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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

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

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OR TESTIMONY FROM DR. LAWRENCE MAYER

INTRODUCTION

Plaintiffs improperly seek to set up an unfair fight at trial by seeking to preclude Defendants from offering Dr. Lawrence Mayer's expert testimony. (Dkt. 170.) Like Plaintiffs' own expert, Dr. Stephanie Budge, Dr. Mayer will opine on the overall state of medical evidence regarding the efficacy of surgical gender dysphoria treatments. The fact that both Dr. Mayer and Dr. Budge will opine on the same issue fatally undermines Plaintiffs' argument that somehow only Dr. Mayer's opinions are irrelevant to this case. Moreover, Plaintiffs offer no sound methodological critiques that render Dr. Mayer's opinions inadmissible under the *Daubert* standard. Nor could they, without

undermining their own expert, too. Both Dr. Mayer and Dr. Budge examined available scientific studies and drew conclusions from those studies about the state of the evidence regarding surgical gender dysphoria treatments. That is a sound method, and it suffices to clear *Daubert*'s admissibility hurdle. Plaintiffs merely dispute Dr. Mayer's conclusions, but their arguments all go to the weight a jury should assign to his opinions, not the threshold admissibility of those opinions. Plaintiffs' motion in limine should be denied.

ARGUMENT

I. Dr. Mayer's opinion on the available evidence regarding the medical efficacy surgical gender dysphoria treatments is relevant to the state interests supporting the Exclusion.

Plaintiffs argue that Dr. Mayer's opinion regarding the safety and efficacy of surgery to treat gender dysphoria fails the "helpfulness test" articulated in Fed. R. Evid. 702(a) because it is irrelevant and not a fact at issue in this case. (Dkt. 170:5–7.) They contend that medical efficacy is not the standard by which insurance coverage determinations are made, and that because GIB did not consider Dr. Mayer's opinions when it reinstated the Exclusion, the justification cannot be considered as a valid state interest. (Dkt. 170:5–7.) Plaintiffs' argument is legally and factually misplaced.

Dr. Mayer's opinion regarding the safety and efficacy of surgery to treat gender dysphoria is plainly relevant to Plaintiffs' equal protection claim. Under rational basis review, Plaintiffs must show that differential treatment

was "not rationally related to a legitimate state interest." *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). While no evidence is required to satisfy rational basis review, *RJB Properties, Inc. v. Board of Education*, 468 F.3d 1005, 1011 (7th Cir. 2006), Defendants offer Dr. Mayer's opinion as evidence of a legitimate state interest underlying the Exclusion.

Likewise, Plaintiffs contend that heightened scrutiny applies to the equal protection analysis. (Dkt. 97:27–31.) Defendants disagree but, assuming heightened scrutiny does apply, they must establish with evidence that the Exclusion "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citation omitted). As explained in their summary judgment briefs, protecting public health is an important government interest. *See IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011) ("[W]e agree with the district court that Vermont does have a substantial interest in . . . protecting public health."); *Stuart v. Camnitz*, 774 F.3d 238, 250–51 (4th Cir. 2014) (government has an important interest in "promoting psychological health" and preventing "psychological harm").

Here, Dr. Mayer opined that that "[m]edical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria." (Dkt. 88, DFOF ¶ 101). He similarly opines that "[t]he evidence that these interventions are safe, effective, and optimal is minimal." (DFOF ¶ 102.) These

opinions support the state interest in protecting the public health because with the Exclusion, state employees and their families are not encouraged to undergo these unproven treatments. More insured state employees will undergo gender reassignment surgery if they can shift some or all of the cost onto their health insurance carriers.

Dr. Mayer's opinion also responds to Plaintiffs' claim that gender reassignment surgery is medically necessary to treat gender dysphoria—the underlying premise in their expert reports and summary judgment briefs. Only medically necessary services are covered by the Uniform Benefits, and so Plaintiffs can only get insurance coverage for surgical gender dysphoria treatments—the relief they seek—if those treatments are medically necessary. (Dkt. 82-1¶31.) Even Plaintiffs' psychological expert, Dr. Stephanie Budge, agrees that "the effectiveness of a treatment should be considered when determining whether something is medically necessary." (Dkt. 158 (Budge Dep. 75:23–76:1).) Plaintiffs have thus put the medical necessity and efficacy of surgical gender dysphoria treatments at issue in this case. To this end, Defendants are entitled to present evidence that gender reassignment surgeries have not been proven effective at treating gender dysphoria and, thus, are not medically necessary. It is responsive to Plaintiffs' anticipated evidence regarding medical necessity, and will assist the jury in resolving this issue.

