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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs, Case No. 17-cv-0264

v.

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

Defendants.

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Plaintiffs are State Employees Eligible for Health Insurance through Defendants

1. Plaintiff, Alina Boyden, is and has been employed by the University of Wisconsin as a graduate student employee since August 2013, working as either a teaching assistant or a fellow on at least a one-third full-time basis. (Declaration of Alina Boyden ("Boyden Decl.") at ¶ 3; Declaration of Michael R. Godbe in Support of Motion for Summary Judgment ("Godbe Decl."), Ex. X; May 2, 2018 Stipulation ("May 2, 2018 Stip.") at ¶ 7).

RESPONSE: Undisputed for purposes of summary judgment.

2. Plaintiff, Shannon Andrews, works at the School of Medicine and Public Health as a researcher in the Carbone Cancer Center. (Declaration of Shannon Andrews ("Andrews Decl.") at ¶ 1).

RESPONSE: Undisputed for purposes of summary judgment.

3. Proposed Plaintiff, Wren Logan, is employed by the University of Wisconsin Hospital and Clinics Authority as a Psychiatry Resident. (Declaration of Wren W. Logan ("Logan Decl.") at ¶1).

RESPONSE: State Defendants OBJECT to this proposed fact because it is not likely to lead to the discovery of admissible evidence; Logan is not a party in this case. (*See* Dkt. 109.)

4. Boyden, Andrews and Logan are state employees eligible for state-provided health insurance. (Godbe Decl., Ex. A (Defs.' Resp. to Pls.' Second Set of Requests for Admission and Interrogatory), Responses to Requests for Admission ¶¶ 1 & 3); Logan Decl. ¶ 1).

RESPONSE: Undisputed for purposes of summary judgment as to Boyden and Andrews. As for Logan, see Response to Plaintiffs' Proposed Finding of Fact (PFOF) ¶ 3.

5. Boyden, Andrews, and Logan are women who are transgender. (Boyden Decl. ¶ 2; Andrews Decl. ¶ 2; Logan Decl. ¶ 2).

RESPONSE: Undisputed for purposes of summary judgment that Boyden and Andrews are transgender with a female gender identity. Dispute that Andrews' and Logan's sex is female, as their gender is different from their birth sex. (Dkt. 88, DFOF ¶¶ 3, 82–86.) As to Logan, see Response to PFOF ¶ 3.

A. Plaintiff Alina Boyden

6. Boyden has received several fellowships and scholarships to support her academic work at UW-Madison, including support from the federal Foreign Language and Areas Students Program and from the University of Wisconsin LGBT Campus Center. She has also served on the Ad-Hoc Committee on Equal Health Care, a faculty shared governance committee. (Boyden Decl. ¶ 4; Declaration of Dr. Stephanie Budge ("Budge Decl."), Ex. 1, p. 24).

RESPONSE: Undisputed for purposes of summary judgment.

7. Boyden first started to recognize her gender identity around the age of five (5). (Budge Decl., Ex. 1, p. 24).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this proposed finding of fact implies that gender identity is an innate or immutable characteristic, which State Defendants dispute. (Dkt. 88, DFOF ¶¶ 82–86; Dkt. 121,[1] DFOF ¶ 119.)

8. Boyden has gender dysphoria, or severe distress caused by the incongruence between her gender assigned at birth and her gender identity, and has been prescribed hormone therapy and gender confirmation surgery ("GCS") to treat her dysphoria. (Budge Decl., Ex. 1, pp. 12, 26-28).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this proposed finding of fact implies that gender identity is an innate or immutable characteristic, which State Defendants dispute. (Dkt. 88, DFOF ¶¶ 82–86; Dkt. 121, DFOF ¶ 119.)

9. Hormone therapy and GCS are medically necessary treatments for Boyden's gender dysphoria. (Budge Decl., Ex. 1, p. 28; Boyden Decl. ¶¶ 9, 15).

RESPONSE: State Defendants OBJECT to this proposed fact because Boyden's Declaration relies on inadmissible hearsay; FURTHER OBJECT because the term "medically necessary" is vague and ambiguous, and the cited evidentiary materials lack sufficient foundation to resolve this ambiguity. There is no indication that "medical necessity" as used is the definition as set

[1] Docket number 121 contains State Defendants' Additional Proposed Findings of Fact (DFOF) numbers 119 through 168.

forth in the Uniform Benefits that govern the Wisconsin Group Health Insurance Program, which, in part, requires "the most appropriate service, treatment, [or] procedure] . . . which can be safely provided to the Participant and accomplishes the desired end result in the most economical manner." (Dkt. 103-3:25. *See also* Dkt. 121, DFOF ¶ 160.)

Notwithstanding and without waiving these objections, State Defendants dispute this proposed fact. There is insufficient evidence that these procedures can safely and effectively treat Plaintiffs' gender dysphoria. (Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Dkt. 112, Mayer Dep. 49:21–50:15, ("There is not a single study that shows the incidence of gender dysphoria goes down as a function of plastic surgery or reassignment surgery. . . . In other words, gender dysphoria isn't about people feeling better. . . . Gender dysphoria is a very serious illness leading to a high risk of suicide, for example. You need to cure that dysphoria. . . . [W]e do not have long-term follow-up studies of what percentage of them are still dysphoric."), 62:21–63:14, "Q. Do you believe . . . that hormone therapy is medically necessary for treating gender dysphoria in adults with long-standing gender dysphoria? A. Well, I have to know what its relative efficacy is versus other treatments. I don't know, because we dont have the data, we don't have the analysis. Is this an effective treatment? I would like to see people given hormones and people given the reassignment surgery, and follow them up in 20 years or whatever length of time, and see how well

they're doing compared to another group. Science is about comparison. Where are the transgender people who then don't undergo hormone therapy to have a comparison group?"), 65:9–66:5, "There are no studies . . . [that] show the incidence and prevalence rate of gender dysphoria is significantly decreased by hormone or reassignment surgery compared to other modalities of treatment. So if you mean, if it works as well as a 10 cent pill, is that safe and effective? No. The fact is that all surgery has side effects. The fact is that all medicines have side effects. Is the risk of those side effects warranted? We just don't have the research; we don't have the publications. We have studies telling people feel better, they like the way they look, they have less burden. None of that is dysphoria. . . . Better body [image], but do they actually have a decreased risk of dysphoria? I do not know that."), 71:25–72:3, "Safe and effective in surgery means safe and effective as surgery. You can't mean it's safe and effective treatment of dysphoria if you don't have any evidence."); (Dkt. 90, Mayer Report, App. D:109–12, referencing the 2004 Birmingham University assessment of more than one-hundred post-operative studies, "[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"; referencing the Dhejne (2011) study, "post-surgical mental health was quite poor, as indicated especially by the high rate of suicide attempts . . . this study suggests that sex-reassignment surgery may not rectify

the comparatively poor health outcomes associated with transgender populations in general"; referencing the Kuhn (2009) study that "found considerably lower general life satisfaction in post-surgical transsexuals as compared with females who had at least one pelvic surgery in the past"; referencing the Murad (2010) study that found "'very low quality evidence' that sex reassignment via hormonal interventions 'likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life.'"); Dkt. 121, DFOF ¶¶ 120–39.)

State Defendants further assert that this is not a *material* disputed fact, because this Court need not resolve whether such procedures are in fact "medically necessary treatments" for Plaintiffs or anyone else with gender dysphoria. Rather, it need only find that reasonable doubts exist regarding the state of the scientific evidence regarding the safety and efficacy of surgical treatments for gender dysphoria, such that State Defendants have a substantial basis for excluding insurance coverage for these treatments.

10. Boyden experiences emotional and physical suffering as a result of not receiving the treatment prescribed for her. (Boyden Decl. ¶ 20).

RESPONSE: Undisputed for purposes of summary judgment that "Boyden experiences emotional and physical suffering"; dispute that this suffering is caused by not receiving the gender reassignment surgery Boyden seeks, as insufficient evidence exists to conclude that this treatment is

safe and effective at treating gender dysphoria. (*See* Response, PFOF ¶ 9; Dkt. 90, Mayer Report 3, Summary of Opinions ¶ 6, Op. ¶ 26; Dkt. 121, DFOF ¶¶ 120–39.)

B. Plaintiff Shannon Andrews

11. Ms. Andrews first started to recognize her gender identity around the age of five (5). (Andrews Decl. ¶ 4).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this proposed finding of fact implies that gender identity is an innate or immutable characteristic, which State Defendants dispute. (Dkt. 88, DFOF ¶¶ 82–86; Dkt. 121, DFOF ¶ 119.)

12. Ms. Andrews has a Ph.D. in molecular biology from Princeton University. (Andrews Decl. ¶ 6).

RESPONSE: Undisputed for purposes of summary judgment.

13. Andrews has gender dysphoria, or severe distress caused by the incongruence between her gender assigned at birth and her gender identity, and has been prescribed hormone therapy and GCS to treat her dysphoria. (Budge Decl., Ex. 1, pp. 12, 32-34).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this proposed finding of fact implies that gender identity is an innate or immutable characteristic, which State Defendants dispute. (Dkt. 88, DFOF ¶¶ 82–86; Dkt. 121, DFOF ¶ 119).

14. Hormone therapy and GCS are medically necessary treatments for Andrews' gender dysphoria, and she underwent a vaginoplasty in 2015. (Budge Decl., Ex. 1, p. 34; Andrews Decl. ¶¶ 13, 15, 16).

RESPONSE: Undisputed that Andrews underwent a vaginoplasty in 2015; Dispute that hormone therapy and GCS are medically necessary treatments for gender dysphoria, in that insufficient evidence exists to conclude that this treatment is safe and effective at treating gender dysphoria. (*See* Response, PFOF ¶ 9; Dkt. 90, Mayer Report 3, 7–8, Summary of Opinions ¶ 6, Opinions ¶ 26; Dkt. 121, DFOF ¶¶ 120–39.)

