DHS § 106.02(3): recipient of services was eligible to receive Medicaid benefits.	42 U.S.C. § 1396a(a)(19); 42 C.F.R. 447.45(f).
In addition, the service must meet all applicable program requirements	DHS § 106.02(4): shall be reimbursed only if the provider complies with applicable state and federal procedural requirements.	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 456.1–.6; 431.960 (c).
including, but not limited to, medical necessity,	DHS § 106.02(5): shall be reimbursed only for services that are appropriate and medically necessary for the condition of the recipient.	42 C.F.R. § 440.230.
prior authorization,	DHS § 107.03(9): any service requiring prior authorization (PA) for	42 C.F.R. § 440.230.

	which PA is denied or for which PA was not obtained prior to the provision of the service is not a covered service for Medicaid. DHS § 107.12(2)(a): prior authorization is required for all private duty nursing services.	
claims submission,	DHS § 106.03(2)(b): claims shall be submitted in accordance with the claims submission requirements. DHS § 107.02(2)(h): services that fail to meet timely submission of claims requirements are not Medicaid reimbursable.	42 U.S.C. § 1396a(a)(37); 42 C.F.R. §§ 447.45(d)(1); 455.18.
prescription	Wis. Stat. § 49.46(2)(b)6.g.: nursing services require a physician's prescription to be Medicaid covered. DHS § 107.12(1)(c): private duty nursing services shall be provided only when prescribed by a physician.	42 C.F.R. § 440.80.
and documentation requirements.	Wis. Stat. § 49.45(3)(f). DHS § 107.02(2)(e) and (f): services for which records are not kept or other documentation failure are not Medicaid reimbursable. DHS § 107.12(4)(d) private duty nursing services that were provided but not documented are not covered services.	42 U.S.C. § 1396a(a)(27).

Every phrase of Topic #66 is explicitly grounded in Wisconsin statutes and administrative code provisions—none of which PHP challenges here.[11] Contrary to PHP's

[11] Indeed, as noted above, to even begin to bring such a challenge to existing rules, as PHP implies (*see* PHP Br. 51), a party must specifically plead it and then provide the required statutory notices. *See supra* Section I.A. That had not happened here.

assertions, the table is not the cobbling together of statutes and regulations to give support to DHS's supposed power to recoup using Topic #66. Instead, the table is simply an illustration that DHS has legal foundation to state the obvious—that all Medicaid services must meet all applicable program requirements. Indeed, Topic #66 does not even contain the word "recovery" or "recoupment" at all.

Topic #66 states that a covered service must meet all applicable program requirements, and then gives some examples of those applicable program requirements. As the court of appeals explained, "[t]his simply begs the question of what the 'applicable' requirements actually are—the very type of thing you would see in a summary." *Papa*, 388 Wis. 2d 474, ¶ 17. Topic #66 does not set forth law-like pronouncements, but rather it merely "synthesizes and summarizes the existing law." *Id.* "By its terms, Topic #66 directs the reader to other sources of law and does not read like a directive having the force of law." *Id.* Accordingly, the language of Topic #66 does *not establish* a policy; it *confirms* it. *Tannler,* 211 Wis. 2d at 187–89. And there would be no point in promulgating Topic #66 when it merely recites rules already established.

PHP claims that the court of appeals was wrong in holding that Topic #66 merely synthesizes and summarizes existing law. In support, PHP asserts that the definition of "covered service" in Topic #66 does not match the definition of "covered service" in Wis. Admin. Code DHS § 101.03(35). (PHP's Br. 27–28.) This argument fails from the outset because Topic #66 does not define "covered service." Further, Topic #66 is within a section of the handbook entitled "Covered *and Noncovered Services*: Covered Services and Requirements." (R. 10:124 (emphasis added).) The administrative code defines "non-covered service" as "a service . . . for which [Medicaid] reimbursement is not

available, including a service for which prior authorization has been denied, a service listed as non-covered in ch. DHS 107, or a service considered to be medically unnecessary, unreasonable or inappropriate." Wis. Admin. Code DHS § 101.03(103). Thus, it is unremarkable that Topic #66 would include references to the contents of "non-covered service" and not match the definition of only "covered service."