Plaintiffs incorrectly assert that GIB did not consider the safety and efficacy of gender reassignment surgeries when deciding whether to reinstate the Exclusion. (Dkt. 170:6–7.) Evidence shows that GIB did. (Dkt. 128:¶ 67.) At one of the board discussions, there was a comment regarding "the efficacy or nature of the services covered by the exclusion." (Dkt. 128:¶ 67.) The DOJ memorandum considered by GIB also mentions questionable medical efficacy as a government interest serviced by the Exclusion. (Dkt. 128:¶ 67.) And GIB member J.P. Wieske testified that he was aware from insurance providers that they "were finding these [gender dysphoria services] consistently not medically necessary and that, even without a blanket exclusion, gender reassignment surgery wouldn't end up being covered because it wouldn't fall under their . . . their medical necessity." (Dkt. 128:¶ 67 (alteration in original).) This suffices to show that GIB did not create medical efficacy concerns as a mere post hoc justification during litigation.

Moreover, courts consider state interests that were "always implicit" and "intimately bound up" in the challenged decision, which is surely the case when state officials consider whether to expand health insurance benefits. *See Dudum v. City & Cty. of San Francisco*, No. C 10-00504, 2010 WL 3619709, at *13 n.11 (N.D. Cal. Sept. 9, 2010) *aff'd sub nom. Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011). The fact that Dr. Mayer's expert report was not created until this litigation changes nothing. Plaintiffs identify no authority stating

that each piece of evidence regarding a state interest must have been considered by the decision-maker before acting. That is, it is enough that GIB considered medical efficacy when it reinstated the Exclusion. It did not also need to have Dr. Mayer's expert report before it to further support its decision. Indeed, courts often consider expert evidence created during litigation that provides more detail regarding a state interest that a decision-maker had considered when it acted earlier. *See, e.g.*, *Heller v. District of Columbia*, 801 F.3d 264, 270 (D.C. Cir. 2015); *Gratz v. Bollinger*, 135 F. Supp. 2d 790, 796–801 (E.D. Mich. 2001); *Dudum*, 2010 WL 3619709, at *2, *7 n.6. Plaintiffs' post hoc argument for excluding Dr. Mayer's opinion is unpersuasive.

Plaintiffs also argue that a jury may be confused and misled by Dr. Mayer's opinion because he reached a different conclusion about the overall state of the medical evidence than Dr. Budge. (Dkt. 170:9–10.) But just because Dr. Mayer disagrees with Dr. Budge does not mean he will mislead the jury—it just means the jury will need to decide which expert offers stronger arguments. It would be fundamentally unfair to allow Plaintiffs to present their expert—who argues that scientific studies support the medical necessity of surgery to treat gender dysphoria—but prevent Defendants from responding to that argument with expert testimony of their own. That is especially true where both experts have effectively adopted the same methodology: examining available scientific studies and evaluating the quality and reliability of their

conclusions. Dr. Mayer's believes that Plaintiffs' expert bases her opinions on scientifically weak studies, and he is entitled to testify to that. His opinion "should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities." *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11, 15 (1st Cir. 2011) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 596 (1993)).

Lastly, Plaintiffs argue that Dr. Mayer's opinion is misleading because treatment is provided for other unidentified medical conditions without strong scientific research. (Dkt. 170:10.) But this argument goes to the weight a jury should assign to Dr. Mayer's testimony, not its admissibility. Plaintiffs do not attempt to connect this critique to any methodological defect in Dr. Mayer's analysis; rather, it is presented as an attack on Dr. Mayer's conclusions. This "is the sort of issue that can be explored adequately via the normal adversarial process of '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Lees v. Carthage Coll.*, 714 F.3d 516, 526 (7th Cir. 2013) (alteration in original) (quoting *Daubert*, 509 U.S. at 596); *see also Ortiz v. City of Chicago*, 656 F.3d 523, 536 (7th Cir. 2011) ("[t]he admissibility determination [under Rule 702] is not intended to supplant the adversarial process").

Moreover, Plaintiffs' only support for this critique is a single conclusory statement from their own expert and a single offhand remark from Dr. Mayer's

deposition. (Dkt. 170:9–10.) Plaintiffs present no evidence about any other specific treatments, let alone significant surgical procedures with similar risks of side effects, with the same quality of available efficacy evidence as surgical gender reassignment procedures. There is simply no basis to conclude based on Plaintiffs' terse argument that Dr. Mayer's conclusions are so unreliable that a jury should not be permitted to hear them. Plaintiffs offer no evidence that the Uniform Benefits cover those unidentified procedures or otherwise show that covering these unnamed procedures supports their discrimination claims.

