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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs, Case No. 17-cv-264

v.

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' PROPOSED FINDINGS OF FACT

NOW COME Plaintiffs, Alina Boyden and Shannon Andrews, through their attorneys, the American Civil Liberties Union and Hawks Quindel, S.C., and submit the following responses to Defendants' Proposed Findings of Fact:

I. The Parties and the Dispute

1. Plaintiff Alina Boyden ("Boyden") is a graduate student and teaching assistant in the Department of Anthropology in the College of Letters and Science at the University of Wisconsin – Madison. (Dkt. 27:4 ¶ 10).

RESPONSE: No dispute. The parties have stipulated that Boyden is employed by the Defendant as "either a teaching assistant or a fellow on at least a one-third full-time basis and has been employed on that basis since August 2013." (Dkt. # 103-24, Ex. X, May 2, 2018 Stip).

2. Plaintiff Shannon Andrews ("Andrews") is an employee of the University of Wisconsin School of Medicine and Public Health ("School of Medicine"), a school within the University of Wisconsin System. (Dkt. 27:4–5 ¶ 11).

RESPONSE: No dispute.

3. Both Boyden and Andrews have already transitioned to a gender that differs from their birth sex. (Roth Decl. Ex. P, May 29, 2018

(Budge Report 24, 29, Feb. 19, 2018)).

RESPONSE: Disputed. Boyden and Andrews are women who were assigned a male gender at birth. (Dkt. # 98, Decl. of Alina Boyden ("Boyden Decl.") ¶ 2; Dkt. # 99, Decl. of Shannon Andrews ("Andrews Decl.") ¶ 3).

4. Defendant, Wisconsin Department of Employee Trust Funds (ETF), is a state agency that has various administrative powers and duties with respect to retirement, insurance and other benefit programs for state and local government employees and retirees of the Wisconsin Retirement System. (Mallow Decl. ¶ 3, May 24, 2018).

RESPONSE: No dispute.

5. Defendant, State of Wisconsin Group Insurance Board (GIB), sets policy and oversees administration of the group health, life insurance and Income Continuation Insurance plans for state employees and retirees and the group health and life insurance plans for local employers who choose to offer them. (Mallow Decl. ¶ 4, May 24, 2018).

RESPONSE: Disputed. The Office of Strategic Health Policy, part of ETF, evaluates health insurance benefits and makes recommendations to GIB about changes to the benefits package, and GIB votes on whether to implement those recommendations. (Plaintiffs' Proposed Findings of Fact ("Pls.' PFOF") ¶¶ 71-73).

6. Defendant Robert J. Conlin currently serves as ETF's Secretary. All of ETF's administrative powers and duties are vested in him in his official capacity as its Secretary. (Dkt. 54 (Conlin Dep. 28:13–29:2, Apr. 18, 2018)).

RESPONSE: No dispute.

7. Boyden and Andrews allege that, due to actions and omissions by ETF, GIB, and Secretary Conlin, they have been improperly denied coverage for medical services and care related to gender transition and gender dysphoria. (Dkt. 27:4–5).

RESPONSE: No dispute.

8. Boyden and Andrews allege that Secretary Conlin, in both his official and individual capacity, discriminated against them on the basis of their sex and transgender status, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. (Dkt. 27:20–22).

RESPONSE: No dispute.

9. Boyden and Andrews allege that ETF discriminated against them on the basis of their sex and transgender status, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). (Dkt. 27:22–23).

RESPONSE: No dispute.

10. Boyden and Andrews allege that ETF and GIB discriminated against them on the basis of their sex and transgender status, in violation of Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116. (Dkt. 27:24–25).

RESPONSE: No dispute.

II. Overview of the State of Wisconsin Group Health Insurance Program and its Uniform Benefits

11. Eligible state employees in Wisconsin may participate in the Wisconsin Group Health Insurance Program (the "Group Health Program") through their state employers. (Roth Decl. Ex. B, May 29, 2018 (State Defs' Resp. to Req. For Admis. No. 7 (Set 2))).

RESPONSE: No dispute.

12. Most insurance plans offered through the Wisconsin Group Health Insurance Program (the "Group Health Program") are fully-insured. In these plans, benefit claims are processed and paid by third-party insurance carriers with whom GIB contracts (such as Dean and Quartz); state employees and their employers both pay a share of the insurance premium to ETF, which transmits those funds to third-party carriers. (Mallow Decl. ¶ 5, May 24, 2018).

RESPONSE: No dispute.

13. The pharmaceutical portion of the Group Health Program is self-insured. For these prescription drug benefits, ETF pays these claims directly out of its health coverage reserves, while a third-party administrator assists with claims processing and other administrative tasks. (Mallow Decl. ¶ 6, May 24, 2018).

RESPONSE: No dispute.

14. The scope of the Group Health Program's benefits—that is, which medical services, treatments, procedures, and the like are covered—is defined in a document called the "Uniform Benefits." (Mallow Decl. ¶ 7, May 24, 2018).

RESPONSE: No dispute.

15. The Uniform Benefits defines the coverage terms that apply to all insurance plans offered to state employees through the Group Health Program. (Dkt. 68 (Ellinger Dep. 38:9–19, Apr. 4, 2018); Dkt. 78 (Bogardus Dep. 55:9–11, Apr. 3, 2018)).

RESPONSE: No dispute.

16. Insurance carriers that contract to provide health insurance to state employees must offer the coverage terms defined in the Uniform Benefits; those terms are not subject to negotiation and may not be modified. (Dkt. 68 (Ellinger Dep. 38:9–19, Apr. 4, 2018); Roth Decl. Ex. B, May 29, 2018 (State Defs' Resp. to Req. For Admis. No. 13 (Set 2), State Defs' Resp. to Interrogatory No. 1 (Req. for Admis. No. 10) (Set 2)); Mallow Decl. ¶ 9, May 24, 2018).

RESPONSE: No dispute.

17. Not all services and procedures prescribed or deemed to be medically necessary by a member's clinician are covered under the Uniform Benefits; certain medically necessary procedures may be excluded from coverage. The Uniform Benefits provide that "[s]ome of the listed exclusions may be MEDICALLY NECESSARY, but still are not covered under this program." (Mallow Decl. ¶ 10, May 24, 2018; Mallow Decl. Ex. A:138, May 24, 2018).

RESPONSE: No dispute.

18. The state entity that sets coverage terms in the Uniform Benefits is the Group Insurance Board (GIB). (Roth Decl. Ex. B, May 29, 2018 (State Defs' Resp. to Req. For Admis. No. 13 (Set 2)); Dkt. 54 (Conlin Dep. 39:4–10, Apr. 18, 2018); Dkt. 68 (Ellinger Dep. 23:23–24:5, Apr, 4, 2018)).

RESPONSE: Disputed. OSHP, which is part of ETF, is the "policy office" for state health insurance programs, and "sets the policy with the GIB for the group health insurance program." (Pls.' PFOF ¶ 71). GIB relies on ETF staff to make policy decisions, and ETF staff have significant control over the new benefits added to state employee health plans because GIB generally does not adopt new benefits that are not recommended by ETF. (*Id.* ¶¶ 76-77).

19. GIB is made up of 11 appointees and designees of the Governor and heads of various agencies (including the Department of Administration, Department of Justice, and the Office of the Commissioner of Insurance). (Mallow Decl. ¶ 11, May 24, 2018; Wis. Stat. § 15.165(2)).

RESPONSE: No dispute.

20. GIB has the statutory authority to set "[t]he terms and conditions of the insurance contract or contracts, including the amount of premium." Wis. Stat. § 40.03(6)(d)(5). (Mallow Decl. ¶ 12, May 24, 2018).