Further, courts look to a disputed provision's use to determine whether the state agency intends for it to have the force of law. *See Barry Labs., Inc. v. Wis. State Bd. of Pharmacy*, 26 Wis. 2d 505, 516, 132 N.W.2d 833 (1965). As the court of appeals correctly explained, "nowhere has PHP shown or demonstrated that Topic #66 itself—rather than the myriad of statutes and rules underlying the summary—is being used by DHS to interpret or guide enforcement of any documentation requirements." *Papa,* 338 Wis. 2d 474.

Indeed, PHP's own evidence reveals no DHS reliance on Topic #66. On summary judgment, nurses Unke, Steger, Goss, and Rueda filed affidavits stating that they provide services to Medicaid patients and they were subject to audits and post-audits. OIG sought to recoup Medicaid payments based on "alleged noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy, specifically for non-correlation between the medication record, the record of treatment and the nurse's clinical notes." (R. 13 ¶¶ 1–2, 5–7, 14 ¶¶ 1–2, 4–7; 15 ¶¶ 1–2, 4–8; 17 ¶¶ 1–2, 5–6.) However, none of these nurses alleged that DHS used or referenced Topic #66 in seeking recoupment of Medicaid payments. Nor did these nurses attach any documentation to their affidavits showing OIG's recoupment demand or the bases for it. Nurse Zuhse-Green also testified that she was subject to an OIG audit, but did not state that DHS used Topic #66

as a basis, either. (R. 16.) Finally, neither the current nor past president of PHP (i.e., Kathleen Papa) testified that she had been subject to OIG audits, let alone any pursuant to Topic #66. (R. 11–12.)

This lack of proof that DHS actually uses Topic #66 as a ground for its Medicaid recovery efforts confirms that DHS does not intend Topic #66 to have "the force of law." It does not and, therefore, Topic #66 is not a "rule."

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As the party bringing a rule challenge, PHP bears the burden of proof. *Wis. Realtors Ass'n v. Pub. Serv. Comm'n of Wis.*, 2015 WI 63, ¶¶ 64–67, 363 Wis. 2d 430, 867 N.W.2d 364 (citing *Loeb v. Bd. of Regents of Univ. of Wis.*, 29 Wis. 2d 159, 164, 138 N.W.2d 227 (1965)). PHP has not met its burden in showing that Topic #66 is a "rule" requiring promulgation. Because a § 227.40(1) challenge determines the validity of a rule, this Court should affirm the court of appeals decision on this basis alone.

II. Even if PHP could challenge a so-called "Perfection Policy" in this case, that claim is not ripe, the so-called "Perfection Policy" is not a "rule," and PHP has no valid Wis. Stat. § 227.10(2m) argument.

Notwithstanding that PHP only brought a section 227.40(1) declaratory judgment action challenging *Topic #66*, it nonetheless attempts to challenge a so-called "Perfection Policy" as an invalid rule or guidance document. PHP asserts that this so-called policy is unpromulgated and also creates a standard, requirement, or threshold that exceed DHS's statutory and regulatory authority to recover Medicaid payments in violation of Wis. Stat. § 227.10(2m). (PHP's Br. 39–55.) These arguments fail for two independent reasons. First, PHP's challenge is not ripe for adjudication.

The lack of concrete facts would merely result in a decision about an abstract disagreement that would provide no benefit to the parties or the public.[12] Second, even assuming PHP's challenge is ripe, a so-called "Perfection Policy" is not a "rule" anyway. PHP does not point to any standard that DHS has been implementing as a "Perfection Policy," and certainly not one having the force of law. Thus, PHP has no valid Wis. Stat. § 227.10(2m) argument.

A. PHP's challenge to a so-called "Perfection Policy" is not ripe.

To reach the merits of a case, a court must be presented with a justiciable controversy. *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). A controversy is justiciable when four requirements are met, *see id.*, but only one is relevant here—ripeness. Ripeness "requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Id.* The facts should not be contingent or uncertain. *Id.* at 695. The ripeness requirement "guarantees that declaratory judgment is not used as a procedural tool for the adjudication of hypothetical issues." *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 72, 255 Wis. 2d 447, 649 N.W.2d 626.