15. The surgical procedures and hormone replacement therapy ("HRT") Ms. Andrews has undergone are necessary for her survival. Had she not been able to transition, she would have killed herself. (Andrews Decl. ¶¶ 29, 30).

RESPONSE: Dispute that "[t]he surgical procedures and hormone replacement therapy ("HRT") Ms. Andrews has undergone are necessary for her survival." (*See* Response, PFOF ¶ 9; Dkt. 90, Mayer Report 3, 7–8, Summary of Opinions ¶ 6, Opinions ¶ 26; Dkt. 121, DFOF ¶¶ 120–39.) State Defendants OBJECT to the statement "[h]ad she not been able to transition, she would have killed herself" because it is inadmissible speculation. *See Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 659–60 (7th Cir. 1991).

16. Andrews has suffered monetary harm as a result of having to pay for GCS, because it was not covered by her state employee health insurance. She has also suffered emotional harm as a result of the denial of benefits because she is transgender. (Andrews Decl. ¶¶ 28-30).

RESPONSE: Undisputed for purposes of summary judgment that Andrews chose to pay for GCS, because it was not covered by her state employee health insurance. State Defendants OBJECT to the remainder of this proposed fact on the ground that the cited evidentiary material lacks foundation and/or does not support that Andrews was denied benefits "because she is transgender," and that the denial of benefits caused monetary or emotional harm. The Exclusion does not discriminate on the basis of sex or gender identity. (*See* Dkt. 88, DFOF ¶¶ 15, 24, 30)

C. Proposed Plaintiff Wren Logan

17. Ms. Logan first recognized her gender identity when she was in preschool. (Logan Decl. ¶ 3).

RESPONSE: *See* Response to PFOF ¶ 3.

18. Logan has gender dysphoria, or severe distress caused by the incongruence between her gender assigned at birth and her gender identity, and has been prescribed hormone therapy and GCS to treat her dysphoria. (Logan Decl. ¶¶ 9, 13).

RESPONSE: *See* Response to PFOF ¶ 3.

19. Logan's therapist and psychiatrist agree that GCS is medically necessary treatment for her gender dysphoria. (Logan Decl. ¶ 13).

RESPONSE: *See* Response to PFOF ¶ 3.

20. Logan has suffered emotional and physical harm as a result of her inability to obtain prescribed GCS. (Logan Decl. ¶ 27).

RESPONSE: *See* Response to PFOF ¶ 3.

II. Gender Identity, Gender Dysphoria, and Treatment

21. Gender identity is one's internal core sense of one's own sex, such as male or female. (Budge Decl., Ex. 1, p. 8).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this proposed finding of fact implies that gender identity is the same as sex, or that gender identity is an innate or immutable characteristic, which State Defendants dispute. (Dkt. 88, DFOF ¶¶ 3, 82–86; Dkt. 121, DFOF ¶ 119.)

22. All human beings have a gender identity. Gender identity is innate and generally considered to be an immutable characteristic. (Budge Decl., Ex. 1, pp. 8, 19-20).

RESPONSE: Undisputed for purposes of summary judgment that "[a]ll human beings have a gender identity." Dispute that "[g]ender identity is innate and generally considered to be an immutable characteristic." (Dkt. 88, DFOF ¶¶ 3, 82–86; Dkt. 90, Mayer Report 5–6, Opinions ¶¶ 5–11, App. D:87–93; Dkt. 121, DFOF ¶ 119.)

23. Treatment aimed at trying to change a person's gender identity and expression to match their sex assigned at birth is recognized by the World Professional Association of Transgender Health ("WPATH") and other major medical associations to be harmful and unethical. (Budge Decl., Ex. 1, pp. 19-20).

RESPONSE: Undisputed that this is Budge's opinion, but dispute the accuracy of this opinion. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") notes that, with respect to children, rates of persistence of gender dysphoria may be low, which indicates that treatments aimed at aligning one's gender identity with their biological sex may be successful at ending (i.e. treating) gender dysphoria. (Dkt. 90, Mayer Report App. D:106.) (*See also* Dkt. 121, DFOF ¶¶ 131–33.) Further, "[t]herapeutic interventions for children must take into account the probability that the children may outgrow cross-gender identification." (Dkt. 90, Mayer Report App. D:106–07.)

24. "Transgender" means there is an incongruence between a person's gender assigned at birth and the individual's gender identity. (Budge Decl., Ex. 1, p. 9).

RESPONSE: Dispute. Gender is not "assigned" at birth and is different from one's birth sex. (Dkt. 88, DFOF ¶¶ 3, 82–86; Dkt. 121, DFOF ¶¶ 119, 134.)

25. Transgender people make up an extremely small percentage of the population, between .38 and .6% of the United States population, and approximately .43% of the population in Wisconsin. (Budge Decl., Ex. 1, p. 10).

RESPONSE: Undisputed for purposes of summary judgment.

26. Plaintiffs' academic and career accomplishments demonstrate their contributions to society. (Boyden Decl. ¶¶ 1, 3, 4; Andrews Decl. ¶¶ 1, 2; Logan Decl. ¶ 1).

RESPONSE: Undisputed for purposes of summary judgment as to Boyden and Andrews. As to Logan, see Response to PFOF ¶ 3.

27. For most transgender individuals, a gender transition or "transitioning" is considered psychologically and medically necessary. Transition can involve social transition and medical transition. (Budge Decl., Ex. 1, pp. 18-19).

RESPONSE: Undisputed for purposes of summary judgment that "[t]ransition can involve social transition and medical transition." Dispute the remainder of this proposed fact. (*See,* Response to PFOF ¶ 9; Dkt. 90, Mayer Report 6–7, Opinions ¶¶ 12–15; Dkt. 122, Mayer Dep. 76:20–77:11 ("I don't know what gender transition means. You're born with that gender. It seems that . . . people are talking out of both sides of their mouth. They say you're born with a gender, but then you need gender transition. If you're born with that gender, why do you need a transition? . . . They need to have a long-term identification, not any particular body configuration."); Dkt. 121, DFOF ¶ 136.)

28. A medical transition usually includes any medical procedure to assist a transgender individual with achieving primary or secondary sex characteristics that are closely aligned with their gender identity, including hormone therapy and/or surgeries. Not all transgender persons will want or need medical interventions. (Budge Decl., Ex. 1, p. 9-10).

RESPONSE: Undisputed for purposes of summary judgment.

29. HRT for transgender individuals includes the administration of feminizing or masculinizing hormones to induce changes in physical appearance and is medical necessary treatment for many transgender individuals. (Budge Decl., Ex. 1, p. 10).

RESPONSE: Undisputed for purposes of summary judgment that "HRT for transgender individuals includes the administration of feminizing or masculinizing hormones to induce changes in physical appearance." Dispute the remainder of this proposed fact. (*See* Response to PFOF ¶ 9; Dkt. 88, DFOF ¶¶ 101–06; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Dkt. 121, DFOF ¶¶ 120–39.)

30. GCS includes any surgery to alter or adjust an individual's primary or secondary sex characteristics to align with their gender identity, and is considered medically necessary treatment due to its efficacy in relieving the psychological distress associated with gender dysphoria. (Budge Decl., Ex. 1, p. 10).

RESPONSE: Undisputed for purposes of summary judgment that GCS "includes any surgery to alter or adjust an individual's primary or secondary sex characteristics to align with their gender identity." Dispute the remainder of this proposed fact. (*See,* Response to PFOF ¶ 9; Dkt. 88, DFOF ¶¶ 101–06; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Dkt. 121, DFOF ¶¶ 120–39.)

31. Gender dysphoria is the medical and psychiatric term for the psychological distress caused by the incongruence between a transgender person's gender assigned at birth and their gender identity. This psychiatric diagnosis is codified in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"). (Budge Decl., Ex. 1, p. 12).

RESPONSE: Dispute. The DSM-5 defines gender dysphoria as "incongruence between one's experience/express gender and assigned gender," as well as "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (Dkt. 90, Mayer Report Appx D:94.) Gender is not "assigned" at birth and is different from one's birth sex. (Dkt. 88, DFOF ¶¶ 3, 82–86; Dkt. 121, DFOF ¶ 119.)

32. When individuals diagnosed with gender dysphoria do not obtain competent and necessary treatment, serious and debilitating psychological distress (depression, anxiety, self-harm, suicidal ideation/attempts, etc.) often occurs. (Budge Decl., Ex. 1, p. 13).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this proposed finding of fact implies that gender reassignment surgery is "competent and necessary treatment" for gender dysphoria. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Dkt. 112, Mayer Dep. 54:18–25 ("These transgender or gender dysphoric people have very high suicide rates, treated or not. You're saying there are people . . . who can show, had they not had treatment, they would have been suicidal. I do not know of that study. I would be interested if you'd send it to me."); Mayer Dep. 126:13–16 ("But if it causes them serious dysphoria, if they're suicidal, of course that has to be treated one way or the other. But I don't know what the best way to treat them is. We have too little data."); Dkt. 121, DFOF ¶ 137.)

33. To date, every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people and has called for health insurance coverage for treatment of gender dysphoria. (Budge Decl., Ex. 1, p. 15).

RESPONSE: State Defendants OBJECT to this proposed fact because evidentiary material cited rests on inadmissible hearsay, is conclusory, and lacks foundation. Budge quotes a separate publication, one that she did not author, that asserts this as a purported fact; she does not establish that she has personal knowledge of the purported fact. Notwithstanding and without waiving these objections, dispute that gender reassignment surgery is a "medical necessity of transition-related care for improving the physical and mental health of transgender people." (*See,* Response to PFOF ¶ 9; Dkt. 88, DFOF ¶¶ 101–06; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Dkt. 121, DFOF ¶ 138.)