In sum, the jury should be presented with *both* sides of the scientific debate about the medical efficacy of surgery to treat gender dysphoria. Thus, Plaintiffs' motion to exclude Dr. Mayer's opinion as irrelevant and potentially confusing should be denied.

II. Dr. Mayer utilized a proper scientific methodology in evaluating the available studies concerning the efficacy of surgical gender dysphoria treatments, and Plaintiffs' challenge to the accuracy of his opinion is not the proper subject of a *Daubert* motion.

Dr. Mayer is a research physician, epidemiologist and biostatistician. (Dkt. 90:1.) He has over 50 years of experience in to developing, applying, and evaluating the degree of statistical evidence contained in research studies conducted in medicine and public health. (Dkt. 125-2:1.) As a research physician, Dr. Mayer focuses on the evaluation of studies which are complex

medically and biologically, are interdisciplinary or multi-specialty, and have implications for clinical decision making. (Dkt. 125-2:1.) He has reviewed thousands of statistical studies, with a majority of those estimating the effect of treatments, or other input factors, on the incidence or severity of the disease. (Dkt. 125-2:1–2.)

When conducting a scientific review on the efficacy of treatments for a given disease or medical condition, Dr. Mayer utilizes established standards and criteria. (Dkt. 125-2:2.) He starts by examining the primary studies, i.e., the studies that contain direct statistical evidence, including direct statistical analysis of primary data and that gives the details of the statistical analysis used. (Dkt. 125-2:2.) Those details include whether or not the treatment affects the studied disease in terms of incidence or severity. (Dkt. 125-2:2.) To conclude that a given treatment is efficacious, Dr. Mayer does not review abstracts, opinion pieces, clinical guidelines, ethical reviews, anecdotal reports or case series. (Dkt. 125-2:2.) While these types of publications may be valuable for other reasons, they cannot draw reliable conclusions regarding actual effect of the treatment on the disease of interest given their lack of rigorous statistical analysis. (Dkt. 125-2:2.) When evaluating available scientific evidence, Dr. Mayer applies well-established standards in the academic scientific community, including: the Hierarchy of Statistical Evidence as presented by the Cambridge University Program in Evidence Based Medicine;

the CONSORT documents; the Federal Reference Guide; and the Bradford Hill Criteria. (Dkt. 125-2:2–3.) Dr. Mayer used these forming his opinion in this case. (*See* Dkt. 125-2.)

With this backdrop, Plaintiffs' challenge to Dr. Mayer's methodology rings hollow. The purpose of the *Daubert* inquiry is to scrutinize proposed expert witness testimony to determine if it has "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field" so as to be deemed reliable enough to present to a jury. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, (1999). "A *Daubert* inquiry is not designed to have the district judge take the place of the jury to decide ultimate issues of credibility and accuracy." *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012). "If the proposed expert testimony meets the *Daubert* threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Id.* (quoting *Daubert,* 509 U.S. at 596).

Here, Plaintiffs' argument boils down to a challenge to the accuracy of Dr. Mayer's opinion, not a true scientific challenge to his research and statistical methodology. That argument goes to a jury. As such, Dr. Mayer's opinions are admissible.

A. Dr. Mayer's opinion has a sufficient factual and scientific basis.

Plaintiffs argue that Dr. Mayer's opinion is inadmissible because his expert report only contains three citations to secondary sources and, in a part unrelated to his conclusions about the available evidence of medical efficacy, utilizes "common sense". (Dkt. 170:12–13.) Plaintiffs' argument is based on a limited reading of Dr. Mayer's report and does not support exclusion of his opinion. In short, Plaintiffs primarily critique sources Dr. Mayer cited rather than the method he used in rendering his expert opinion here. Again, Dr. Mayer's method was to review available scientific studies applying the evaluation standards mentioned above—that method is reliable. The places he published his findings have nothing to do with that underlying method.

In his expert report, Dr. Mayer quotes and adopts several excerpts from a published report that he co-authored, "Sex and Gender: Findings from the Biological, Psychological, and Social Sciences," *The New Atlantis*, Number 50 (Fall 2016). (Dkt. 90.) Dr. Mayer's report also adopts analysis and evidentiary citations provided in an amicus brief submitted by him and other physicians in *Gloucester County School Board v. G.G.*, No. 16-273 (U.S.). (Dkt. 90:5–6.) As he expressly notes in his report here, "[t]he basis for this opinion" regarding the medical efficacy of surgical procedures to treat gender dysphoria, "along with the studies on which this opinion relied, can be found in both [the]

Sexuality and Gender publication and my amicus brief" (Dkt. 90:8), both of which were provided to Plaintiffs with the expert report. Both his *New Atlantis* report and his amicus brief contain multiple references to appropriate scientific references.