RESPONSE: No dispute.

21. Neither ETF nor its Secretary has any statutory authority to make final decisions on the Uniform Benefits' content. (Mallow Decl. ¶ 13, May 24, 2018).

RESPONSE: No dispute with respect to statutory authority, but in the case of the exclusion, Conlin made the decision that the contingencies established by the board had been met, which had the effect of "deciding" to reinstate the exclusion, and prepared and issued the contract amendment to the plans, which had the effect of satisfying the fourth contingency. (Pls.' PFOF ¶¶ 139-142).

22. ETF assists GIB with benefits design policy. Based on input from stakeholders—including state employees, state employers, and insurance carriers—and its own policy analysis, ETF commonly recommends changes to the Uniform Benefits and other aspects of the Group Health Program. (Mallow Decl. ¶ 14, May 24, 2018; Dkt. 68 (Ellinger Dep. 13:13–14:3, Apr. 4, 2018); Dkt. 54 (Conlin Dep. 54:8–55:1, Apr. 18, 2018)).

RESPONSE: Disputed, in that ETF does more than merely "assist GIB" with benefits design policy. OSHP, which is part of ETF, is the "policy office" for state health insurance programs, and "sets the policy with the GIB for the group health insurance program." (Pls.' PFOF ¶ 71). GIB relies on ETF staff to make policy decisions, and ETF staff have significant control over the new benefits added to state employee health plans because GIB generally does not adopt new benefits that are not recommended by ETF. (*Id.* ¶¶ 76-77).

23. ETF has no authority to alter the Uniform Benefits itself; it can only make recommendations to GIB, which GIB may accept or reject at its sole discretion. (Mallow Decl. ¶ 15, May 24, 2018; Dkt. 68 Ellinger Dep. 23:24–24:5, Apr. 4, 2018); Dkt. 54 (Conlin Dep. 52:13–53:1, Apr. 18, 2018)).

RESPONSE: Disputed. Ellinger testified that GIB "is an eleven-member board that has the statutory authority over the health insurance program…they are the final authority on the recommendations that were presented by the OSHP team." (Ellinger Dep. 23:24–24:5). Conlin testified that ETF staff makes recommendations to GIB for benefit changes and GIB decides whether to approve those recommendations, which ETF is responsible for carrying out. (Conlin Dep. 52:13-53:8).

24. Under Section (A)(1)(c) of the exclusions under the heading "Surgical Services," the Uniform Benefits exclude from coverage, "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" (the "Exclusion"). (Mallow Decl. Ex. A:138, May 24, 2018).

RESPONSE: No dispute.

25. Since 1994, the Uniform Benefits have contained an exclusion materially identical to the one at issue here. (Roth Decl. Ex. A, May 29, 2018 (State Defs' Resp. to Interrogatory 10)).

RESPONSE: No dispute, but Plaintiffs note that the language of the exclusion was modified but not eliminated in 2015. (Dkt. # 83-3, Roth Decl. Ex. C, Ellinger Dep. Ex. 2, ETF Spreadsheet (suggesting changing the exclusion language from "sex transformation" to "gender reassignment")).

26. GIB originally added the Exclusion because [it] was standard industry practice; services associated with gender reassignment surgery were generally accepted by health insurance companies and health care providers to be

experimental and not medically necessary. (Roth Decl. Ex. A, May 29, 2018 (State Defs' Resp. to Interrogatory 10)).

RESPONSE: No dispute as to whether these were GIB's reasons for adding the exclusion in 1994, but Plaintiffs maintain that these services are not experimental, are medically necessary, and this was the case even in 1994. (Budge Rep. 18-20).

27. The Exclusion does not apply to hormone therapy or mental health counseling, when used to treat gender dysphoria rather than a course of treatment involving gender reassignment surgery. That is, if a covered person indicates that both (1) they have not had gender reassignment surgery in the past, and (2) they do not intend to have that surgery in the future, the person may obtain coverage for sex hormones associated with the sex that differs from their birth sex. (Dkt. 78 (Bogardus Dep. 102:3–19, Apr. 3, 2018); Mallow Decl. ¶¶ 16–17, May 24, 2018).

RESPONSE: Disputed. The actual language of the exclusion states that it excludes "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment," and does not expressly draw a distinction between individuals who have not or do not intend to have gender confirmation surgery. (Pls.' PFOF ¶ 43).

28. Mental health counseling as a stand-alone treatment for gender dysphoria is covered under the Uniform Benefits. (Mallow Decl. ¶ 18, May 24, 2018).

RESPONSE: No dispute.

29. When hormone therapy is part of a treatment plan meant to culminate in gender reassignment surgery (or involves follow-up treatments after such surgery), those services are not covered under the Uniform Benefits. (Mallow Decl. ¶ 19, May 24, 2018).

RESPONSE: No dispute.

30. Section IV of the Uniform Benefits sets forth a list of services, treatments, equipment or supplies that are excluded from coverage under Uniform Benefits. That section excludes from coverage "treatment, services and supplies for cosmetic . . . purposes" and explains that "[p]sychological reasons do not represent a medical/surgical necessity." (Mallow Decl. Ex. A:145–46, May 24, 2018).

RESPONSE: No dispute, but the full language of the exclusion reads as follows:

> Treatment, services and supplies for cosmetic or beautifying purposes, including removal of keloids resulting from piercing and hair restoration, except when associated with a covered service to correct a functional impairment related to CONGENITAL bodily disorders or conditions or when associated with covered reconstructive surgery due to an ILLNESS or accidental INJURY (including subsequent removal of a prosthetic device that was related to such reconstructive surgery). Psychological reasons do not represent a medical/surgical necessity.

31. The Uniform Benefits also note that "[s]ome of the listed exclusions may be MEDICALLY NECESSARY, but still are not covered under this program." (Mallow Decl. Ex. A:138, May 24, 2018).

RESPONSE: No dispute.

32. GIB pays no wages nor provides benefits to the persons who serve on it as board members, nor does it pay wages or provide benefits to any other person. (Mallow Decl. ¶ 28, May 24, 2018).

RESPONSE: No dispute.

33. Although ETF makes benefit recommendations regarding which benefits should be provided to members of the Group Health Insurance Program and also makes recommendations concerning state and federal regulations, ETF has no control over which benefits should be provided to members of the Group Health Program. (Mallow Decl. ¶ 29, May 24, 2018).

RESPONSE: Disputed. GIB relies on ETF staff when making policy decisions, and ETF staff have significant control over what new benefits are added to state employee health plans because GIB generally does not adopt new benefits that are not recommended by ETF. (Pls.' PFOF ¶¶ 76-77, 80).

34. Although ETF administers certain aspects of the Group Health Program, it has no policy-making authority over the Uniform Benefits. Rather, it must follow and implement GIB's decisions regarding what benefits to provide. (Mallow Decl. ¶ 30, May 24, 2018).

RESPONSE: Disputed. *See supra* Pls.' Resp. to Defs.' PFOF ¶ 33.

35. ETF had no authority to provide supplemental coverage to Plaintiffs or resolve any appeals regarding their coverage in any way other than in conformance with the Uniform Benefits. (Mallow Decl. ¶ 31, May 24, 2018).

RESPONSE: No dispute.

36. Once GIB voted to reinstate the Exclusion on December 30, 2016, ETF had no choice but to implement GIB's decision. (Mallow Decl. ¶ 32, May 24, 2018).

RESPONSE: No dispute.