State Defendants further assert that any purported consensus by "major medical association[s] in the United States" is not a material fact, since the scientific evidence does not support such a consensus. (Dkt. 112, Mayer Dep. 77:14–25 ("Q. Assuming that what I said is true that the AMA supports hormone therapy and surgeries as treatment for gender dysphoria, would you agree that that is the correct position? A. I agree the AMA supports it. I can't second-guess the APA. I don't know that much about what their position is. I would have to read the whole document, but if they are saying that's been

demonstrated that it's a significant factor in reducing dysphoria, I would have a great deal of difficulty with that statement."), 97:21–98:1 ("[T]he AMA has been wrong so many times. Remember, the AMA believed that being gay was a disorder. The AMA believed that the answer to domestic violence was never to leave your husband. The AMA supported smoking. The AMA is a trade union. They've made all sorts of mistakes."), 155:12–17 ("[T]onsillitis is another example. AMA took out millions of tonsils in this country when no tonsils virtually were taken out in Europe. And we did it so we wouldn't have recurrent sore throats. And we quit taking tonsils out, there was no increase in sore throats. Nobody has their tonsils out.").)

34. Within the medical and mental health care fields, transition-related medical care, including HRT and GCS, is recognized as medically necessary. (Budge Decl., Ex. 1, p. 18).

RESPONSE: Dispute. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

35. A substantial body of research confirms the safety and effectiveness of hormone therapy and surgery to treat gender dysphoria, as well as the serious harm caused by denying care to those who need it. (Budge Decl., Ex. 1, p. 15-18; Expert Witness Report of Dr. Loren S. Schechter ("Schechter Rep."), p. 6-14).

RESPONSE: Dispute. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

36. The WPATH Standards of Care ("SOC") for treatment of gender dysphoria outline thirty-seven (37) years of data that focuses on the beneficial psychosocial outcomes of HRT and GCS. (Budge Decl., Ex. 1, p. 16).

RESPONSE: Undisputed that the WPATH standards for treatment of gender dysphoria outline data that focuses on the outcomes of HRT and GCS. Dispute that this data conclusively demonstrates that such treatments result in "beneficial psychosocial outcomes." (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

37. The WPATH SOC are widely recognized guidelines for the clinical management of transgender individuals with gender dysphoria. (Schechter Rep. p. 6).

RESPONSE: Undisputed that some providers recognize WPATH standards as guidelines for the clinical management of transgender individuals with gender dysphoria. Dispute that these guidelines are "widely recognized" to the extent the guidelines mean that gender reassignment surgery is medically necessary, safe and effective treatment for gender dysphoria. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

38. There is no medical basis for blanket exclusions of coverage for all transition-related care. (Budge Decl., Ex. 1, pp. 18, 21-22, 35).

RESPONSE: Dispute. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

39. When performing GCS, surgeons use many of the same procedures that they use to treat other medical conditions. (Schechter Rep. p. 11).

RESPONSE: Undisputed for purposes of summary judgment.

40. For example, surgeons regularly perform mastectomies and chest/breast reconstruction, hysterectomies/salpingo-oophorectomies, and orchiectomies to treat individuals with cancer, or a genetic predisposition to cancer (BRCA 1, 2 genes in the case of prophylactic mastectomy or oophorectomy). (Schechter Rep. p. 11).

RESPONSE: Undisputed for purposes of summary judgment.

41. Similarly, surgeons perform procedures to reconstruct male or female external genitalia for individuals who have certain medical conditions (e.g., cancer) or who have suffered traumatic injuries to or disabling infections of their genitalia. (Schechter Rep. p. 11).

RESPONSE: Undisputed for purposes of summary judgment.

42. Insurance coverage is provided to state employees for medically necessary surgeries, including reconstructive surgeries on abnormal structures of the body caused by: (1) congenital defects; (2) trauma; (3) tumors; or (4) disease. (Godbe Decl., Ex. C, Excerpts From 2016 Contract & Uniform Benefits, p. 4-35). In general, medically necessary services are provided "consistent with the symptom(s) or diagnosis and treatment of the Participant's Illness or Injury," based on "standards of acceptable medical practice to treat that Illness or Injury," (Id. p. 4-22; Godbe Decl., Ex. E, 2017 Benefit Year Uniform Benefits, p. 26 (coverage for surgical procedures "when needed to care for an ILLNESS or INJURY"); Dkt. # 93, Deposition of Nancy Thompson ("Thompson Dep.") 24:17-25:12 (surgical procedures are covered if needed to care for an illness or an injury)).

RESPONSE: State Defendants OBJECT to the first sentence of this proposed fact because the cited evidence does not support these assertions. Page 4–35 of the cited exhibit specifically addresses the treatment of temporomandibular disorders and transplants, not "medically necessary surgeries," generally. Dispute the remainder of this proposed fact and assert that 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." (Dkt. 88, DFOF ¶ 17.) Similarly, services and procedures prescribed by a member's clinician may still be deemed not medically necessary by a third-party health plan as part of the health plan's independent medical necessity review. (DFOF ¶¶ 160, 174–75.)

43. But not all medically necessary surgeries are covered, because Defendants do not cover reconstructive surgeries to treat gender dysphoria though they do cover the same surgeries for other medical conditions and injuries. (Godbe Decl., Ex. C, Excerpts From 2016 Contract & Uniform Benefits, p. 4-44 (exclusion for "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment"); Godbe Decl., Ex. E, 2017 Benefit Year Uniform Benefits, p. 41; Thompson Dep. 24:23-26:20).

RESPONSE: Undisputed that "not all medically necessary surgeries are covered," and that the Uniform Benefits do not provide coverage for

"procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." Dispute the remainder of this proposed fact. Surgeries that purport to treat gender dysphoria are neither "reconstructive" nor "medically necessary surgeries," in that insufficient evidence exists to conclude that this treatment is safe and effective at treating gender dysphoria. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

44. When billing insurers for reimbursement, health care providers use Current Procedural Terminology ("CPT") codes, which are developed and maintained by the American Medical Association. The same code or codes may apply to a particular procedure regardless of whether the procedure is performed on a transgender patient or a cisgender patient. (Schechter Rep. p. 11).

RESPONSE: Undisputed for purposes of summary judgment.

45. For example, a subcutaneous mastectomy may be performed for a cisgender woman to reduce her risk of breast cancer or for a transgender man with gender dysphoria. (Schechter Rep. p. 11).

RESPONSE: Undisputed for purposes of summary judgment.

46. The same CPT code may be used for both procedures. In general, the charge per CPT code would be the same, whether the procedure were used for treatment of gender dysphoria or treatment of another condition — for example, the charge for a subcutaneous mastectomy (19304). (Schechter Rep. pp. 11-12).

RESPONSE: Undisputed for purposes of summary judgment.

47. The research, as well as clinical expertise and the WPATH SOC, show that hormone therapy and surgical procedures for gender dysphoria are safe and effective, and that many of these procedures are analogous to surgical procedures used to treat other medical conditions. (Schechter Rep. pp. 6, 12).

RESPONSE: Dispute. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 112, Mayer Dep. 55:10–56:4 ("Q. Isn't it standard . . . that when the standards of care for treating a condition such as gender dysphoria are established, that they look at the research as well as clinical experience? A. Well, sometimes they do, but the Cochrane Review that studied OB/GYN procedures found that two-thirds of the things we do, including holding babies up by their feet and spanking their butts are actually harmful. So there is a great deal of folklore in what we do in medicine. . . . The other example that I worked on were VBACs. A VBAC is a vaginal birth after cesarean delivery. We'd forbid them in the United States. The AMA said they were dangerous. And yet when we finally did a study of Canadian experiences versus ours, we found out that VBACs were safe. That is the importance of doing research."); Dkt. 121, DFOF ¶¶ 120–39, 138–39.)

48. The fact that the medical community deems these procedures sufficiently safe to treat conditions other than gender dysphoria is by itself more than sufficient to support the safety of those surgeries to treat gender dysphoria. (Schechter Rep. p. 12).

RESPONSE: State Defendants OBJECT to this proposed fact to the extent Dr. Schechter is opining regarding proper treatment for gender dysphoria. Dr. Schechter is a plastic surgeon and his curriculum vitae does not reveal any expertise in diagnosing or evaluating the efficacy of treatments for

psychiatric disorders such as gender dysphoria. His expert report lacks foundation to support these opinions. Notwithstanding and without waiving this objection, State Defendants dispute this proposed fact. (*See* Response to PFOF ¶¶ 9, 47; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39, 138–39.)

49. Studies show overall complication rates for surgical procedures to treat gender dysphoria are similar to the rates for similar surgical procedures for treating other medical conditions. (Schechter Rep. pp. 12-13).

RESPONSE: Undisputed for purposes of summary judgment, except dispute that gender reassignment surgery is safe and effective treatment for gender dysphoria. (*See,* Response to PFOF ¶ 9; Dkt. 88, DFOF ¶¶ 101–06; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Dkt. 121, DFOF ¶¶ 120–39.).

50. The evidence regarding the efficacy and safety of these treatments is at least as good, if not better, than the evidence supporting other commonly provided medical and surgical treatments. (Schechter Rep. p. 19).

RESPONSE: State Defendants OBJECT to this proposed fact to the extent Dr. Schechter is opining regarding proper treatment for gender dysphoria. Dr. Schechter is a plastic surgeon and his curriculum vitae does not reveal any expertise in diagnosing or evaluating the efficacy of treatments for psychiatric disorders such as gender dysphoria. His expert report lacks foundation to support these opinions. Notwithstanding and without waiving this objection, State Defendants dispute this proposed fact. (*See* Response to

PFOF ¶¶ 9, 47; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.)