Plaintiffs go on to argue that because Dr. Mayer references "common sense" in his analysis on the difference between sex and gender identity, his opinion is not sufficiently reliable. (Dkt. 170:12–13.) First, that opinion is unrelated to his conclusion that the available evidence is poor regarding the efficacy of surgical gender dysphoria treatments. Moreover, the isolated passage Plaintiffs quote applies a scientific premise discussed earlier in his report—that sex is biological, innate, and assigned at birth, where gender is a cultural construct. Dr. Mayer's report, *New Atlantis* article, and amicus brief provide multiple authorities that support this opinion. His discussion is sufficiently support by those authorities, and his reference to "common sense" does not render those expert opinions inadmissible.

B. Dr. Mayer's reliance on his *New Atlantis* report, amicus brief, and the CMS study does not render his opinion unreliable.

Plaintiffs also contend that Dr. Mayer's citation of his *New Atlantis* article, an amicus brief he joined, and a report from the Centers for Medicare and Medicaid Services (CMS) undermine his opinion and render it unreliable.

But, again, all of these critiques primarily focus on Dr. Mayer's conclusions not his methods—and only the latter matters to a *Daubert* challenge.

First, Plaintiffs argue that Dr. Mayer's *New Atlantis* report is methodologically flawed because it appeared in a conservative publication and because other experts disagreed with his conclusions. But the "focus of the district court's *Daubert* inquiry must be solely on principles and methodology, not on the conclusions they generate." *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002). Thus the "general acceptance" criteria focuses on the method underlying the analysis, not the conclusions an expert draws.

Here, Dr. Mayer used a scientifically-sound methodology in assessing the evidentiary strength of the available studies regarding the effectiveness of surgery to treat gender dysphoria. (*See* Dkt. 125-2:1–2.) None of the criticism of Dr. Mayer's *New Atlantis* study sufficiently addresses the methodology of his analysis, namely, his application of the well-established hierarchy of evidence to studies involving treatment for gender dysphoria. Even Dr. Budge admits that studies have found conflicting psychiatric outcomes following gender-confirming medical interventions. (Dkt. 158 (Budge Dep. 173:17–174:5).) So despite the unpopularity of his *New Atlantis* study and his opinion in this case, it is otherwise reliable. *See, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, n.11 (9th Cir. 1995) ("the court and the

parties are not limited to what is generally accepted; methods accepted by a minority in the scientific community may well be sufficient").[1]

In any event, while general acceptance "remains an important consideration" in evaluating expert testimony, it "is not a necessary precondition to the admissibility of scientific evidence." *Daubert*, 509 U.S. at 597. Nor should this factor be used to exclude opinions that differ from a scientific consensus, so long as the analysis rests on reliable foundations. As one court explained,

> [t]he *Daubert* decision, in adding four new factors to the traditional "general acceptance" standard for expert testimony, effectively opened the courts to a broader range of opinion evidence than was previously admissible. Although *Daubert* attempted to ensure that courts screen out "junk science," it also enabled the courts to entertain new and less conventional forms of expertise. As the Court explained, the addition of the new factors would put an end to the "wholesale exclusion [of expert testimony based on scientific innovations] under an uncompromising 'general acceptance' test."

United States v. Crisp, 324 F.3d 261, 268 (4th Cir. 2003) (alteration in original) (quoting *Daubert,* 509 U.S. at 596).

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[1] It should also be noted that consensus throughout the scientific community on what is medically necessary treatment for gender dysphoria is not as clear-cut as Plaintiffs portray. In the case of *Kosliek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), the court appointed an expert to assist in determining what was medically necessary treatment for an inmate suffering from gender identity disorder. The court-appointed expert acknowledged that while the defense expert's opinion that gender reassignment surgery was not medically necessary may be "unpopular and uncompassionate in the eyes of some experts in [gender identity disorder]," it "is within prudent professional community standards. Treatment stopping short of [sex reassignment surgery] would be considered adequate by many psychiatrists, gender team members, and gender patients themselves." *Kosliek*, 774 F.3d at 78 (alteration in original).