This Court has found cases not ripe for adjudication in analogous scenarios under the declaratory judgment statute, Wis. Stat. § 806.04. In *Miller Brands-Milwaukee*, for example, this Court held that the declaratory judgment

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[12] The court of appeals noted that DHS "made a credible argument that this controversy was not justiciable," but chose to resolve the case by holding that Topic #66 was not a rule. *Papa*, 388 Wis. 2d 474, ¶ 18 n.14.

action should have been dismissed as not ripe because it was based on hypothetical facts. 162 Wis. 2d at 688, 695. There, the plaintiff filed a complaint and subsequent affidavit that mirrored the complaint. *Id.* at 690. The defendant state agency asserted that the facts were insufficient to permit a declaratory judgment. *Id.* This Court agreed, stating that "the facts of this case are too shifting and nebulous for the invocation of the remedy of declaratory judgment." *Id.* at 697.

That is the case here. PHP asks this Court to declare a hypothetical "Perfection Policy" a rule and adjudicate the scope of DHS's Medicaid recovery authority based on general allegations in its complaint coupled with unspecific testimony in affidavits. PHP's "Statement of the Facts" in its brief reveals this lack of sufficiently developed facts. If this Court were to reach the merits, the Court would be entangling itself in an "abstract disagreement." *Id.* at 694.

PHP's complaint generally alleges that "OIG auditors have alleged that services provided by Plaintiff PHP's members were 'non-covered services' due to alleged documentation shortcomings, resulting in 'overpayments' that, at times, constitute everything the PHP member was paid for weeks, months, or even years at a time." (R. 1:7–8 ¶ 24, P-App. 029–30.) The complaint further alleges that "OIG auditors have sought to recoup funds from Medicaid-certified nurses because the nurse provided extra care, above and beyond what was on the Plan of Care." (R. 1:8 ¶ 27, P-App. 030.) It also alleges that "OIG auditors have claimed that Medicaid-certified nurses must pay back their earnings for entire shifts of work because a physician did not timely sign and return a written order to the nurse, after the nurse relied on a verbal order to administer necessary healthcare to a patient." (R. 1:8 ¶ 28, P-App. 030.)

PHP's summary judgment filings did not expand on these vague, general allegations. Rather, they reiterated the same ambiguities. PHP cites affidavits of its member nurses in arguing that DHS recovers payments for alleged "imperfections" in their Medicaid claims. (PHP's Br. 23.) But PHP fails to articulate specifics. On the contrary, PHP merely makes a general cite to the appellate record with "R.11 to R.19." (PHP's Br. 24, 29.) This Court need not make PHP's arguments for it. *Am. Family Mut. Ins. Co. v. Cintas Corp. No. 2*, 2018 WI 81, ¶ 17, 383 Wis. 2d 63, 914 N.W.2d 76; *Clean Wis., Inc. v. Pub. Serv. Comm'n of Wis.*, 2005 WI 93, ¶ 180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.").

Nonetheless, even if PHP discussed the affidavits, it would not matter because they wholly lack substance. No nurse testified in any detail about any alleged "documentation shortcomings;" no nurse testified in detail about the matter regarding the lack of physician's written order for nursing services; no nurse testified in detail about the specifics of the nursing services provided beyond a patient's Plan of Care; and no nurse testified that a DHS decision had been rendered to recoup any payments. And because the nurses did not submit any exhibits, there are no documents showing their Medicaid claims and no documents showing any specific OIG recovery demands.[13]

Further, PHP cites a legal brief filed by DHS legal counsel. (PHP's Br. 23–24 (citing R. 10:130–31).) But this brief cannot be evidence of a so-called "Perfection Policy."

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[13] Absent exceptions, DHS must provide specific written notice to the provider before it may recover any improper payments. Wis. Admin. Code DHS § 108.02(9)(b) (notice) and (c) (exceptions).

"[I]t is a black letter principle that a lawyer's argument is not evidence." *State v. Eugenio*, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997), *aff'd,* 219 Wis. 2d 391, 579 N.W.2d 642 (1998). And the same reasoning applies to the now six-year old DHS decision from a contested case of a different nurse that PHP cites. (PHP's Br. 23–24 (citing R. 10:136–37.) Also, the Legislature has already decided that a decision in a contested case is not a "rule." *See* Wis. Stat. § 227.01(13)(b) ("'Rule' does not include, and s. 227.10 does not apply to, any action or inaction of an agency . . . that . . [is] a decision or order in a contested case.").

Nonetheless, the brief PHP cites is from an administrative agency hearing concerning a nurse, Nidra Moore. (R. 10:125–33). PHP claims that OIG sought to recover Medicaid payments for Moore's failure to countersign and date a patient's Plan of Care. (PHP Br. 9.) But PHP submitted no other documents from the *Moore* matter that would document OIG's approach.