37. The GIB Chair signs contracts on behalf of GIB with third-party insurers and benefits managers. (Mallow Decl. ¶ 33, May 24, 2018).

RESPONSE: Disputed to the extent the proposed finding implies that the GIB Chair is the only signatory and the GIB is the only contracting party for the State. ETF and GIB are both identified as contracting parties for pharmacy benefits, and ETF is the point of contact for and enforces the contracts with private health plans. (Pls.' PFOF ¶¶ 87-88).

III. GIB Removes the Exclusion and then Reinstates it

38. In 2015, ETF considered but ultimately declined to recommend to GIB that the Exclusion be removed from the Uniform Benefits. (Mallow Decl. ¶ 21, May 24, 2018).

RESPONSE: No dispute.

39. In response to correspondence from a University of Wisconsin–Madison professor, ETF sought input from its independent benefits consultant, Segal Consulting ("Segal"), on whether to recommend removing the Exclusion to GIB. (Dkt. 68 (Ellinger Dep. 54:8–17, Apr. 4, 2018); Roth Decl. Ex. D, May 29, 2018 (Ellinger Dep. Ex. 3, Apr. 4, 2018)).

RESPONSE: Disputed. Neither of the cited sources mention contacting Segal on whether to recommend removing the exclusion. Ellinger testified as follows about removing the exclusion in 2015:

> Q: Do you recall speaking with anyone from Segal during 2015 about removing the gender reassignment exclusion?
>
> A: Not for certain.

(Ellinger Dep. 56:14-17).

40. Segal opined that the financial impact of such a change would be "moderate" and said its position was "neutral" regarding whether to remove the Exclusion. (Roth Decl. Ex. C, May 29, 2018 (Ellinger Dep. Ex. 2, Apr. 4, 2018)).

RESPONSE: Disputed. Pursuant to Fed. R. Civ. P. 56(c)(2), this fact is not presented in a form that would be admissible evidence. The document does not state on its face that it is the opinion of Segal, nor does it contain any information as to its authorship, and deponent Lisa Ellinger was unable to identify who created the document, though she testified it was "highly likely someone on the OSHP team," not Segal. (Ellinger Dep. 44:3-46:20). Ellinger did testify, in accordance with her own notes from a February 12, 2015 meeting with Segal, that Segal had helped other states develop benefits and services and stated that those states "found it was cheaper and easier." (Ellinger Dep. 59:4-60:12; Declaration of Caitlin Madden in response to Defendants' Motion for Summary Judgment ("Madden Decl.") Ex. A, Ellinger 2/12/15 Notes, ETF00618).

41. In an advisory memo provided to GIB in May 2015, ETF recommended that GIB defer consideration of removing the Exclusion to 2017 or later. (Roth Decl. Ex. G, May 29, 2018 (Bogardus Dep. Ex. 2:2, Apr. 3, 2018)).

RESPONSE: No dispute.

42. GIB in 2015 generally hoped to hold current benefits stable, since it was considering a broad redesign of the Group Health Program, including a possible shift to self-insurance for all program aspects. (Dkt. 69 (Pray Dep. 57:14–23, Apr. 10, 2018)).

RESPONSE: No dispute.

43. The 2015–17 State of Wisconsin budget required GIB to identify $25 million in cost savings in the Group Health Program over those two fiscal years. (Roth Decl. Ex. G, May 29, 2018 (Bogardus Dep. Ex. 2:2, Apr. 3, 2018)).

RESPONSE: No dispute.

44. This meant that ETF's recommendations to GIB at the time were focused on cost reduction strategies, not expanding benefits. (Dkt. 68 (Ellinger Dep. 51:21–52:7, Apr. 4, 2018)).

RESPONSE: No dispute.

45. Because removing the Exclusion would have expanded benefits under the Group Health Program, it did not fit into GIB's mission for the program at the time, and so ETF did not recommend the change. (Dkt. 68 (Ellinger Dep. 51:21–52:7, Apr. 4, 2018)).

RESPONSE: Disputed. Ellinger did not testify that the only reason removal of the exclusion was not recommended was because of GIB's focus on cost reduction strategies. (Ellinger Dep. 51:21-52:7). Nor did ETF recommend the change on the numerous occasions prior to 2016 that removal of the exclusion was requested by the Teacher's Assistant union. (Pls.' PFOF ¶¶ 96-98).

46. On June 22, 2016, ETF submitted a memorandum to the GIB recommending that it remove the exclusion of benefits and services related to gender reassignment or sexual transformation from the Uniform Benefits. (Roth Decl. Ex. H, May 29, 2018 (Nispel Dep. Ex. 1, Apr. 3, 2018)).

RESPONSE: No dispute.

47. In the June 22, 2016 memorandum, ETF analyzed the federal Department of Health and Human Services promulgated regulations implementing the Affordable Care Act's (ACA) anti-discrimination provision. (Roth Decl. Ex. H, May 29, 2018 (Nispel Dep. Ex. 1, Apr. 3, 2018)).

RESPONSE: No dispute.

48. In the June 22, 2016 memorandum, ETF concluded that ETF was a "covered entity" for the purpose of the HHS regulations—that is, that the HHS regulations applied to ETF because ETF received federal financial assistance in the form of Medicare Part D subsidies. (Roth Decl. Ex. H, May 29, 2018 (Nispel Dep. Ex. 1:2–3, Apr. 3, 2018)).

RESPONSE: No dispute. This memo also notes that "ETF is also a covered entity in connection with the insured plans because ETF is principally engaged in administering health insurance coverage." (Roth Decl. Ex. H at 3).

49. In the June 22, 2016 memorandum, ETF concluded that, under the HHS regulations, the Exclusion amounted to a prohibited benefit exclusion. (Roth Decl. Ex. H, May 29, 2018 (Nispel Dep. Ex. 1:2–3, Apr. 3, 2018)).

RESPONSE: No dispute.

50. ETF recommended that GIB remove the Exclusion. (Roth Decl. Ex. H, May 29, 2018 (Nispel Dep. Ex. 1:2, Apr. 3, 2018); Mallow Decl. ¶ 22, May 24, 2018).

RESPONSE: No dispute.

51. At its July 12, 2016 meeting, GIB approved ETF's recommendation and voted unanimously on a motion to remove the Exclusion from the Uniform Benefits. (Roth Decl. Ex. E, May, 29, 2018 (Ellinger Dep. Ex. 7:3–4, Apr. 4, 2018); Mallow Decl. ¶ 22, May 24, 2018).

RESPONSE: No dispute.

52. The change in the Uniform Benefits removing the Exclusion did not go into effect immediately upon the July 12, 2016 GIB vote to remove it; it was scheduled to take place on January 1, 2017, the first day of the following full benefits year. (Roth Decl. Ex. H, May 29, 2018 (Nispel Dep. Ex. 1:3, Apr. 3, 2018); Dkt. 51 (Day Dep. 47:1–48:2, Apr. 2, 2018)).

RESPONSE: No dispute.

53. On August 10, 2016, Deputy Attorney General Andy Cook from the Wisconsin Department of Justice (DOJ) submitted a memorandum to GIB, which opined that the new HHS regulations were unlawful, at least as applied to the Exclusion. (Roth Decl. Ex. I, May 29, 2018 (Farrell Dep. Ex. 6, Apr. 11, 2018)).

RESPONSE: Disputed. Deputy Attorney General Cook's memo, which was written at the behest of the Governor's office (Dkt. # 83-12, Dec. 13, 2016 GIB Meeting Minutes, p. 9), states that the new HHS rules "improperly reinterpret Title IX to cover 'gender identity,'" that the Fourteenth Amendment does not authorize HHS to issue these rules, and that the rules "do not mandate coverage for any particular procedure." (Roth Decl. Ex. I).