51. There is no controversy amongst mainstream medical professionals regarding the appropriateness and necessity of medical and surgical care for gender dysphoria. (Budge Decl., Ex. 1, pp. 35-36; Schechter Rep. pp. 19-20).

RESPONSE: Dispute. (*See* Response to PFOF ¶¶ 9, 47; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39, 138–39.)

52. Transitioning to the sex that matches the individual's identity is also more cost-effective than denying such care, because denial of care is associated with increased disparities in depression and other costly-to-treat conditions. (Budge Decl., Ex. 1, p.22-23).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited lack sufficient foundation. Budge is professionally trained as a psychologist and there no indication in her submissions that she has any expertise in assessing the costs of treating psychiatric (or any other) conditions. Notwithstanding and without waiving this objection, State Defendants dispute this proposed fact. (Dkt. 88, DFOF ¶¶ 88–92; Dkt. 91, Williams Report 3; Dkt. 121, DFOF ¶¶ 142–43.)

53. From an actuarial standpoint, the removal of the exclusion for coverage of transition-related care is immaterial, since it represents less than .1% of the overall costs of medical care. (Declaration of Joan C. Barrett ("Barrett Decl."), Ex. 1, pp. 1, 8; Godbe Decl., Ex. D, July 21, 2016 Emails between Tara Pray and Michael McNally (stating that consultant Segal noted the "cost impact" of removing the exclusion "is typically less than 0.1%," describing this cost as "negligible")).

RESPONSE: Dispute. The estimated yearly cost of this benefit is approximately $300,000. (Dkt. 88, DFOF ¶¶ 88–92; Dkt. 91, Williams Report 3.) Further, the actuarial concept of "materiality" does not govern the actions of a policy-making body (like GIB) with the fiduciary responsibility to prudently manage assets under its control. (Dkt. 121, DFOF ¶ 144.)

54. Recent population-based estimates indicate that approximately .38% to .6% of the United States population identifies as transgender and .43% of the population in Wisconsin is transgender. (Budge Decl. ¶2, Exhibit 1, p. 10).

RESPONSE: Undisputed for purposes of summary judgment, but duplicative of no. 25.

55. Boyden cannot afford her prescribed GCS without insurance coverage. (Boyden Decl. ¶ 19).

RESPONSE: State Defendants OBJECT to this proposed fact because it is conclusory and the cited evidentiary materials lacks sufficient foundation. *See Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 659–60 (7th Cir. 1991).

56. The health insurance coverage provided to state employees by the State of Wisconsin excludes "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" (hereinafter the "exclusion"). (Godbe Decl., Ex. E, 2017 Benefit Year Uniform Benefits, p. 41).

RESPONSE: Undisputed for purposes of summary judgment.

57. Boyden was denied coverage for GCS (specifically, a vaginoplasty) because of the exclusion found in the Uniform Benefits plan that prohibits "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (Boyden Decl. ¶¶ 8, 11; Godbe Decl., Ex.

F, Excerpts from Boyden ETF Written Complaint File, p. 1 (reason for denial was exclusion)).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this finding implies that the Exclusion has no basis in the State's interest in avoiding costs and coverage for procedures that lack adequate evidence to support their safety and efficacy for treating gender dysphoria. To that extent, this fact is disputed. (*See* Response to PFOF ¶¶ 9, 47; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39; Dkt. 88, DFOF ¶¶ 88–92; Dkt. 91, Williams Report 3.)

58. Andrews was denied coverage for GCS (a vaginoplasty) because of the exclusion found in her Health Plan, which prohibits benefits for "HEALTH CARE SERVICES for, or leading to, sex transformation surgery and sex hormones related to such TREATMENT." (Andrews Decl. ¶¶ 16, 20-21; Godbe Decl., Ex. G, Excerpts from Andrews ETF Written Complaint File, p. 8 (reason for denial was exclusion)).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent this finding implies that the Exclusion has no basis in the State's interest in avoiding costs and coverage for procedures that lack adequate evidence to support their safety and efficacy for treating gender dysphoria. To that extent, this fact is disputed. (*See* Response to PFOF ¶¶ 9, 47; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39; Dkt. 88, DFOF ¶¶ 88–92; Dkt. 91, Williams Report 3.)

59. Andrews had to pay for her prescribed GCS out-of-pocket because it was not covered by her insurance. (Andrews Decl. ¶ 28).

RESPONSE: Undisputed for purposes of summary judgment that Andrews chose to pay for her prescribed GCS out-of-pocket because it was not covered by her insurance.

60. After being placed at the University of Wisconsin for her residency, Logan learned that as a state employee, all insurance available to her would exclude transition-related care. Logan was denied coverage for GCS because of the exclusion of transition-related coverage found in the Uniform Benefits plan and was advised that such care was excluded under a provision excluding coverage for "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (Logan Decl. ¶¶ 12, 22, 21).

RESPONSE: *See* Response to PFOF ¶ 3.

61. After insurer Wisconsin Physicians Service ("WPS") denied the coverage of her 2015 GCS, Andrews filed an appeal of the denial with WPS and submitted a complaint to Employee Trust Funds ("ETF"). (Andrews Decl. ¶¶ 22, 24).

RESPONSE: Undisputed for purposes of summary judgment.

62. The coverage exclusion is based on gender identity. (Godbe Decl., Ex. H, Jan. 31, 2017 ETF Memo to Health Plans ("the [Group Insurance] Board approved reinstating the exclusion of health benefits and services based on gender identity")); Godbe Decl., Ex. B, "It's Your Choice" Access Health Plan, p. 2 ("There will no longer be an exclusion related to benefits or services based on gender identity"); Godbe Decl., Ex. E, 2017 Benefit Year Uniform Benefits, p. 41 (exclusion for "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment"); Dkt. # 53, Deposition of Michael S. Farrell ("Farrell Dep.") at 28:17-25 (describing Texas litigation as a challenge to federal rule forbidding "transgender exclusions" from health plans); Dkt. # 51, Deposition of Herschel Day ("Day Dep.") at 49:17-50:3 (stating his view that the exclusion should be ended because it is "discriminatory and…[he] support[s] the right of transgender individuals to get the healthcare they need," and because "it's not costly to add it to the group plan").

RESPONSE: Dispute. The Exclusion is one element of a broader set of exclusions that excludes from coverage "treatment, services and supplies for cosmetic . . . purposes" and explains that "[p]sychological reasons do not represent a medical/surgical necessity." (Dkt. 88, DFOF ¶ 30. *See also* Dkt. 81:20–24.)

63. Plaintiffs are denied coverage they need because they are transgender. For most transgender individuals, a gender transition is considered psychologically and medically necessary. (Budge Decl., Ex. 1, p. 9). A medical transition includes any medical procedure to assist a transgender individual with achieving primary or secondary sex characteristics that are closely aligned with their gender identity, such as hormone therapy and/or surgeries. (Id.).

RESPONSE: State Defendants OBJECT to the first sentence of this proposed fact because it is argumentative and a legal conclusion. Notwithstanding and without waiving the objection, undisputed for purposes of summary judgment that "medical transition includes any medical procedure to assist a transgender individual with achieving primary or secondary sex characteristics that are closely aligned with their gender identity, such as hormone therapy and/or surgeries." Dispute the remainder of this proposed fact. (*See* Response to PFOF ¶¶ 9, 62; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39. *See also* Dkt. 81:20–24.)

64. Plaintiffs, like non-transgender state employees, qualify for ETF-administered health insurance coverage and have a need for such coverage. (Boyden Decl. ¶ 3; Andrews Decl. ¶ 2; Logan Decl. ¶ 1).

RESPONSE: Undisputed for purposes of summary judgment that Plaintiffs qualify for ETF-administered health insurance coverage. Dispute that Andrews and Boyden "have a need for such coverage" to the extent it applies to coverage for treatments set forth in the Exclusion. (*See* Response to PFOF ¶ 9; Dkt. 90, Mayer Report Opinions ¶¶ 17–26; Mayer Report App. D:109–12; Dkt. 121, DFOF ¶¶ 120–39.) As to Logan, see Response to PFOF ¶ 3.

65. The State provides insurance coverage for the reasons stated in Wis. Stat. § 40.01(1), which include "aid[ing] public employees in protecting themselves . . . against the financial hardships of . . . illness, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale …. [and] by establishing equitable benefit standards throughout public employment." (Godbe Decl., Ex. A, Defs' Resp. to Interrog. 1).

RESPONSE: Undisputed for purposes of summary judgment.

III. The Defendants

66. Defendant, ETF, is an executive branch agency, created by Wis. Stat. § 15.16 and charged with providing and administering retirement, health insurance and other benefit programs to state and local government employees. (*See* Wis. Stat. § 40.01(1); Dkt. # 69, Deposition of Tara S. Pray ("Pray Dep.") at 39:6-17 ("ETF . . . administers the group health insurance program" for state and municipal employees and retirees); Dkt. # 54, Deposition of Robert J. Conlin ("Conlin Dep.") at 25:2-9; 84:1-12; Dkt. # 78, Deposition of Jeffrey E. Bogardus ("Bogardus Dep.") at 15:9-15; 15:20-16:2).

RESPONSE: Undisputed for purposes of summary judgment.

67. ETF directly receives federal financial assistance in the form of Medicare Part D subsidies for the self-insured pharmacy benefits plan offered to state employees. (Godbe Decl., Ex. X, May 2, 2018 Stip. ¶ 2).