PHP next cites the affidavit of nurse Zuhse-Green, stating that she was subject to an OIG audit and OIG later sought recoupment for Medicaid payments. But Zuhse-Green testified that OIG actually *reversed* its initial audit findings. (R. 16 ¶¶ 1–2, 4, 7–8, 15.) DHS confirmed this by submitting DHS staff testimony that Zuhse-Green's affidavit was not the complete story. DHS explained that OIG's initial recovery demand occurred because of incomplete documentation by Zuhse-Greene (including a lack of mandatory prescription by a physician) but that, in the end, no recoupment was sought. (R. 24:2–3 ¶¶ 7(d)–(f), 8.) So, there was never any post-audit demand for recoupment by DHS, at all. PHP has provided no concrete evidence of DHS demanding "perfection" in a provider's documentation.

Without more evidence showing the bases upon which DHS has been recovering Medicaid overpayments, the case

presents only hypothetical facts, which this Court holds are insufficient to fulfill the ripeness requirement. A decision here would entangle this Court in an "abstract disagreement[]" as to the scope of DHS's recovery authority. *Miller Brands-Milwaukee*, 162 Wis. 2d at 694. Such a decision on the scope of DHS's recovery authority will be too vague to provide any real guidance to DHS, PHP, and other home care nursing Medicaid providers.[14]

While courts cannot decide abstract disagreements, PHP and other affected parties have established ways to raise controversies in the courts, when actual concrete controversies arise. Parties may obtain court review of actual agency decisions through ch. 227 judicial review proceedings.[15] Indeed, during the course of this litigation, the court of appeals issued one relevant published decision addressing the scope of DHS's recoupment authority: *Newcap, Inc. v. DHS*, 2018 WI App 40, 383 Wis. 2d 515, 916 N.W.2d 173. This decision, discussed more below, provides an example of how, with sufficient facts obtained through a contested case, a court can properly draw the lines of DHS's

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[14] For example, after the circuit court issued a general declaration on the subject, PHP haled DHS back into court alleging DHS was continuing with its so-called "Perfection Policy" in subsequent administrative agency proceedings. (R. 43; 44.) A decision based on the hypothetical facts here would only lead to more such litigation.

[15] For example, a ruling here as to the specifics on Nidra Moore's matter would run headlong into this Court's decision in *Kosmatka v. Department of Natural Resources*, 77 Wis. 2d 558, 565, 253 N.W.2d 887 (1977), which held that awarding a declaratory judgment in favor of a plaintiff who participates in administrative agency proceedings improperly bypasses review of an agency decision under ch. 227.

recovery authority. In that case, the court held that DHS did not have authority to recover Medicaid payments for the provider's failure to maintain prescription drug invoices and its failure to submit claims with missing or incorrect national drug codes. *Newcap*, 383 Wis. 2d 515, ¶¶ 24–43. *See infra* Sec. II.B.2. In contrast, a decision on the hypothetical and undefined "Perfection Policy" would not provide guidance to the parties and the general public.

Accordingly, this Court can dispose of PHP's section 227.40(1) challenge to a so-called "Perfection Policy" because it is not ripe.

B. In addition, DHS's so-called "Perfection Policy" does not constitute a "rule" and thus DHS does not violate Wis. Stat. § 227.10(2m).

In addition to not being ripe, PHP's "Perfection Policy" challenge under section 227.40 would fail on the merits. PHP argues that the unpromulgated policy violates Wis. Stat. § 227.10(2m) because it enforces or implements a standard, requirement, or threshold that is not explicitly required or permitted by statute or rule. (PHP's Br. 39–56.) This argument is unpersuasive. To the extent this Court can decide the issue, the proper conclusion is that the so-called "Perfection Policy" is not a "rule" in the first place. PHP points to no standard at all. Therefore, PHP's Wis. Stat. § 227.10(2m) fails.

1. The statutes and regulations.

Wisconsin Stat. § 49.45(3)(f) reads in pertinent part:

> 1. Providers of services under this section shall maintain records as required by the department for verification of provider claims for reimbursement. The department may audit such records to verify

> actual provision of services *and the appropriateness and accuracy of claims.*
>
> 2. The department may deny any provider claim for reimbursement *which cannot be verified under subd. 1. or may recover the value of any payment made to a provider which cannot be so verified.*

Wis. Stat. § 49.45(3)(f)1.–2.