54. The DOJ memorandum also stated that "[t]o the extent [GIB] believes that the new HHS rules compel it to accept ETF's recommended changes, it should reconsider." (Roth Decl. Ex. I, May 29, 2018 (Farrell Dep. Ex. 6, Apr. 22, 2018)).

RESPONSE: No dispute.

55. On August 11, 2016, ETF submitted a memorandum to the GIB responding to DOJ's August 10, 2016 memorandum. ETF recommended continuing with removal of the Exclusion as adopted at the July 12, 2016 GIB meeting. In this memorandum, ETF cited concerns about possible fiduciary liability for declining to follow federal regulations. (Roth Decl. Ex. I, May 29, 2018 (Farrell Dep. Ex. 6, Apr. 11, 2018)).

RESPONSE: No dispute, but Plaintiffs note that ETF also recommended continuing with the removal of the exclusion because "a decision not to comply with

the HHS rule would jeopardize ETF's ability to contract with its health insurance issuers," because "the cost of removing [the exclusion] is anticipated to be low," and because such services would still be required to be medically necessary. (*Id.*) ETF also expressed concern that the exclusion could lead to liability under Title VII. (Dkt. # 103-16, June 22, 2016 GIB Correspondence Memo, at 3 ("Even if an employer is not covered under Section 1557, they will generally be prohibited from discriminating on the basis of sex, gender identity, or sexual orientation under Title VII and EEOC regulations"); Dkt # 103-16, Aug. 12, 2016 ETF Memo to GIB, at 11-12 (notes that complaints have been filed with the EEOC against GIB and that the EEOC interprets discrimination on the basis of gender identity as unlawful sex discrimination)).

56. Both the August 10, 2016 memorandum from DOJ and the August 11, 2016 response memorandum from ETF were made available to the GIB before its August 16, 2016 meeting. GIB did not act on the Exclusion at the August 16 meeting. (Roth Decl. Ex. J, May 29, 2018 (Farrell Dep. Ex. 15:6, Apr. 11, 2018)).

RESPONSE: No dispute.

57. GIB had another meeting on December 13, 2016. At that meeting, DOJ attorneys attended the meeting to discuss DOJ's recommendations about how to proceed. A DOJ attorney told GIB that the State of Wisconsin had joined federal litigation in the Northern District of Texas challenging the legality of the HHS regulations addressed in DOJ's August memorandum. (Roth Decl. Ex. L, May 29, 2018 (Day Dep. Ex. 5:8–9, Apr. 2, 2018)).

RESPONSE: No dispute.

58. The DOJ attorney explained that Wisconsin was seeking an injunction against enforcement of the HHS regulations and that a hearing was scheduled for December 20, 2016. (Roth Decl. Ex. L, May 29, 2018 (Day Dep. Ex. 5:8–9, Apr. 2, 2018)).

RESPONSE: No dispute.

59. But since the HHS regulations had not yet been enjoined, the DOJ attorney advised that GIB continue with its July 2016 decision to remove the Exclusion. (Roth Decl. Ex. L, May 29, 2018 (Day Dep. Ex. 5:8–9, Apr. 2, 2018)).

RESPONSE: Disputed. The minutes state only, "Mr. Potter stated that the DOJ recommends the Board follow the law as it currently stands." (Roth Decl. Ex. L at 9).

60. GIB followed this advice and took no action, noting that it would revisit the issue if and when an injunction was issued. (Roth Decl. Ex. L, May 29, 2018 (Day Dep. Ex. 5:8–9, Apr. 2, 2018)).

RESPONSE: No dispute.

61. At its December 30, 2016 meeting, after a closed session discussion to discuss GIB's legal strategy in light of pending or potential litigation regarding the Exclusion, GIB approved reinstating the Exclusion after certain contingencies were met. (Roth Decl. Ex. M, May 29, 2018 (Day Dep. Ex. 6:3, Apr. 2, 2018); Mallow Decl. ¶ 23, May 24, 2018).

RESPONSE: No dispute.

62. The first contingency adopted by GIB at its December 30, 2016 meeting for reinstatement of the Exclusion was a court decision that "enjoin[ed], rescind[ed] or invalidate[d] the HHS Rule." (Roth Decl. Ex. M, May 29, 2018 (Day Dep. Ex. 6:3, Apr. 2, 2018)).

RESPONSE: No dispute.

63. The second contingency adopted by GIB at its December 30, 2016 meeting for reinstatement of the Exclusion was confirmation that the decision would "maintain or reduce premium costs" in compliance with Wis. Stat. § 40.03(6)(c). (Roth Decl. Ex. M, May 29, 2018 (Day Dep. Ex. 6:3, Apr. 2, 2018)).

RESPONSE: No dispute.

64. The third contingency adopted by GIB at its December 30, 2017 meeting for reinstatement of the Exclusion was a DOJ opinion that the decision would not breach GIB members' fiduciary duties. (Roth Decl. Ex. M, May 29, 2018 (Day Dep. Ex. 6:3, Apr. 2, 2018)).

RESPONSE: No dispute.

65. The fourth contingency adopted by GIB at its December 30, 2017 meeting for reinstatement of the Exclusion was renegotiation of contracts to reinstate the Exclusion. (Roth Decl. Ex. M, May 29, 2018 (Day Dep. Ex. 6:3, Apr. 2, 2018)).

RESPONSE: No dispute.

66. Under GIB's decision, the Exclusion would be removed from the Uniform Benefits as of January 1, 2017, but would be added back to the Uniform

Benefits if and when all four contingencies were met. (Roth Decl. Ex. M, May 29, 2018 (Dkt. 51 (Day Dep. Ex. 6:3, Apr. 2, 2018))).

RESPONSE: No dispute.

67. At one or more of the August 16, 2016, December 13, 2016, and December 30, 2016, meetings, at least one GIB member raised concerns about the costs of removing the Exclusion and the medical efficacy and nature of services associated with gender reassignment surgery. (Dkt. 54 (Conlin Dep. 150:3–18, 195:25–196:25, Apr. 18, 2018)).

RESPONSE: Disputed. Conlin testified that there was no discussion of reasons for reinstatement other than the Texas litigation at the portion of the December 30, 2016 closed session that he attended. (Conlin Dep. 150:3-18).

- Board president Farrell testified that the exclusion was reinstated "exclusively because of the expected and then ultimately known injunction that occurred at the end of December of 2016." (Farrell Dep. 56:4-7).

- Board member Herschel Day recalled that board member J.P. Wieske brought up the issue of reinstating the exclusion, with "some question about the constitutionality of the portion of the Affordable Care Act that it enacted" and made a comment "about not being able to put the toothpaste back in the tube" but did not recall any comments about cost. (Dkt. # 51, Day Dep. 65:18-66:4). Nor did Day recall that "cost" was one of the reasons recommended for reinstating the exclusion. (*Id.* 110:23-113:11). Day did recall some discussion about the potential cost of *reinstating* the exclusion during the December 30, 2016 closed session, but not of

the cost of *removing* the exclusion. (Dkt. # 110, Supplemental Deposition of Herschel Day, 134:1-135:2). Nor did he recall any discussion during this meeting of the safety or efficacy of gender confirmation surgery and hormone therapy. (*Id.* at 136:8-137:2).

- Ellinger did not recall any questions from board members about the cost of removing the exclusion at the July 12, 2016 meeting (Ellinger Dep. 96:14-17), the August 16, 2016 meeting (*Id.* 110:25-111:5 ("the board did ask that ETF staff bring this back to them again later in the year"), or any comments that board member J.P. Wieske made about the exclusion at any board meeting (*Id.* 117:17-21).