RESPONSE: Undisputed for purposes of summary judgment.

68. Defendant Robert Conlin, Secretary of ETF, is "in charge of the administration of the department and exercise[s], as head of the department, all powers and duties" exercised by other department secretaries. (Wis. Stat. § 40.03(2)(a)).

RESPONSE: Undisputed for purposes of summary judgment.

69. Conlin and subordinate ETF staff within the Office of Strategic Health Policy ("OSHP") administer health insurance plans for state employees. (Conlin Dep. 35:9-36:3 (Secretary is "ultimately responsible for administering" health insurance programs); 30:18-32:10 (delegates day-to-day administration of health insurance program to OSHP), 89:21-24 & 93:8-19 (ETF administers state employee group health insurance plans)).

RESPONSE: Undisputed for purposes of summary judgment. However, Conlin does not have involvement in deciding the coverage provided under those plans, which is determined by GIB. GIB determines the Uniform Benefits. (Dkt. 88, DFOF ¶ 113.)

70. As Secretary, Conlin oversaw a reorganization of ETF that created OSHP, and hired Lisa Ellinger, who was the OSHP director during the time when Defendants rescinded and then reinstated the exclusion. (Conlin Dep. 23:4-13; 31:7-19; 55:22-56:2; Dkt. # 68, Deposition of Lisa M. Ellinger ("Ellinger Dep.") at 11:25-12:3).

RESPONSE: Undisputed for purposes of summary judgment.

71. OSHP is the "policy office" for state health insurance programs, and "sets the policy with the Group Insurance Board ('GIB') for the group health insurance program." (Pray Dep. 39:22-25).

RESPONSE: Dispute. By statute, OSHP does not and cannot "set policy" for the Wisconsin Group Health Insurance Program. That is GIB's role under Wis. Stat. § 40.52(1). (Dkt. 88, DFOF ¶ 110.)

72. As Secretary, Conlin is ultimately responsible for ensuring that OSHP staff carry out the GIB's decisions. (Pray Dep. 48:20-23; Conlin Dep. 51:16-23, 52:1-12).

RESPONSE: Undisputed for purposes of summary judgment that Conlin must ensure effective administrative and oversight of ETF operations. However, he does not have authority over deciding the coverage provided under Wisconsin Group Health Insurance Program plans, which is determined by GIB. GIB determines the Uniform Benefits. (Dkt. 88, DFOF ¶ 113.)

73. Policy analysts in OSHP, sometimes with assistance from contracted consultants, evaluate the package of employee health insurance benefits (called the "Uniform Benefits") throughout the year and analyze and make recommendations to the GIB about changes to that package, typically in late winter and early spring. (Pray Dep. 45:21-47:3, 48:24-54:25; Conlin Dep. 52:13-53:8 (staff recommend uniform benefits changes and implement uniform benefits approved by GIB); Bogardus Dep. 52:10-16).

RESPONSE: Undisputed for purposes of summary judgment.

74. As secretary, Conlin took a number of specific actions to review the coverage exclusion at issue in this case, including reviewing the final Health and Human Services ("HHS") rule on nondiscrimination and requesting a legal opinion from ETF as to the applicability of that rule to ETF, reviewing memos by OSHP and ETF relating to the proposed removal of the exclusion, and discussing the coverage exclusion with ETF attorneys on multiple occasions.

(Godbe Decl., Ex. W, Defs.' Resp. to Pls.' First Set of Disc. Requests, Interrog. 10).

RESPONSE: Undisputed for purposes of summary judgment, and assert that Conlin consistently recommended removing the Exclusion from the Uniform Benefits, despite GIB's vote to reinstate the Exclusion. (Dkt. 88, DFOF ¶¶ 114–18.)

75. Defendant, GIB, is one (1) of five (5) boards within ETF. Wis. Stat. § 15.165(2) ("There is created in the department of employee trust funds a group insurance board").

RESPONSE: Undisputed for purposes of summary judgment.

76. GIB relies on ETF staff when making policy decisions. (Farrell Dep. 36:9-11).

RESPONSE: Undisputed for purposes of summary judgment, but assert that Conlin and ETF staff consistently recommended removing the Exclusion from the Uniform Benefits, despite GIB's vote to reinstate the Exclusion. (Dkt. 88, DFOF ¶¶ 114–18.)

77. ETF staff have significant control over what new benefits are added to the state employee health plans, because GIB generally does not adopt new benefits that are not recommended by ETF. (Pray Dep. 62:2-5).

RESPONSE: State Defendants OBJECT to this proposed fact because he evidence cited does not establish the proposed finding of fact—Pray testified only that GIB did "not usually" elect to include benefits not recommended to be added by ETF staff. (Dkt. 69, Pray Dep. 62:2–5.) Notwithstanding and without waiving this objection, State Defendants dispute this proposed fact.

Under state statute, GIB has sole control over what new benefits are added to the state employee health plans. (Dkt. 88, DFOF ¶¶ 110–111.) And Conlin and ETF staff consistently recommended removing the Exclusion from the Uniform Benefits, despite GIB's vote to reinstate the Exclusion. (Dkt. 88, DFOF ¶¶ 114–18.)

78. GIB votes on the uniform benefit recommendations of ETF staff, typically at its quarterly meeting in May or August, for inclusion in contracts with the private insurance companies that provide coverage to state employees. (Conlin Dep. 78:20-79:22; Day Dep. 32:8-22, 35:10-13).

RESPONSE: Undisputed for purposes of summary judgment, but assert that an ETF recommendation is not required before GIB takes any action. Reinstatement of the Exclusion by GIB occurred despite ETF's recommendation to remove it from the Uniform Benefits. (Dkt. 88, DFOF ¶¶ 51, 61.)

79. GIB is "a policymaking board that directs ETF staff on matters related to the group insurance plan for the State of Wisconsin," and directs ETF staff on matters related to the group insurance plans. (Farrell Dep. 32:2-6, 35:17-36:2; Conlin Dep. 34:25-35:1).

RESPONSE: Undisputed for purposes of summary judgment.

80. GIB considers recommendations from ETF and establishes health insurance benefits for Wisconsin state employees each contract year. (Thompson Dep. 17:24-18:19; Farrell Dep. 35:17-36:5, 39:10-17; Conlin Dep. 34:18-35:1).

RESPONSE: Undisputed for purposes of summary judgment, but assert that Conlin and ETF staff consistently recommended removing the Exclusion

from the Uniform Benefits, despite GIB's vote to reinstate the Exclusion. (Dkt. 88, DFOF ¶¶ 114–18.)

81. ETF implements the decisions of the GIB regarding the uniform benefits package. (Conlin Dep. 51:16-52:11, 89:21-24; Dkt. # 52, Deposition of David H. Nispel ("Nispel Dep.") at 17:11-19; Farrell Dep. 38:13-39:9.)

RESPONSE: Undisputed for purposes of summary judgment.

82. The uniform benefits adopted by GIB govern all state employee plans. (Ellinger Dep. 38:10-19 ("Uniform benefits was instituted to ensure that all those health plans were administering the same benefits package").)

RESPONSE: Undisputed for purposes of summary judgment.

83. ETF's implementation of GIB's benefits decisions includes incorporating the benefits changes into contracts with private health plans who administer employee coverage. (Pray Dep. 66:13-24; Conlin Dep. 82:23-83:3).

RESPONSE: Undisputed for purposes of summary judgment, with the clarification that only GIB is statutorily authorized to contract with private health plans and set the terms and conditions of those contracts. (Dkt. 88, DFOF ¶¶ 110–11.)

84. GIB contracts with private insurance companies to administer the insurance for state employees pursuant to the Uniform Benefits set by GIB. (Conlin Dep. 82:23-83:3; Nispel Dep. 17:11-23).

RESPONSE: Undisputed for purposes of summary judgment.

85. Private insurers that contract with GIB may not deviate from the uniform benefits package. (Pray 69:14-19).

RESPONSE: Undisputed for purposes of summary judgment.

86. ETF negotiates and is the point of contact for contracts with the private health plans. (Nispel Dep. 34:19-20; Conlin Dep. 91:10-92:6; Pray 68:6-23; *see also* Wis. Stat. § 40.02(37) (authorizing GIB to enter "contractual arrangements which may include, but are not limited to, indemnity or service benefits, or prepaid comprehensive health care plans, which will provide full or partial payment of the financial expense incurred by employees and dependents as the result of injury, illness or preventive medical procedures")).

RESPONSE: Undisputed for purposes of summary judgment, with the clarification that ETF cannot negotiate the terms of the Uniform Benefits, which are set by GIB. (Dkt. 88, DFOF ¶¶ 110–11.)

87. ETF and GIB are both identified as contracting parties for pharmacy benefits. (Godbe Decl., Ex. X, May 2, 2018 Stip. ¶ 8).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited do not establish that ETF is a contracting party, only that ETF is the department to which GIB—the contracting party—is an "attached board" under Wis. Stat. § 15.165(2). Notwithstanding and without waiving this objection, State Defendants dispute this proposed fact. Only GIB is empowered by state statute to enter into contracts with third-party insurance entities. Wis. Stat. § 40.03(6)(a).

88. ETF enforces contracts with private health plans, which contain the exclusion at issue in this case, through hearing grievances and appeals, conducting audits, and other means. (Conlin Dep. 82:23-83:25 (ETF enforces contracts through appeals and audits); Pray Dep. 85:14-88:12 (describing ways in which ETF OSHP enforces contracts with health plans)).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support these assertions and because

the word "enforces" is vague and ambiguous. Secretary Conlin testified only that ETF "make[s] sure that the plans are offering the benefits that are covered by uniform benefits" through hearing appeals to ETF and ETF audits of self-insured insurance plans. (Dkt. 54, Conlin Dep. 83:8–18.) As for Pray, she testified that ETF requires from private health plans "reports" and information about grievances and independent reviews of medical necessity, and that ETF is involved in grievance appeals. (Dkt. 69, Pray Dep. 86:1–88:12.) None of the evidentiary materials cited support that ETF "enforces" contracts with private health plans.