The statute requires Medicaid providers to "maintain records as required by [DHS] for verification of provider claims for reimbursement." Wis. Stat. § 49.45(3)(f)1. OIG has authority to audit these records "to verify actual provision of services and the appropriateness and accuracy of the claims." *Id.* Then, only after reasonable notice and opportunity for hearing, *see* Wis. Stat. § 49.45(2)(a)10, may DHS "recover the value of any payment made to a provider which cannot be so verified," Wis. Stat. § 49.45(3)(f)2.

In addition to the statute, DHS's recoupment authority also is established by administrative code provisions that have the force of law: Wis. Admin. Code DHS §§ 108.02(9)(a) and 106.02(9)(g). Notably, PHP does not challenge these rule relating to recordkeeping. These code provisions provide a further basis for DHS's recovery actions.

Wisconsin Admin. Code DHS § 108.02(9)(a) states: "If [DHS] finds that a provider has received an overpayment, including but not limited to erroneous, excess, duplicative and improper payments regardless of cause, under the program, [DHS] may recover the amount of the overpayment." In addition, Wis. Admin. Code DHS § 106.02(9)(g) provides: "[DHS] may refuse to pay claims and may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records."

Further, DHS decides "whatever records are necessary" to verify claims. Wis. Admin. Code. DHS

§ 105.02(4). The types of records are specified in rules. *See e.g.,* Wis. Admin. Code. DHS § 105.02(6) (records to be maintained by all providers), (7)(b) (records to be maintained by certain providers). For private duty nurses, such documentation includes progress notes and clinical notes. *See* Wis. Admin. Code DHS § 105.19(7)(f) and (g). Importantly, progress notes must be "posted as frequently as necessary to clearly and accurately document the [patient's] status and services provided." Wis. Admin. Code DHS § 105.19(7)(f). And clinical notes must be created the same day as the service provided. Wis. Admin. Code DHS § 105.19(7)(g). Also, Wis. Admin. Code DHS § 105.19(2) requires that such services be provided under a plan of care that a physician must review and sign at least every 62 days.

In sum, Wis. Stat. § 49.45 (3)(f)1.–2. gives DHS the power to recover Medicaid payments when OIG cannot verify from the provider's records: (1) that actual services were provided; and (2) that the claims on which the payments were based are appropriate and accurate.

2. Case law.

As noted above, the court of appeals in *Newcap* recently addressed the issue PHP raises here, in a way that confirms *DHS's* position. *Newcap* involved an OIG audit of a Medicaid-certified family planning clinic "to determine whether pharmacy services provided to Wisconsin Medicaid and BadgerCare Plus members were documented and billed appropriately." 383 Wis. 2d 515, ¶ 5. DHS issued a "Notice of Intent to Recover" for "claims for which Newcap had failed to retain invoices documenting its purchase of prescription drugs," and for claims for which Newcap submitted invalid or incorrect National Drug Codes or none at all. *Id.* ¶ 7. Newcap appealed, and its witness conceded at the

administrative hearing that it "had failed to retain invoices for some of the prescription drugs for which it had billed Medicaid." *Id.* ¶ 8. She testified, however, that other records Newcap had, like patient charts, "showed the medications in question were actually provided to Medicaid patients." *Id.* Newcap also introduced into evidence some of the missing invoices, which it had obtained and produced *after* the audit. *Id.* As part of its challenge, Newcap argued that DHS was not authorized by law to recover Medicaid payments "where the provision of services has been verified." *Id.* ¶ 9. The administrative law judge (ALJ) rejected this argument, affirming the Notice of Intent to Recover. *Id.* ¶ 10. Newcap filed a Wis. Stat. ch. 227 judicial review action challenging the final agency decision. The circuit court reversed, reasoning that Newcap had presented evidence at the administrative hearing that the services were provided and any failure to maintain required records alone did not justify recoupment. *Id* ¶ 12.