- Tara Pray testified that the expected costs of eliminating the exclusion were not raised as a reason for reinstatement. (Pray Dep. 179:16-25).

- Board member J.P. Wieske remembered discussing the Texas litigation and potential notification issues at the December 13, 2016 meeting, but did not mention any discussion of cost. (Wieske Dep. 80:14-82:6). Wieske testified that he thinks there was "a discussion about costs being a factor" at the December 30, 2016 meeting, but does not know what was said about costs, or who said it. (Wieske Dep. 89:8-90:7). He also stated, "I don't believe there was broader discussion of cost at any other meeting." (Wieske Dep. 94:3-11). Wieske did not recall any discussion of "medical necessity" of the treatment by the Board. (Wieske Dep. 92:17-22).

- Board member Nancy Thompson recalled discussion of the legality of the HHS regulations, but not of the cost, efficacy, or safety of gender reassignment

surgery at the August 12, 2016 meeting (Thompson Dep. 40:19-41:9, 44:16-20), the December 13, 2016 meeting (Thompson Dep. 55:11-25), or the December 30, 2016 meeting (63:15-64:6 (no discussion of cost, efficacy, or safety, but discussion about the legality of the HHS regulations)).

68. On January 30, 2017, ETF sent a memorandum to GIB confirming that all four contingencies had been met. (Roth Decl. Ex. O, May 29, 2018 (Conlin Dep. Ex. 17, Apr. 18, 2018); Mallow Decl. ¶ 24, May, 24, 2018).

RESPONSE: No dispute.

69. In the January 30, 2017 memorandum, ETF noted that the Northern District of Texas issued a preliminary injunction against the HHS regulations; GIB's actuary predicted that reinstating the Exclusion would not increase premiums; DOJ opined that reinstating the Exclusion would not breach GIB's fiduciary duties; and ETF issued contract amendments reinstating the Exclusion. (Roth Decl. Ex. O, May 29, 2018 (Conlin Dep. Ex. 17, Apr. 18, 2018)).

RESPONSE: No dispute, except that Segal Consulting communicated with ETF staff members, not directly with GIB members, so Plaintiffs dispute that Segal is "GIB's actuary." (*See, e.g.*, Dkt. # 103-14, Segal Maryland Coverage Estimate Memorandum (emailed to Lisa Ellinger of ETF, not any GIB member)).

70. The Exclusion became effective again on February 1, 2017 and has remained in place since then. (Roth Decl. Ex. O, May 29, 2018 (Conlin Dep. Ex. 17, Apr. 18, 2018); Mallow Decl. ¶ 25, May 24, 2018).

RESPONSE: No dispute.

IV. The Exclusion and Transgender Status

71. Under Section (A)(11)(ad) of the exclusions under the heading "General," the Uniform Benefits exclude from coverage, "[t]reatment, services and supplies for cosmetic or beautifying purposes, including removal of keloids resulting from piercing and hair restoration, except when associated with a covered service to correct a functional impairment related to CONGENITAL bodily disorders or conditions or when associated with covered reconstructive surgery due to an ILLNESS or accidental INJURY (including subsequent removal of a prosthetic device that was related to such reconstructive surgery). Psychological reasons do not represent a medical/surgical necessity." (Mallow Decl. Ex A:145–46, May 24, 2018).

RESPONSE: No dispute.

72. Gender confirmation surgery is also commonly referred to as sex reassignment surgery. It includes any surgery to alter or adjust an individual's primary or secondary sex characteristics to align with their current gender identity. The most common surgeries include changes to the chest, genitals, and face/neck. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 10, Feb. 19, 2018)).

RESPONSE: No dispute.

73. Medical procedures that can assist a transgender individual with achieving primary or secondary sex characteristics aligned with their gender identity include hormone therapy, chest/breast surgery, vaginoplasty (surgical creation of vagina and vulva), orchietomy (surgical removal of the testes),

phalloplasty (surgical creation of a penis), surgery on facial features, and body contouring. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 9, 11, Feb. 19, 2018)).

RESPONSE: No dispute.

74. According to Plaintiffs' expert, Dr. Stephanie Budge, "[h]ormone therapy is considered medically necessary for many transgender individuals due to its efficacy in relieving psychological distress associated with gender dysphoria and improving quality of life." (Roth Decl. Ex. P, May 29, 2018 (Budge Report 10, Feb. 19, 2018)).

RESPONSE: No dispute.

75. According to Plaintiffs' expert, Dr. Stephanie Budge, "[g]ender confirmation surgery is considered medically necessary for many transgender individuals due to its efficacy in relieving psychological distress associated with gender dysphoria and improving quality of life." (Roth Decl. Ex. P, May 29, 2018 (Budge Report 10, Feb. 19, 2018)).

RESPONSE: No dispute.

76. According to Plaintiffs' expert, Dr. Stephanie Budge, Alina Boyden and Shannon Andrews both have a diagnosis of gender dysphoria. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 36, Feb. 19, 2018)).

RESPONSE: No dispute.

77. Gender dysphoria is a psychiatric condition codified in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5). It is the term used for the psychological distress caused by the

incongruence between a transgender person's gender at birth and their gender identity. It affects both males and females. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 9, 12, Feb. 19, 2018)).

RESPONSE: No dispute.

78. Plaintiff Alina Boyden is currently on hormone therapy. She is seeking gender confirmation surgery to decrease her dysphoric distress. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 28, Feb. 19, 2018)).

RESPONSE: Disputed in part. Boyden's physician also recommends gender confirmation surgery to keep Boyden's testosterone levels low, further demonstrating the medical necessity of this treatment for her. (Budge Rep. at 28).

79. Plaintiff Shannon Andrews has had genital reassignment surgery and is currently on hormone therapy to reduce her dysphoria. She also sought facial feminization surgery to reduce her dysphoria. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 34–35, Feb. 19, 2018)).

RESPONSE: No dispute, but note that Andrews has had "gender confirmation surgery," which Budge also refers to as "genital surgery," not "genital reassignment surgery." (Budge Rep. at 34-35).

80. A hypothetical cisgender female member diagnosed with severe depression due to negative body self-image could not obtain coverage for surgical procedures that modify her outward appearance, such as breast augmentation or rhinoplasty, in an effort to treat her depression. (Mallow Decl. ¶ 20, May 24, 2018).

RESPONSE: No dispute as to the hypothetical posited, but Plaintiffs dispute the suggestion that "depression due to negative body self-image" is a diagnosable condition or comparable to gender dysphoria. (Supplemental Expert Report of Dr. Stephanie Budge ("Budge Supp. Rep.") at 3-4; Supplemental Expert Report of Dr. Loren Schechter ("Schechter Supp. Rep.") at ¶ 1).

81. In his expert report, Dr. Lawrence Mayer discusses instances where cisgender individuals may also suffer psychological distress related to their outward appearance. (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report, 8–9, Apr. 19, 2018)).

RESPONSE: Not disputed that Dr. Mayer discusses such "instances," but Plaintiffs note that these are hypotheticals posited by Dr. Mayer rather than instances that have actually occurred.

82. Someone who is transgender has an incongruence between their sex (or gender assigned at birth), and their gender identity. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 8–9, Feb 19, 2018)).

RESPONSE: No dispute.

83. According to the American Psychological Association, sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 3, Apr. 19, 2018)).