89. ETF's Office of Legal Services ("OLS") staff provide legal counsel to GIB and ETF. (Nispel Dep. 15:1-3, 18:4-6).

RESPONSE: Undisputed for purposes of summary judgment.

90. The Board of Regents and the Medical School, along with their chief executive officers (the "Employer Defendants"), offer health insurance plans with the uniform benefits packages set by ETF and GIB. (Godbe Decl., Ex. A, Defs.' Resp. to Reqs. for Admis. ¶¶ 2, 4, 10, 11, 13; Wis. Stat. § 40.52(1) ("all insured employees shall participate" in standard employee health plans devised by GIB and ETF)).

RESPONSE: State Defendants OBJECT to this proposed fact because neither the Board of Regents nor the Medical School are defendants in this case. *See* Dkt. 67. Notwithstanding and without waiving this objection, undisputed that Board of Regents and the Medical School offer health insurance plans with the uniform benefits packages set by GIB. Dispute that those uniform benefits packages are "set by" ETF. State statute provides that

GIB has the exclusive authority to determine the uniform benefits packages. (Dkt. 88, DFOF ¶¶ 110–11.)

91. ETF's OLS concluded that ETF is a "covered entity" under the Affordable Care Act ("ACA"). (Nispel Dep. 32:6-17; Godbe Decl., Ex. I, June 22, 2016 GIB Correspondence Memorandum, p. 4).

RESPONSE: State Defendants OBJECT to this proposed fact because it is not supported by the evidentiary materials cited. This is not the final version of the June 22, 2016, memorandum that ETF provided to GIB. Furthermore, ETF's OLS concluded in the final memorandum that, "for purposes of these regulations"—i.e. the HHS regulations that implement Section 1557 of the ACA—"ETF is a covered entity." Section 1557 itself does not mention "covered entities," and ETF's OLS did not opine on ETF's status under Section 1557, itself. (Dkt. 83-8, Nispel Dep. Ex. 1.)

92. Navitus Health Solutions is the pharmacy benefit manager that is contracted with the GIB. (Bogardus Dep. 21:3-5).

RESPONSE: Undisputed for purposes of summary judgment.

93. The OSHP deals primarily with the GIB and the group health plans, including the pharmacy benefit program. (Bogardus Dep. 40:4-11).

RESPONSE: Undisputed for purposes of summary judgment.

94. Bogardus testified that the cost of hormone drugs, such as estrogen and androgen, is "fairly low compared to other drugs in the market" that the plan does pay for. (Bogardus Dep. 109:17-110:4).

RESPONSE: Undisputed for purposes of summary judgment.

IV. History of the Exclusion and Reasons Given for Reinstating the Exclusion

95. ETF employee health insurance plans excluded coverage of transition-related care starting in 1994. (Nispel Dep. 25:9-13).

RESPONSE: State Defendants OBJECT that the term "transition-related care" is vague and ambiguous. Subject to and without waiving that objection, undisputed that the Exclusion has existed in materially the same form since 1994. Dispute that the insurance plans at issue are "ETF employee health insurance plans." Rather, they are health insurance plans in which state employees can participate, the terms of which are set by GIB. (Dkt. 88, DFOF ¶¶ 110–11.) Dispute that the plans "excluded coverage of transition-related care starting in 1994." The current Exclusion applies to "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (Dkt. 88, DFOF ¶ 24.)

96. In response to bargaining demands submitted to ETF by the Teaching Assistants Association ("TAA") for the 2005-07 contract, which included a demand that the state "provide coverage for transgender, and transsexual individuals to get surgery and follow-up hormone therapy," ETF stated as follows:

> The Board's actuary estimates that in a population of the size of the state program there would be two procedures annually, each costing about $55,400, including all follow-up therapy. The annual cost could be expected to rise at the rate of general increases in health care costs.

ETF estimated the annual cost of the benefit at $110,800 (Godbe Decl., Ex. J, Attachment to Sept. 8, 2006 emails between Bill Kox and Jeff Bogardus, pp. 19-20).

RESPONSE: Undisputed for purposes of summary judgment.

97. The TAA's 2009-2011 list of bargaining demands included "coverage for transgender, and transsexual individuals to get surgery and follow-up hormone therapy." (Godbe Decl., Ex. K, Attachment to Oct. 22, 2008 emails between Linda Owens and Jeff Bogardus, pp. 16-17).

RESPONSE: Undisputed for purposes of summary judgment.

98. ETF noted again that "the Board's actuary estimates that in a population of the size of the state program there would be two procedures annually," and that "data from current extensive studies of employers who cover these procedures show that costs are lower than earlier reported, ranging from approximately $20,000 to $25,000" meaning an estimated annual cost of $40,000 to $50,000. (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

99. GIB adopted a modification of the exclusion language in 2015 or 2016, but did not remove the exclusion. (Bogardus Dep. 60:10-17).

RESPONSE: Undisputed for purposes of summary judgment.

A. Removal of the Exclusion

100. As part of the Group Health Insurance Program Considerations in 2015 for the plan year starting January 1, 2016, ETF noted that it would not recommend for 2016, but would consider in 2017, "add[ing] coverage for gender reassignment benefits with strict protocols." (Godbe Decl., Ex. L, April 24, 2015 Pray Memorandum, at 5).

RESPONSE: Undisputed for purposes of summary judgment.

101. The University of Wisconsin specifically requested elimination of the exclusion to enhance hiring, and provided evidence that the costs of such coverage would be minimal. (Pray 104:21-105:9).

RESPONSE: State Defendants OBJECT to this proposed fact because the cited evidence does not establish these assertions. Pray testified only to what a document she was shown said, and that document did not contain any "evidence." (Dkt. 69, Pray Dep. 105:5–9.) The document stated only that a "[m]ember present[ed] documentation stating that the coverage cost would be minimal." (Dkt. 123, Roth Supp. Decl. ISO MSJ Opp. Ex. T (Pray Dep. Ex. 7).) That statement is hearsay, to the extent it is offered to prove that the "coverage cost would be minimal."

102. In mid-July 2016, ETF staff first recommended to GIB that the exclusion be removed. (Nispel Dep. 27:2-5 ("the department first recommended to the GIB the removal of the exclusion . . . at the July 12, 2016 meeting of the GIB"); Day Dep. 47:1-6).

RESPONSE: Undisputed for purposes of summary judgment.

103. At the July 12, 2016 GIB meeting, GIB voted unanimously to amend the uniform benefits to permit coverage of transition-related care beginning in January 2017. (Godbe Decl., Ex. M, July 12, 2016 Open Meeting Minutes, pp. 3-4).

RESPONSE: Undisputed for purposes of summary judgment, except to the statement "transition-related care," which State Defendants OBJECT to as not supported by the evidentiary materials cited. GIB voted unanimously to amend the uniform benefits to remove the coverage exclusion for "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (Dkt. 88, DFOF ¶¶ 24, 51.)

104. GIB member Herschel Day ("Day") was supportive of the removal of the exclusion because he "view[ed] the exclusion as discriminatory and…support[s] the right of transgender individuals to get the healthcare they need," and because "it's not costly to add it to the group plan." (Day Dep. 49:17-50:3).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent it is meant to establish that, in fact, "it's not costly to add [this coverage] to the group plan." To that extent, dispute. (Dkt. 88, DFOF ¶¶ 88–96.)

105. Wisconsin's actuarial and benefits consultant, Segal, estimated that removing the exclusion would result in a very minor increase in costs. (Thompson Dep. 35:3-8).

RESPONSE: Undisputed that this accurately reflects Thompson's testimony, but to the extent it is offered to establish that Segal actually estimated a "very minor increase in costs," State Defendants OBJECT to this proposed fact as inadmissible hearsay. To the extent Thompson was referencing Segal's cost estimate from January 2017, that written estimate speaks for itself, without Thompson's characterization of it. (Dkt. 83-6, Ellinger Dep. Ex. 16.)

106. The day after GIB voted to remove the exclusion, Day emailed Lisa Ellinger, the director of ETF's OSHP, and asked whether ETF had an actuarial cost estimate for the removal of the exclusion. (Godbe Decl., Ex. D, July 21, 2016 Emails between Tara Pray and Michael McNally, p. 2).

RESPONSE: Undisputed for purposes of summary judgment.

107. Segal provided two (2) cost estimates for benefits related to treatment of gender dysphoria. In June of 2016, when ETF was considering removing the exclusion, it obtained Segal's March 3, 2014 estimate provided to the State of Maryland to get a sense of the expected costs for Wisconsin. (Godbe Decl., Ex. N, March 3, 2014 Segal Maryland Coverage Estimate Memorandum, p. 6).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary material cited does not establish these facts in that (1) the cited document contains evidence about a single cost estimate for benefits related to the treatment of gender dysphoria, not two, and (2) it does not say anything about ETF's motivation in obtaining the cost estimate, whether to "get a sense of the expected costs for Wisconsin" or anything else. (Dkt. 103-14, Godbe Decl., Ex. N.)

108. That estimate was between .02% and .03% of total premiums. (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

109. ETF obtained another estimate from Segal on January 23, 2017, as part of its determination that reinstating the exclusion would not increase costs to the state. (Godbe Decl., Ex. O, January 27, 2017 Segal Transgender Cost Estimate Memorandum, p. 3).