On appeal, the court of appeals issued two holdings relevant to this case. *First*, it held that "Wis. Stat. § 49.45(3)(f) gives DHS authority to recoup payments made to a Medicaid provider when that provider has failed to maintain records required by DHS, regardless of whether the provider possesses other records that show the provider actually rendered the services in question." *Id.* ¶ 2. *Second*, the court held that "the provider has an obligation to make the required records available to DHS at the time of DHS's audit, and records subsequently submitted during an administrative hearing are insufficient to defeat DHS's recoupment claim." *Id.*

The court summarized its interpretation of Wis. Stat. § 49.45(3)(f)1.–2.:

> (1) a provider must retain records as required by DHS; (2) DHS may audit the records it has required

> a provider to maintain in order to verify the actual provision of services and the appropriateness and accuracy of claims; and (3) DHS may deny a claim or recover a payment already made to a provider when it cannot verify the actual provision of services or the appropriateness and accuracy of claims based on the records DHS required the provider to maintain.

Id. ¶ 19.[16]

Foreign case law is in accord. The Washington Court of Appeals held that the state Medicaid agency had the power to recover payments because of the provider's failure to keep required records, even without proving that the services were not actually provided. *Bircumshaw v. State*, 380 P.3d 524, 529–30, 534, 535 (Wash. Ct. App. 2016). The Virginia Court of Appeals upheld a Medicaid overpayment against a provider for its failure to maintain required records. *1st Stop Health Servs., Inc. v. Dep't of Med. Assistance Servs.*, 756 S.E.2d 183, 185–86 (Va. Ct. App. 2014). After noting the significant portion of the state's budget devoted to Medicaid, it explained that "uniformity and clarity of documentation is essential . . . because it is difficult to reconstitute the nature . . . of the services provided months or years after the fact." *Id.* at 189.

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[16] The court of appeals then turned to two specific recordkeeping questions. The court held that no law required Newcap "to retain invoices documenting its purchase of prescription drugs that it subsequently dispensed to Medicaid patients," and so its failure to do so did not allow DHS to recover these payments under Wis. Stat. § 49.45(3)(f). *Newcap, Inc. v. DHS*, 2018 WI App 40, 383 Wis. 2d 515, ¶ 3, 916 N.W.2d 173. It also held that DHS did not possess legal authority to recover payment based on Newcap's "failure to include correct National Drug Codes (NDCs) on reimbursement claims it submitted to Medicaid." *Id.* (footnote omitted). DHS, therefore, was not permitted to recover payment.

3. The so-called "Perfection Policy" is not a "rule" and thus PHP has no valid Wis. Stat. § 227.10(2m) argument here.

Applying this unchallenged law to the limited facts here does not show that a so-called "Perfection Policy" is a "rule" at all. As a result, PHP has no valid Wis. Stat. § 227.10(2m) argument in its section 227.40 action.[17]

As explained above, a "rule" is, in part, a "regulation, standard, statement of policy or general order of general application that has the force of law and that is issued by an agency." Wis. Stat. § 227.01(13). PHP, however, points to no evidence that DHS has "issued" a so-called "Perfection Policy" through a "regulation," "statement of policy," or "general order," or in any other way. To the extent PHP argues that this so-called policy is a perfection "standard," PHP has not articulated what that standard is. PHP uses the example of repeated waste discharge permits as an agency "rule" despite no formal pronouncement. (PHP's Br. 21 (citing *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 240, 287 N.W.2d 113 (1980)), 24.) But those numerous permits issued by DNR contained specific limitations as to the amount and number of chlorine discharges per day. *Wis. Elec. Power Co.*, 93 Wis. 2d at 225–27. Not only is the amorphous term "perfection" unlike specific amounts and discharges of chlorine, the argument fails for one of the same reasons that Topic #66 is not a rule: there is no evidence revealing that DHS uses, or "issues," a "perfection" standard. *See infra* Section I.B.

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[17] PHP's Wis. Stat. § 227.10(2m) argument adds nothing to its Wis. Stat. § 227.40 action. DHS acknowledges that it did not promulgate any so-called "Perfection Policy."