RESPONSE: Disputed. This definition is paraphrased by Dr. Mayer from a 2014 version of an American Psychological Association Q&A, which has been subsequently revised. (*Compare* Mayer Rep. 3 *with* "Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression, accessed at <http://www.apa.org/topics/lgbt/transgender.pdf>, last accessed June 19, 2018).

84. An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 4, 6, Apr. 19, 2018)).

RESPONSE: Disputed. Sex "refers to a person's chromosomes, hormones, reproductive organs, secondary sex characteristics, and gender identity," but "there is no single sex-based characteristic that defines an individual's sex" because "sex-related characteristics such as internal or external genitalia, reproductive capacity, chromosomes, or gender identity" may be inconsistent, such as with transgender people, people with intersex conditions, or people with sex chromosome conditions. (Budge Rep. 7). Gender identity, a person's internal sense of their own sex, is innate and generally considered an immutable characteristic. (*Id.* at 8).

85. Gender is almost uniformly defined as a cultural construct while sex is a biological trait. (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 3, Apr. 19, 2018)).

RESPONSE: Disputed. Gender refers to an individual's social, cultural, and psychological characteristics that are considered masculine or feminine based on cultural stereotypes, norms, and traits. (Budge Rep. 8). Sex is a classification as male, female, or neither male nor female, and is based on a person's chromosomes,

hormones, reproductive organs, secondary sex characteristics, and gender identity, and not defined by any single characteristic. (*Id.* at 7).

86. There is no evidence that gender is innate, immutable, or present at birth. (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 2, Apr. 19, 2018)).

RESPONSE: Disputed. Neuroimaging data demonstrate strong evidence for biological causes for transgender identity and biological sources for gender. (Budge Rep. 8). Gender identity, a person's internal sense of their own sex, is innate and an immutable characteristic. (*Id.*) Further, a growing body of research indicates the immutability of gender identity. (Budge Supp. Rep. at 11-12).

87. Alina Boyden has the "intention of transforming secondary sex characteristics that are considered feminine," and Shannon Andrews "has always been drawn to femininity and expressions that explicitly are not male. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 27, 33, Feb. 19, 2018)).

RESPONSE: No dispute.

V. The State's Interests

88. For fully-insured plans in the Group Health Program, if the Exclusion were removed from the Uniform Benefits, both ETF and all covered members would bear a share of costs associated with procedures, services, and supplies related to gender reassignment surgery through their respective contributions to health insurance premiums. (Mallow Decl. ¶ 26, May 24, 2018).

RESPONSE: No dispute, but the costs would be miniscule -- less than 0.1% of total premiums, an amount that is actuarially immaterial, in that it amounts to a

rounding error. (Dkt. # 103-16, Expert Rep. of Joan Barrett, at 3). Board member and actuary Herschel Day, after reviewing literature and publically available information about the pricing impact of removing the exclusion, determined that the pricing impact would be "negligible," and would not exceed .1 to .2 percent. (Dkt. # 51, Deposition of Herschel Day, at 52:16-53:13).

89. For the self-insured pharmacy benefit in the Group Health Program, if the Exclusion were removed from the Uniform Benefits, state employers, through their contributions to ETF's health coverage reserves, would directly bear all costs associated with procedures, services, and supplies related to gender reassignment surgery, beyond those costs covered by members' premiums, co-pays, and deductibles. (Mallow Decl. ¶ 27, May 24, 2018).

RESPONSE: No dispute.

90. For each procedure, service, and supply related to gender reassignment surgery undertaken by a group health member that, absent the Exclusion, would be otherwise covered, the State saves a corresponding amount of health insurance costs. (Mallow Decl. ¶¶ 26–27, May 24, 2018).

RESPONSE: Disputed. It is more costly to deny coverage to transgender patients because denial of care is associated with increased disparities of other conditions that are costly to treat. (Budge Rep. 22-23). ETF has also recognized that coverage of these benefits would have an extremely low cost and would not increase premiums. (Dkt. # 103-16, Godbe Decl. Ex. P, Aug. 12, 2016 ETF Memo, at 12).

91. Based on Williams' analysis of actual claims data from 2016 and the risk posed by uncertainties in that data, the State could expect to bear around $300,000 in yearly costs by removing the Exclusion. (Roth Decl. Ex. R, May 29, 2018 (Williams Report 3, Apr. 19, 2018)).

RESPONSE: Disputed. Plaintiffs' expert, health care actuary Joan Barrett, employed the same methodology as Williams and determined that the impact of removing the exclusion would be $140,000 or 0.01% of total program costs. (Barrett Rep. 7). The $300,000 estimate presents a "worst case" scenario that effectively doubles the expected costs, rather than a more reasonable scenario. (*Id.*) Even Williams concedes that his risk estimate assumes a "pretty bad" case scenario. (Dkt. # 111, Deposition of David Williams ("Williams Dep.") 178:18-21). Using a more appropriate risk margin of 25% results in a net impact to the state plan of $175,000 or 0.02% of total costs. (Barrett Rep. 8).

92. Williams further explained that, in an adverse year, costs associated with removing the Exclusion could even jump to around $800,000. (Roth Decl. Ex. R, May 29, 2018 (Williams Report 12, Apr. 19, 2018)).

RESPONSE: Disputed. As explained by Dr. Barrett, this assumption relies on highly unlikely scenarios. (Barrett Rep. 8). These scenarios are unlikely because while there may be steady growth in the number of such surgeries performed over time, a doubling in the near future is not likely, and this benefit has been offered by employers for over a decade so overstating the cost of the benefit is unnecessary. (*Id.*)

93. A report by Segal Consulting, a company that provides actuarial consulting services to ETF and GIB, estimated slightly lower costs associated with removing the Exclusion of up to around $240,000 per year. (Roth Decl. Ex. F, May 29, 2018 (Ellinger Dep. Ex. 16:3, Apr. 4, 2018)).

RESPONSE: Disputed. Segal estimated the annual cost to "range from $100,000 to $250,000" or 0.007% to 0.018% of premiums. (Roth Decl. Ex. F, Segal Cost Estimate Memo, at 3). But this estimate includes non-surgical benefits such as counseling costs, which are already covered by the Uniform Benefits regardless of the presence of the exclusion. (*Id.* at 2; Mallow Decl. Ex. A, Uniform Benefits, at 131-32).

94. A number of factors explain the wide range in estimated costs, such as the relatively low proportion of covered members who will seek the treatment, the high range in costs of the treatment, the low amount of available claims data, and ambiguities in the claims data itself. (Roth Decl. Ex. R, May 29, 2018 (Williams Report 11–14, Apr. 19, 2018)).

RESPONSE: No dispute.

95. The Governor and Wisconsin Legislature, through the 2015–17 State Budget, had required ETF and GIB to identify $25 million in savings in the Group Health Program. (Roth Decl. Ex. G, May 29, 2018 (Bogardus Dep. Ex. 2:2, Apr. 3, 2018); Dkt. 68 (Ellinger Dep. 16:8–15, 17:8–15, Apr. 4, 2018); Dkt. 69 (Pray Dep. 53:22–54:6, Apr. 10, 2018)).

RESPONSE: No dispute.

96. Given this budget requirement, ETF and GIB were focused during 2015 and 2016 on cost reduction strategies, not on expanding coverage for additional categories of services, like those at issue in the Exclusion. (Dkt. 69 (Ellinger Dep. 51:10–52:7, Apr. 4, 2018)).

RESPONSE: No dispute.

97. GIB members discussed at one or more GIB meetings in 2016 the potential cost of providing coverage for procedures, services, and supplies related to surgery and sex hormone[s] associated with gender reassignment. (Dkt. 79 (Wieske Dep. 89:8–90:7, May 7, 2018)).