RESPONSE: Undisputed for purposes of summary judgment that ETF obtained another estimate from Segal on January 23, 2017, but State Defendants OBJECT to the remainder of this proposed fact as unsupported by the evidentiary material. The January 27, 2017 Segal memorandum cited does not establish why ETF obtained another estimate from Segal in January 2017. (Dkt. 103-15:3–5, Godbe Decl., Ex. O.)

110. That estimate indicated a range of between .007% and .018% of total premiums. (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

111. At no time did the Wisconsin Department of Justice ("DOJ") or ETF present evidence of medical research to the GIB members suggesting that gender confirmation surgeries are experimental or have not been demonstrated to be safe and effective for treating gender dysphoria. (Day Dep. 111:5-14; Thompson Dep. 37:4-14).

RESPONSE: Undisputed for purposes of summary judgment that "evidence of medical research" was not presented to GIB, but concerns regarding the nature and efficacy of gender reassignment surgery were discussed at one or more GIB meetings in 2016. (Dkt. 88, DFOF ¶¶ 107–09.)

B. Reinstatement of the Exclusion

112. However, the DOJ and one (1) GIB board member thereafter began urging that the exclusion be reinstated. (Day Dep. 64:22-65:3 ("the issue was brought up for reconsideration by a board member. . . J.P. Wieske"); Pray Dep. 186:16-20 ("the board made a decision to reinstate it based on . . . the concerns brought forth by the DOJ"); Ellinger Dep. 119:24-120:2 ("board member requested that the Wisconsin DOJ be allowed to address the issue")).

RESPONSE: State Defendants OBJECT to this proposed fact because it is not supported by the evidentiary materials cited. None of the cited evidence shows that either DOJ or Wieske "urg[ed] that the exclusion be reinstated." Rather, it shows only that Wieske brought the issue up for reconsideration, and that he addressed the issue and presented "concerns."

113. J.P. Wieske ("Wieske") brought up the possible reinstatement of the exclusion multiple times. (Day Dep. 65:2-3; Conlin Dep. 151:3-18, 153:23-154:2, 154:10-17).

RESPONSE: Undisputed for purposes of summary judgment.

114. On August 10, 2016, the DOJ provided a memorandum to GIB via ETF, asking that GIB reconsider its vote to eliminate the exclusion. (Godbe Decl., Ex. P, August 12, 2016 ETF Memo to GIB, Attach. A).

RESPONSE: State Defendants OBJECT to this proposed fact because it is not supported by the evidentiary materials cited. The cited memorandum states only that "[t]o the extent the Board believes that the new HHS rules compel it to accept ETF's recommended changes, it should reconsider for two reasons." (Dkt. 103-16:3, Godbe Decl., Ex. P, August 12, 2016 ETF Memo to GIB, Attach. A.)

115. The DOJ memorandum states that the federal HHS rules barring discrimination based on "gender identity" are "unlawful," "intrude on powers reserved to the State of Wisconsin to administer its own health policy," and "do not mandate coverage for any particular procedures." (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

116. David Nispel and Diana Felsmann, attorneys for ETF, provided a memorandum in response to the DOJ's memorandum on August 11, 2016, noting that the GIB members, as fiduciaries, "must ensure that the Group Health Insurance Program complies with state and federal law." (Godbe Decl., Ex. P, August 12, 2016 ETF Memo to GIB, Attach. B).

RESPONSE: Undisputed for purposes of summary judgment.

117. The ETF memorandum observed that the HHS non-discrimination rule prevents health insurance issuers from contracting away their nondiscrimination obligations, and that maintaining the exclusion could

therefore "jeopardize ETF's ability to contract with its health insurance issuers." (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

118. Further, the ETF memorandum noted that the cost of removing the exclusion was anticipated to be low, and that services would still be required to be "medically necessary." (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

119. Kevin Potter from the DOJ attended the December 13, 2016 GIB meeting and stated that the DOJ's August 10, 2016 memorandum "was authored by the DOJ at the request of the governor's office for the benefit of the Board." (Godbe Decl., Ex. Q, Dec. 13, 2016 GIB Open Meeting Meetings, p. 9).

RESPONSE: Undisputed for purposes of summary judgment.

120. Potter "stated that the DOJ recommends the Board follow the law as it currently stands," and noted that the State of Wisconsin was part of a federal lawsuit challenging the HHS regulations pertaining to discrimination on the basis of gender identity. (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

121. ETF was directed to proceed with the implementation of the language previously adopted eliminating the exclusion. (Id.).

RESPONSE: Undisputed for purposes of summary judgment.

122. On December 29, 2016, GIB Chair Michael Farrell ("Farrell") instructed Conlin to call a meeting of GIB for the next day. (Conlin Dep. 130:3-13 (describing frustration at the request from a member of the Department of Administration to set up a last-minute board meeting), 132: 8-10 (Farrell calls Conlin the morning of December 29), 136:10-15 ("are we still dealing with this issue? Last day of the year. . . pull off a full board meeting with 24 hours' notice"); Pray Dep. 193:16-18 (the whole thing was pretty unusual)).

RESPONSE: Undisputed for purposes of summary judgment.

123. Pharmacy Benefits Manager Jeffrey Bogardus ("Bogardus") informed three (3) Navitus employees about the special GIB meeting, which he described via email as "a discussion with Dept of Justice and their recommendation to the GIB to not implement the uniform benefit changes for 2017 surrounding gender identity. This is being pushed by the Governor's office and attorney general. It is based solely on the AG's opinion that the HHS non-discrimination rule is illegal – which I think the courts would have to determine – not the AG." (Godbe Decl., Ex. R, Dec. 29, 2016 email between Jeff Bogardus and Steven Alexander, Shannon Tischer, and Pam Olson).

RESPONSE: Undisputed that Bogardus described the meeting as quoted, but State Defendants OBJECT to this quoted statement as inadmissible hearsay, to the extent that this statement is offered to prove the truth of the matter asserted. State Defendants FURTHER OBJECT to this quoted statement because Bogardus lacks foundation for his comments about the meeting's content, and it is based on pure speculation and conjecture. He testified that "I really have no basis on that [statement] that I can recall" and that it "was more of my own personal spin on this." (Dkt. 78, Bogardus Dep. 92:1–25.)

124. GIB convened in closed session at the December 30, 2016 meeting to discuss the exclusion. (Godbe Decl., Ex. S, Dec. 30, 2016 Open Meeting Minutes, pp. 2-3).

RESPONSE: Undisputed for purposes of summary judgment.

125. After deliberating in closed session from 3:13 p.m. to 6:24 p.m., GIB reconvened in open session and voted to reinstate the exclusion once four (4) contingencies were satisfied:

- Subject to a court ruling or an administrative action that enjoins, rescinds or invalidates the HHS Rule;
- Subject to compliance with Wis. Stat. section 40.03 (6)(c);
- Subject to renegotiation of contacts that maintain or reduce premium costs for the state; and finally
- Subject to the opinion of the DOJ that the action taken does not constitute a breach of board members' fiduciary duties.

(Id. p. 3).

RESPONSE: Undisputed for purposes of summary judgment.

126. To change benefits during a plan year was unusual for GIB and ETF. (Conlin Dep. 80:23-81:23 (unusual to change benefits during plan year), 156:22-157:5); Pray Dep. 63:11-23 (can think of no previous examples of eliminating benefits in middle of plan year), 150:4-23 (no prior examples of eliminating benefit after contracts signed), 152:4-9 ("a lot of concern was really about . . . we have to now go back and change all of these things . . . it was quick timing"), 171:15-18 (can think of no similar instance in which a benefit was provided and then rescinded in the same plan year)).

RESPONSE: Undisputed for purposes of summary judgment.

127. GIB voted to reinstate the exclusion for reasons related to the Texas injunction against HHS to prevent it from enforcing the ACA regulations. (Farrell Dep. 130:11-131:6; Wieske Dep. 95:15-96:6).

RESPONSE: Undisputed for purposes of summary judgment that this was one of the reasons for GIB's vote, but State Defendants OBJECT to any

implication that this was the only reason members of GIB voted to reinstate the Exclusion as unsupported by the evidentiary materials cited.

128. According to GIB chair, Michael Farrell, the exclusion was reinstated solely because of the injunction in Texas. (Farrell Dep. 56:8-58:16, 60:4-9, 130:11-131:6).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support this assertion. Farrell testified only that he personally voted for the exclusion for that reason, not that GIB as an entity reinstated the exclusion solely for that reason. (Dkt. 53, Farrell Dep. 56:8-58:16.)

129. Farrell referred to the Texas litigation as a challenge to a federal rule requiring removal of "transgender exclusions" from health plans. (Farrell Dep. 28:14-25).

RESPONSE: Undisputed for purposes of summary judgment.

130. According to Wieske, the exclusion was reinstated solely because "there was not a legal basis to remove the exclusion and we had relied on the legal basis to remove the exclusion." (Wieske Dep. 87:25-88:7).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support this assertion, and to the extent Wieske's individual opinion purports to speak for GIB as an entity. Subject to and without waiving this objection, dispute. Wieske testified that this was one of the reasons for reinstating the exclusion, not the sole reason. He also testified that cost was a reason, along with the belief that insurers would

decline coverage for procedures addressed by the Exclusion as medically unnecessary. (Dkt. 79, Wieske Dep. 89:8–92:24.)

131. Wieske testified that, while he was thinking about what he considered to be a lack of medical necessity of GCS in considering the reinstatement of the exclusion, he had no knowledge of whether surgery was medically necessary or efficacious. (Wieske Dep. 91:13-92:16).

RESPONSE: Undisputed for purposes of summary judgment.

132. Wieske's only information about the medical necessity of surgery seems to arise from conversations with people at insurance companies who he claims told him that such surgery is not medically necessary. (Wieske Dep. 92:4-9).