The specific examples cited by PHP show this to be the case. As to Zuhse-Green, DHS explained that its initial recovery demand occurred because of incomplete documentation, including a lack of a *mandatory* prescription by a physician.[18] (R. 24:2–3 ¶¶ 7(d)–(f), 8.) More importantly, the matter resolved itself because Moore eventually provided the proper documentation. And Nurse Moore's failure to countersign the patient's Plan of Care—a health care record Medicaid providers are required to maintain and "an important part of the delivery of Medicaid-covered services"—prevented OIG from verifying the accuracy and appropriateness of her claim under Wis. Stat. § 49.45(3)(f). Without it, there was no evidence that Moore even read her patient's Plan of Care or that she was familiar with it before providing services. (R. 10:130.) Regardless, whether DHS can recover for Moore's failure to countersign her patient's Plan of Care should be resolved through her administrative proceeding and ch. 227 judicial review. And the matter should be resolved under current law, which includes the *Newcap* decision. These two examples do not reveal DHS creation of any "standard" of perfection in its recovery efforts. And without specific facts or DHS recovery demand documents, the other nurses' affidavits containing their conclusory opinions add nothing to PHP's argument.

Based on the plain language of Wis. Stat. § 49.45(3)(f) and *Newcap*, DHS is authorized to recover the value of a Medicaid payment where a provider's records, as required to be maintained by statutes and DHS regulations, do not

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[18] All private duty nursing services must be prescribed by a physician to be a covered and reimbursable benefit. Wis. Stat. § 49.46(2)(b)6.g. (2015–2016); Wis. Admin. Code § DHS 107.12(1)(c).

verify the appropriateness and accuracy of the provider's claim.[19] DHS would be not only fiscally irresponsible and in violation of the law to permit Medicaid payments to stand as to nurses who fail to maintain proper records, but blind to the protection of patient health and safety. DHS simply requires Medicaid providers to comply with the relevant Medicaid statutes and promulgated rules.

In a particular case, DHS's Medicaid recovery efforts[20] may not always be affirmed by the courts, as *Newcap* shows, but there is no perfection "standard," much less one that can be coherently addressed here. Put differently, there is no "Perfection Policy" with the "force of law" that is amenable to a rule challenge. Because there is no "rule," PHP's Wis. Stat. § 227.10(2m) argument adds nothing to its section 227.40 action.

III. Although it need not reach the issues, the circuit court's orders for fees and supplemental relief are flawed for additional reasons.

The foregoing resolves this appeal. However, for the sake of completeness only, DHS wishes to point out that

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[19] As the court of appeals explained, "the circuit court's broad declaratory and injunctive relief is contrary to *Newcap*." *Papa*, 388 Wis. 2d 474, ¶ 11 n.9. And PHP does not challenge the holdings in *Newcap*. PHP's argument that the circuit court orders should be affirmed does not grapple with this conflict and, accordingly, should be rejected.

[20] PHP contends that DHS is authorized to impose sanctions for Medicaid noncompliance. (PHP's Br. 53–55.) This is true, but that does not prevent overpayment recovery. Wisconsin Admin. Code DHS § 106.09(1) expressly states that nothing in ch. 106 "shall preclude [DHS] from pursuing monetary recovery from a provider at the same time action is initiated to impose sanctions."

there are additional flaws in the circuit court proceedings related to attorney's fees and a supplemental order. The court of appeals did not reach these issues because the foregoing resolved this case entirely, making these other errors irrelevant.

A. The circuit court improperly awarded attorneys' fees and costs to PHP.

The circuit court awarded PHP its costs and attorneys' fees incurred in bringing its post-judgment motion for supplemental relief. (R. 54; 55:2 ¶3, Supp. App. 1.) While the court of appeals vacated these orders because it reversed on the merits, this fee award also was flawed for an additional reason: sovereign immunity.

Sovereign immunity derives from the Wisconsin Constitution, art. IV, § 27: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." This means that the State enjoys sovereign immunity and cannot be sued without its consent.[21] *PRN Assocs. LLC v. State Dep't of Admin.*, 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 766 N.W.2d 559. The Legislature must clearly and expressly waive the state's immunity. Consent will not be implied. *Townsend v. Wis. Desert Horse Assoc.*, 42 Wis. 2d 414, 421, 167 N.W.2d 425 (1969).

From this foundation, this Court has long held that *express* statutory authority is required to tax costs and attorneys' fees against the state. *See Noyes v. The State*, 46 Wis. 250, 251–52, 1 N.W. 1 (1879); *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 79, 194 N.W.2d 664

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[21] A state agency is the State for purposes of sovereign immunity. *Lister v. Bd. of Regents of the Univ. of Wis. Sys.*, 72 Wis. 2d 282, 291–92, 240 N.W.2d 610 (1976).