RESPONSE: Disputed. In the cited testimony, Wieske cannot identify what board members brought up cost as a factor related to removing the exclusion. (Wieske Dep. 89:8-90:7; *see also* Response to PFOF 67, supra).

98. Secretary Conlin testified that he recalled hearing Wieske discuss his concerns about the costs associated with gender reassignment surgery at GIB meetings in 2016. (Dkt. 54 (Conlin Dep. 150:3–18; 195:25–196:25, Apr. 18, 2018)).

RESPONSE: Disputed. In the cited testimony, Conlin stated that the only reasons discussed for reinstating the exclusion at the December 30, 2016 GIB meeting were related to the Texas litigation. (Conlin Dep. 150:3-18).[1] Wieske himself does not recall what board member brought up cost, or if it was him. (Wieske Dep. 89:8-17).

[1] Perhaps Defendants meant to cite to Conlin Dep. 151:3-18, which discusses Mr. Wieske asking that the Board reconsider its decision to end the exclusion in part due to cost.

99. Wisconsin Department of Justice memorandum considered by GIB mentioned costs as a government interest served by the Exclusion. (Roth Decl. Ex. K, May 29, 2018 (Day Dep. Ex. 4:4, Apr. 2, 2018)).

RESPONSE: Disputed. The DOJ memo says ETF can "point to the high costs the State must bear for covering services and procedures related to gender transition," but provides no evidence to support that such "high costs" exist. (Roth Decl. Ex. K at 4). No cost assessment had been performed, either when the Board initially voted to remove the exclusion on July 12, 2016, or when the Board voted to reinstate it on December 30, 2016. (Roth Decl. Ex. F, Jan. 23, 2017 Segal Consulting Memo (estimating cost for removing the exclusion)). In addition, GIB members testified that they did not recall any discussion of this passage in the DOJ's memorandum. (Thompson Dep. 41:8-9 (no discussion of costs at the August 16, 2016 GIB meeting)).

100. Segal Consulting delivered to GIB in January 2017 a memorandum analyzing projected costs associated with removing the Exclusion. (Roth Decl. Ex. F, May 29, 2018 (Ellinger Dep. Ex. 16, Apr. 4, 2018)).

RESPONSE: No dispute.

101. Dr. Lawrence Mayer, a research biostatistician and psychiatrist, opines that "[m]edical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria." (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 3, Apr. 19, 2018)).

RESPONSE: No dispute that Dr. Mayer states this opinion, but Plaintiffs dispute the accuracy of that opinion. Dr. Loren Schechter opines that data shows gender confirmation surgeries "have been shown to be an effective treatment for gender dysphoria." (Dkt. # 106, Expert Report of Loren S. Schechter, M.D. ("Schechter Rep.") at 5). The World Professional Association for Transgender Health ("WPATH") Standards of Care have identified hormone therapy and surgical procedures as effective treatment options for gender dysphoria. (*Id.* at 6). Other professional organizations, including the Endocrine Society, American Medical Association, American Psychological Association, American Psychiatric Association, American College of Obstetricians and Gynecologists, American Academy of Family Physicians, and World Health Organization, recognize gender confirmation surgery as appropriate and necessary treatment for many people with gender dysphoria. (*Id.* at 8-9). Further, Dr. Mayer testified that when he spoke about "safety" in his expert report, he was not addressing complication rates for the surgery. (Mayer Dep. 171:6-15). When Dr. Mayer opined on the "effectiveness" of such treatment, he stated this "also means cost effective compared to other treatment," (Mayer Dep. 172:11-12) but testified that he has no knowledge about the cost of such treatments. (Mayer Dep. 144:14 ("I'm not an expert in cost")).

102. He similarly opines that "[t]he evidence that these interventions are safe, effective, and optimal is minimal." (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 7, Apr. 19, 2018)).

RESPONSE: No dispute that Dr. Mayer states this opinion, but Plaintiffs dispute the accuracy of that opinion. Dr. Mayer cites to his own publication in The New Atlantis, but this is not a peer-reviewed publication. (Mayer Dep. 134:22-25). Conversely, Dr. Schechter's review of peer-reviewed studies supports his conclusion that gender confirmation surgery is effective in alleviating gender dysphoria. (Schechter Rep. 9-10). In addition, to support this statement, Dr. Mayer references his own New Atlantis article at pages 106-113, which initially discusses the efficacy of interventions on children, not adults. (Mayer Dep. 139:7-140:18). The section of the New Atlantis article that discusses efficacy of these studies for adults points to three studies to support his opinion that there is minimal support for the position that these treatments are safe, effective, and optimal, in addition to a literature review and a newspaper article. (Mayer Dep. 140:21-141:20). Of the studies cited, Dr. Mayer conceded that one studied only 35 people and had important limitations, the second did not address the effectiveness of sex reassignment surgery as a treatment for "transsexualism" and stated outcomes for those studied may have been worse without sex reassignment, the third did not compare individuals with gender dysphoria who did receive reassignment surgery to those who did not receive reassignment surgery, and the literature review concluded that gender reassignment with the use of hormone therapies was associated with improvements in gender dysphoria. (Mayer Dep. 142:11-143:15). Finally, there have been many studies that have found these treatments for gender dysphoria to be safe and effective. (Budge Supp. Decl. at 6-7).

103. An article he co-wrote explains that even though "epidemiological data on the outcomes of medically delayed puberty is quite limited, referrals for sex-reassignment hormones and surgical procedures appear to be on the rise, and there is a push among many advocates to proceed with sex reassignment at younger ages." (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report Appx. D:106, Apr. 19, 2018)).

RESPONSE: Disputed. Dr. Mayer's basis for this opinion in his article is a 2013 article in The Times of London, a newspaper and not a peer-reviewed journal, which stated, that "the United Kingdom saw a 50% increase in the number of children referred to gender dysphoria clinics from 2011 to 2012, and a nearly 50% increase in referrals among adults from 2010 to 2012." (Roth Decl. Ex. Q, Mayer Rep., Appx. D, at 107). This does not support Dr. Mayer's conclusion that there is a "push" towards sex reassignment "at younger ages."

104. As for adults, Mayer notes that "[t]he high level of uncertainty regarding various outcomes after sex-reassignment surgery makes it difficult to find clear answers about the effects on patients of reassignment surgery." (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report Appx. D:109, Apr. 19, 2018)).

RESPONSE: Disputed. Dr. Schechter observes that peer-reviewed literature concludes that when performed in accordance with the WPATH Standards of Care, gender confirmation surgery is found to be effective in alleviating gender dysphoria. (Schechter Rep. 9-10; see also Budge Supp. Rep. at 6-9 (discussing studies of the effectiveness of treatments for gender dysphoria)).

105. Mayer notes that "[t]he potential that patients undergoing medical and surgical sex reassignment may want to return to a gender identity consistent with their biological sex suggests that reassignment carries considerable psychological and physical risk, especially when performed in childhood, but also in adulthood." (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report Appx. D:108, Apr. 19, 2018)).

RESPONSE: Disputed. Dr. Mayer cites no research or evidence to support his claim that a patient may want to reverse medical or surgical sex confirmation treatment. (Roth Decl. Ex. Q, Appx. D at 108). Conversely, research demonstrates that "true regrets" after gender confirmation treatment, meaning regrets other than those caused by lack of social acceptance, are found at rates of 0.3% in transwomen and 0.15% in transmen. (Schechter Rep. 10).