RESPONSE: Undisputed for purposes of summary judgment.

133. According to Nancy Thompson ("Thompson"), the cost of providing the benefits, the safety of the procedures and the effectiveness of the procedures were not reasons for reinstating the exclusion, and were not even discussed by the GIB. (Thompson Dep. 35:3-18, 41:8-9, 44:6-20, 47:14-48:6, 55:11-25, 63:19-64:6, 70:8-71:5, 74:22-75:15).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support these assertions. Thompson did not testify that those issues were not discussed by GIB, but that she did not recall those issues being discussed by GIB. (Dkt. 93, Thompson Dep. 35:21 ("I do not recall that."), 41:8–9 ("Not that I recall."), 44:6–20 ("I do not recall that."), 47:23 ("I do not recall that."), 48:6 ("I don't recall that…."), 55:13 ("I do not recall that specifically."), 63:24–25 ("[I] don't remember any specifics."), 70:24 ("Not that I recall."), 74:25 ("I don't recall that, no."). Wieske testified

that he raised these issues, and Secretary Conlin recalled him doing so. (Dkt. 88, DFOF ¶¶ 107–08.)

134. The only reason Thompson could ascertain for the GIB's reinstatement was that board members were satisfied that they would not be in violation of the law or their fiduciary duties if they did. (Thompson Dep. 85:20-86:16).

RESPONSE: State Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support these assertions. Thompson testified that "[t]he contingencies that have been identified that they [i.e. GIB members] felt . . . if these were met, we're okay with reinstating it [i.e. the exclusion]." (Dkt. 93, Thompson Dep. 86:7–9.)

135. Day did not recall DOJ or ETF providing any medical research on the impact of these procedures on patients, nor did he know that cost was one of DOJ's reasons for recommending the reinstatement of the exclusion. (Day Dep. 111:5-14, 113:5-11).

RESPONSE: Undisputed for purposes of summary judgment.

136. Bogardus did not expect the exclusion to be reinstated prior to the December 30, 2016 meeting, because "the decisions that had already been made we felt were sound." (Bogardus Dep. 94:15-16).

RESPONSE: Undisputed for purposes of summary judgment.

137. Defendant Conlin was personally involved in the administrative process leading up to the reinstatement of the exclusion. (Conlin Dep. 85:3-12; Godbe Decl., Ex. W, Defs.' Resp. to Interrog. 10).

RESPONSE: State Defendants OBJECT to the proposed finding to the extent it is a legal conclusion. Subject to and without waiving the objection, undisputed for purposes of summary judgment that Conlin does have the

responsibility of ensuring effective administrative and oversight of ETF operations, but he does not have authority over deciding the coverage provided under those plans, which is determined by GIB. GIB determines the Uniform Benefits. Furthermore, Conlin hoped to persuade GIB not to reinstate the Exclusion, and repeatedly recommended that the Exclusion be removed from the Uniform Benefits. (Dkt. 88, DFOF ¶¶ 113–18.)

138. Conlin determined there was no need to negotiate with the plans over the reinstatement of the exclusion. (Conlin Dep. 85:24-86:19).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent that this proposed finding implies that Secretary Conlin had any discretion regarding this issue. Rather, he concluded that the third-party health insurance plans had no ability under either state statute or their contracts with GIB to negotiate over the Uniform Benefits' content. (Dkt. 88, DFOF ¶¶ 110–11; Dkt. 54, 162:5–23 ("I think the understanding of renegotiation in this context was to provide the change in the uniform benefits as the contract requires the health plans to administer uniform benefits. . . . At the December 30th meeting, I think Lisa Ellinger or I suggested that we don't renegotiate over benefit provisions, that the uniform benefit is what the plans are contractually obligated to provide.").)

139. Conlin determined that it was unnecessary to bring the issue back to the GIB to determine whether the contingencies had been met. (Conlin Dep. 166:22-167:24).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent that this proposed finding implies that Secretary Conlin had any discretion regarding this issue. Rather, Secretary Conlin concluded that GIB had directed ETF to decide whether the four contingencies set forth in GIB's December 30, 2016, decision had been met. (Dkt. 54, 157:18–158:1 ("Q. At this point were you anticipating that the GIB would meet again to determine whether or not the contingencies were met? A. No. There was some question about whether the board had intended that -- or not the board intended it, but I think Lisa Ellinger, that was her leading. I understood the motion that the board made and approved to kind of be self-executing once the conditions were met.") As ETF's Secretary, Secretary Conlin had a legal obligation under state statute to administer and execute GIB's decisions. (Wis. Stat. §§ 40.03(2)(a); Dkt. 88, DFOF ¶¶ 35–36, 110–11.)

140. In January 2017, ETF Secretary Conlin determined that the contingencies had been met and approved a reinstatement of the exclusion, effective February 1, 2017. (Conlin Dep. 89:17-24, 166:14-167:24, 168:10-20; Nispel Dep. 90:17-91:13).

RESPONSE: Undisputed for purposes of summary judgment that Secretary Conlin, in consultation with other ETF staff, concluded in January 2017 that the contingencies had been met, consistent with GIB's direction to

ETF to make that determination. Dispute that Secretary Conlin "approved a reinstatement of the exclusion," in that neither Secretary Conlin's office nor ETF had any legal authority to "approve" the exclusion. That authority resided with GIB. (Dkt. 88, DFOF ¶¶ 110–11.)

141. Conlin was involved in preparing the contract amendment reinstating the exclusion that was to be sent to plans, including insisting that the amendment be signed by someone with authority to bind the plans. (Conlin Dep. 85:18-89:8).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent that this proposed finding implies that Secretary Conlin had any discretion regarding this issue. Rather, ETF and Secretary had a legal obligation to carry out GIB's December 30, 2017, directive to reinstate the Exclusion, which included preparing a contract amendment reinstating the Exclusion. (Wis. Stat. §§ 40.03(2)(a); Dkt. 88, DFOF ¶¶ 35–36, 110–11.)

142. The contract amendment went out under Conlin's name, because ETF administers GIB's benefit decisions. (Conlin Dep. 89:17-24).

RESPONSE: Undisputed for purposes of summary judgment, except to the extent that this proposed finding implies that Secretary Conlin had any discretion regarding this issue. Rather, ETF and Secretary had a legal obligation to carry out GIB's December 30, 2017, directive to reinstate the Exclusion, which included preparing a contract amendment reinstating the Exclusion. (Wis. Stat. §§ 40.03(2)(a); Dkt. 88, DFOF ¶¶ 35–36, 110–11.) Only

GIB is statutorily authorized to contract with private health plans and set the terms and conditions of those contracts. (Dkt. 88, DFOF ¶¶ 110–11.)

143. Numerous witnesses testified that the reversal of recently adopted benefits, the timing of the meeting to reinstate the exclusion, and the adoption of policy based on the occurrence of contingencies were unusual or unprecedented in their memory. (Conlin Dep. 159: 17-22; Pray Dep. 150:19-151:2; Thompson Dep. 67:21-68:5; Farrell Dep. 139:13-16; Nispel Dep. 94:8-16; Bogardus Dep. 51:18-52:3 (could not recall any time when a change to benefits was made in the middle of a benefit year)).

RESPONSE: Undisputed for purposes of summary judgment.

144. In early February 2017, ETF employees Tara Pray, Joan Steele, Eileen Mallow, and Lisa Ellinger sought legal guidance as to whether reinstating the exclusion would be in violation of either the ACA or a 60-day material modification notice requirement of the Employee Retirement Income Security Act ("ERISA"). (Pray Dep. 164:16-165:22; Godbe Decl., Ex. T, Feb. 6, 2017 emails between Tara Pray and Lisa Ellinger).

RESPONSE: Undisputed for purposes of summary judgment.

145. At GIB's meeting on February 8, 2017, Day stated that reinstating the exclusion could increase GIB's risk of liability for breach of fiduciary duty if the injunction in the HHS lawsuit was lifted. (Godbe Decl., Ex. U, Feb. 8, 2017 GIB Open Meeting Minutes, p. 5).

RESPONSE: Undisputed for purposes of summary judgment.

146. At GIB's meeting on May 24, 2017, Day made a motion to again eliminate the exclusion; the motion failed. (Godbe Decl., Ex. V, May 24, 2017 GIB Open Meeting Minutes, pp. 8-9).

RESPONSE: Undisputed for purposes of summary judgment.

147. Day made this motion because he "felt this could make a positive impact on members' lives," "didn't see it as a high-cost item," and because he "felt that reinstating the benefits meant that doctors and their patients would

determine what is medically necessary and not the board." (Day Dep. 100:17-101:3).

RESPONSE: Undisputed for purposes of summary judgment.

148. When asked to identify the reasons for the exclusion in discovery, the state defendants initially responded "the information requested by this Interrogatory will be addressed by expert testimony and thus it incorporates into this Response any future relevant expert testimony," and that the exclusion "furthers the state interests contained in Wis. Stat. § 40.01(1). (Godbe Decl. Ex. W, Defs.' Resp. to Interrog. 2.)

RESPONSE: Undisputed for purposes of summary judgment.

149. After being asked to supplement their responses to Interrogatory No. 2, Defendants added that the exclusion "furthers the state interests in (1) avoiding potential costs associated with the coverage at issue; and (2) declining to provide coverage for treatments that are experimental and have not been demonstrated to be safe and effective for treating gender dysphoria" (Dkt. 83-1, Defs.' Supp. Resp. to Pls.' First Set of Disc. Requests, Interrog. 2.)

RESPONSE: Undisputed for purposes of summary judgment.

Dated this 29th day of June, 2018.

Respectfully submitted,

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