(1972). In *Department of Transportation v. Wisconsin Personnel Commission*, 176 Wis. 2d 731, 738, 500 N.W.2d 664 (1993), this Court held that, despite attorney's fees language appearing in the statute, because the statute did not explicitly reference the State, sovereign immunity did not authorize imposition of fees against the state agency.

Here, the circuit court's orders that DHS pay PHP its attorneys' fees and costs conflict with this black letter law. The circuit court cited Wis. Stat. § 808.07 as the basis for its orders. (R. 72 Tr. 44:17–21 May 16, 2017); 55:2 ¶ 3, P-App. 022.) The specific statutory provision that the circuit court cited states:

> (2) Authority of a court to grant relief pending appeal.
>
> (a) During the pendency of an appeal, a trial court or an appellate court may:
>
> . . . . .
>
> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

Wis. Stat. § 808.07(2)(a)3. This statute's plain language authorizes no award of attorney's fees at all, much less expressly against the State. Notwithstanding that PHP did not bring its action under Wis. Stat. § 806.04, the circuit court also cited subsection (8), governing supplemental relief to a declaratory judgment, which also does not expressly allow an award of attorney's fees. (R. 55:1, P-App. 021.) Neither statute *clearly and expressly* permits an order of attorneys' fees and costs against the State.[22] Under the

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[22] The circuit court opined that "*the broad brush* of 808.07(2)" gave it the authority to award attorney fees against DHS. (R. 72 Tr. 44:17–19 May 16, 2017, (emphasis added).) This

sovereign immunity doctrine, these statutes do not permit an order directing DHS to pay money to PHP. *Dep't of Trans.*, 176 Wis. 2d at 738.

B. The circuit court improperly entered the Order for Supplemental Relief after DHS filed its notice of appeal and the record had been filed.

There also is an additional flaw regarding the circuit court's Order for Supplemental Relief: it improperly expanded the circuit court's Original Order while on appeal and thus intruded on appellate court jurisdiction.

Circuit courts are limited in the types of relief they may grant while a case is on appeal. Wis. Stat. § 808.075(3). In *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶¶ 2, 18–21, 351 Wis. 2d 237, 893 N.W.2d 388 (per curium), this Court held that, once an appeal has been filed and the record is transmitted to the court of appeals, the circuit court may not alter the judgment on appeal. Such action by the circuit court is an impermissible interference with the appellate court's jurisdiction. *Id.* ¶ 18 (citing Wis. Stat. § 808.075(3).)

That is exactly what happened here. The Original Order enjoined DHS's "policy of recouping payments for noncompliance with Medicaid program requirements," which the Court characterized as an unpromulgated "Perfection Rule," including Topic #66. (R. 35:6.) The Order for Supplemental Relief, however, (1) enjoined DHS from issuing notices of intent to recover Medicaid funds if the findings of the initial audit appear to indicate that the

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reasoning conflicts with the case law cited above. It further stated that, if wrong, "it is a remedy that can be corrected by the appellate court." (R. 72 Tr. 44:19–20, May 16, 2017.)

services in question were provided and the provider was paid an appropriate amount, "notwithstanding that an audit identified other errors or noncompliance with Department policies *or rule*"; and (2) enjoined DHS from furthering *any* agency action, including an administrative proceeding, in which the defendant seeks to recoup Medicaid funds from any Medicaid provider, if the provider's records verify that the services were provided, "notwithstanding that an audit identified other errors or noncompliance with the Department policies *or rules*." (R. 55:1–2, P-App. 021–22 (emphasis added).) For example, Wis. Admin. Code DHS § 106.02(9)(g) allows recovery of improper Medicaid payments based on a provider's failure to meet all documentation and record-keeping guidelines. Without naming this specific rule, the Order for Supplemental Relief effectively halted it, even though the Original Order did not address it and PHP did not challenge it.

The Order for Supplemental Relief is invalid because it improperly expanded the Original Order that was on appeal and thereby intruded on appellate jurisdiction. This is yet another reason why the circuit court's rulings were incorrect.

CONCLUSION

Defendant-Appellant Wisconsin Department of Health Services respectfully asks this Court to affirm the decision of the court of appeals, which reversed the circuit court's summary judgment decision, remanded with directions for judgment to be entered in DHS's favor, and vacated all other circuit court orders.

Dated this 19th day of February 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,911 words.

Dated this 19th day of February 2020.

STEVEN C. KILPATRICK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of February 2020.

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