106. The federal government's Centers for Medicare and Medicaid Services found "inconclusive" clinical evidence regarding gender reassignment surgery. (Roth Decl. Ex. Q, May 29, 2018 (Mayer Report 7–8, Apr. 19, 2018).

RESPONSE: Disputed. The Department of Health & Human Services concluded in 2014 that surgical care to treat gender dysphoria is safe, effective, and not experimental, and Medicare has therefore provided coverage for transition-related care based on patients' individual needs. (Schechter Rep. 15). The 2016 CMS Decision Memo cited by Dr. Mayer simply declined to make a *national* coverage decision for providing gender reassignment surgery, concluding that it was more appropriate to make determinations as to the appropriateness of surgical care on an individual basis. (*Id.* at 15-16; Mayer Dep. 149:6-17 ("I saw that basically what I

thought it was saying is that there shouldn't be a blanket rule, but that, for some people, this [gender reassignment surgery] was a good choice…for some people I imagine it would be")). This conclusion in no way supports Dr. Mayer's statement that the 2016 CMS Decision Memo "supports" his claim that there is minimal evidence for the safety and efficacy of surgical treatments for gender dysphoria. Dr. Mayer also testified that when he went to review the full CMS decision memo, "there was a lot of stuff I don't understand, but what I was trying to use this for is to say it's an open issue, but certainly there are some cases in which it is called for." (Mayer Dep. 150:1-5).

107. Wieske discussed at GIB meetings in 2016 his view that private insurers were not providing coverage for gender reassignment surgery because, based on a medical review, they did not view such procedures as medically necessary. (Dkt. 79 (Wieske Dep. 32:10–33:7, 90:8–92:9, May 30, 2018)).

RESPONSE: Disputed. When asked what the "exclusion" was, Wieske first testified that the exclusion was put in place by insurers "to administratively simplify the way that they were administering gender reassignment coverage issues and that administratively having the exclusion made the policies clearer because…their medical review did not provide coverage for the gender reassignment treatment." (Wieske Dep. 32:10-19). Wieske then testified that he believed insurers do not provide coverage for gender reassignment surgery based on "the review of the medical case specifically" (*Id.* at 33:15-23), but when asked the source of this knowledge, stated "I have no way of knowing whether or not that's the exception…I

have no idea. It's not something that comes up typically that I would understand whether or not there are insurers that are covering it. I have no idea," and that he had not spoken to any experts about research supporting the necessity of such care. (*Id.* at 34:20-35:15). Nowhere in this testimony did Wieske mention bringing up these opinions in any GIB meetings. Wieske also stated that he understood that "with or without the exclusion [this treatment] would be subject to medical necessity" and various insurers' "medical guidelines" did not support providing such treatment. (*Id.* at 90:13-91:24). But when explicitly asked, "Was medical necessity discussed at all by the board?" Wieske replied, "I don't recall. This was just in my – this was part of my thinking process." (*Id.* at 92:17-24).

108. Secretary Conlin testified that he recalled hearing Wieske discuss concerns regarding the nature and efficacy of gender reassignment surgery at one or more GIB meetings in 2016. (Dkt. 54 (Conlin Dep. 150:3–18; 195:25–196:25, Apr. 18, 2018)).

RESPONSE: Disputed. Conlin refers to Wieske raising the efficacy of these services at 151:3-18 in his deposition, though Wieske himself testified that he did not recall raising this issue in any board meeting. (Wieske Dep. 92:17-24).

109. The Wisconsin Department of Justice memorandum considered by GIB addressed potential safety concerns associated with gender reassignment surgeries. (Roth Decl. Ex. K, May 29, 2018 (Day Dep. Ex. 4:4, Apr. 2, 2018)).

RESPONSE: Disputed. DOJ's memo states that ETF could "point to…medical research suggesting that such procedures…may in fact harm patients"

but provides no evidence supporting that claim. (Roth Decl. Ex. K, Appx. A at 4). Peer-reviewed research examined by Dr. Budge and Dr. Schechter confirms that these treatments are safe. (Budge Rep. 15; Schechter Rep. 9-10). In addition, GIB members do not recall any discussion of this passage of the DOJ memorandum at any board meetings. (Thompson Dep. 44:16-20 (did not recall discussion of the safety of these procedures at the Aug. 16, 2016 meeting)).

VI. Secretary Conlin's Personal Involvement

110. The Wisconsin Statutes provide that "[t]he group insurance board shall establish by contract a standard health insurance plan in which all insured employees shall participate." Wis. Stat. § 40.52(1).

RESPONSE: No dispute that the statute so provides, but ETF in fact has significant control over the contracts' terms, both because GIB rarely makes changes to benefits unless they are recommended by ETF, and because ETF drafts the contract language, acts as the point of contact for the plans, and enforces the contracts. (Pls.' PFOF ¶¶ 71, 73, 76-81).

111. GIB sets "the terms and conditions of the insurance contract[s]" applicable to Group Health Program plans. Wis. Stat. § 40.03(6)(d)5.

RESPONSE: No dispute.

112. Part of Defendant Robert J. Conlin's duties as Secretary of the Department of Employee Trust Funds is to recommend policy to the Group Insurance Board. (Dkt. 54 (Conlin Dep. Ex. 1:1, Apr. 18, 2018)).

RESPONSE: No dispute, but the correct citation appears to be Roth Decl. Ex. N.

113. While Conlin does have the responsibility of ensuring effective administrative and oversight of ETF operations, he does not have involvement in deciding the coverage provided under those plans, which is determined by GIB. GIB determines the Uniform Benefits. (Roth Decl. Ex. N, May 29, 2018 (Conlin Dep. Ex. 1, Apr. 18, 2018); Dkt. 54 (Conlin Dep. 39:8–10, Apr. 18, 2018)).

RESPONSE: Disputed. GIB determines uniform benefits on the recommendation of ETF staff, including Conlin. (Conlin Dep. 39:8-12; Roth Decl. Ex. N, "The Secretary's Role" ("the Secretary's role includes…developing and recommending policy")).

114. In 2016, after the final HHS Section 1557 regulations were released, it was both ETF's and Conlin's position that the exclusion should be removed from the Uniform Benefits. (Dkt. 54 (Conlin Dep. 37:20–39:3; 116:13–14; 118:13–19, Apr. 18, 2018)).

RESPONSE: No dispute.

115. At the July 12, 2016 GIB meeting, Conlin was pleased that there was no objection to ETF's recommendation to remove the Exclusion, and that the motion passed. (Dkt. 54 (Conlin Dep. 104:6–20, Apr. 18, 2018)).

RESPONSE: No dispute.

116. Even after the Wisconsin Department of Justice issued its August 10, 2016 memorandum to GIB stating it should reconsider its decision regarding

removal of the Exclusion, it was Conlin's position that GIB should continue with removal of the Exclusion. (Dkt. 54 (Conlin Dep. 118:13–19, Apr. 18, 2018)).

RESPONSE: No dispute.

117. Through ETF's August 11, 2016, memorandum to GIB recommending that it continue to remove the Exclusion, Conlin hoped to persuade GIB not to reinstate the Exclusion. (Dkt. 54 (Conlin Dep. 199:11–200:9, Apr. 18, 2018); Roth Decl. Ex. I, May 29, 2018 (Farrell Dep. Ex. 6, Apr. 11, 2018)).

RESPONSE: No dispute.

118. Conlin has no personal opposition to providing the benefits at issue under the Exclusion, as a matter of employee benefits policy. (Dkt. 54 (Conlin Dep. 125:5-9, 179:1–11, Apr. 18, 2018)).

RESPONSE: No dispute.

Dated this 26th day of June, 2018.

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