Second, Plaintiffs argue that Dr. Mayer's opinion relies on data that is "cherry picked," so it is unreliable. (Dkt. 170:14–15.) No doubt, Dr. Mayer afforded greater evidentiary weight to some studies versus others. But this is because he applied established standards and criteria for the evaluation of evidence—it was not "cherry picking." For example, studies relied upon by Dr. Budge included abstracts that contained no details, data, or analysis, and studies that used a community-based design with no measurement of the primary outcome, which is gender dysphoria. (*See* Dkt. 125-2:4–5.) Dr. Mayer did not find these publications statistically significant, and they did not change his ultimate conclusion. (Dkt. 125-2:4–6.)

Plaintiffs focus primarily on studies addressed in the *New Atlantis* article, but Dr. Mayer explained that this studies discussed there "were not intended to be exhaustive, they were intended to be suggestive." (Dkt. 112 (Mayer Dep. 141:14–17).) Dr. Mayer's conclusions here rest on more than just those few studies; rather, he "reviewed a tremendous amount of literature on what the science has to say." (Dkt. 112:9 (Mayer Dep. 33:1–3).) He relied on "an extensive search I did of the literature, probably a thousand papers," in which he "probably reviewed the biography of 500 of them in the abstract, and probably read 200 of them over the course of four years now trying to find studies on gender dysphoria." (Dkt. 112:26 (Mayer Dep. 100:10–15).)

Lastly, even if Dr. Mayer did not consider every single study in the scientific universe that relates to gender dysphoria, that is not a basis for exclusion. Such a strict rule would impose an impossible burden on experts opining on the overall state of medical efficacy evidence, as Dr. Mayer does here. To the extent Plaintiffs have identified additional studies that they think undermine Dr. Mayer's conclusions, he should be permitted to address those studies in front of a jury. Again, this challenge goes to the weight a jury should assign to Dr. Mayer's opinions, not their admissibility.

In effect, Plaintiffs' motion tries to prematurely resolve the dispute over the effectiveness of surgical gender dysphoria treatments. But even if this were a proper subject for a motion in limine—which is is not—Plaintiffs fail to show that Dr. Mayer sits so far outside the scientific mainstream that he should be excluded. Both the Hayes Directory (Dkt. 129-1), and the Centers for Medicare and Medicaid Services (CMS) (Dkt. 171-10), similarly concluded that, after weeding through the available publications and studies, most have weak evidentiary value, no statistical power, or no useable information for estimating the effect of surgery for treating gender dysphoria.

Specifically, the Hayes directory found the quality of the evidence on sex reassignment surgery as treatment for gender dysphoria to be "very low" and that this was

> due to limitation of individual studies, including small sample sizes, few studies evaluating any 1 outcome, retrospective data, lack of randomization of patients to treatment groups, failure to blind outcome assessors to group assignment, lack of a control or comparator group or minimal adjustment for confounders, lack of baseline assessments to assess change over time, a possible procedural learning curve, and a lack of objective and validated outcome measures.

(Dkt. 129-1:3–4.) The Hayes directory is a reliable source for evidence-based research. (Dkt. 129:2) (*See also https://www.hayesinc.com/hayes/about/,* noting that Hayes is "an industry leader in providing unbiased, timely, clinically focused, evidence-based research and analysis to health plans, hospitals, manages care organizations, government agencies, and healthcare systems.")

The CMS study similarly found that, for assessing the effectiveness of gender reassignment surgery, "[o]verall, the quality and strength of evidence were low," and that this was

> due to mostly observations study designs with no comparison groups, subjective endpoints, potential confounding (a situation where the association between the intervention and outcome is influenced by another factor such as a co-intervention), small sample sizes, lack of validated assessment tools, and considerable lost to follow-up.

(Dkt. 171-10:63.) While Plaintiffs argue that the CMS study has a limited application to only Medicare beneficiaries with gender dysphoria, that is wrong. In fact, CMS examined many studies that did not involve participants similarly situated to the Medicare cohort—i.e. patients that may be more similar to the potential beneficiaries at issue here. (*See* Dkt. 171-10:74–90.)

Third, Plaintiffs argue that Dr. Mayer's opinion is unreliable because his *New Atlantis* study cited an "outdated collection of references" from 2011 and before. (Dkt. 170:15.) However, one third of the publications referenced in Dr. Budge's expert report are from before 2012. (*See* Dkt. 89-2.) Further, Dr. Mayer *did* consider more recent publications in formulating his opinion in this case, including references from 2015, 2016, and 2017. (*See* Dkt. 83-17:12–14.) After employing the standards of evidence, he did not find that these publications undermined his conclusion that surgery has not been proven effective treatment for gender dysphoria. Among other reasons, these studies did not identify gender dysphoria as a primary outcome and did not find a statistically significant impact on the incidence or severity of gender dysphoria. (Dkt. 125-2:4.) Thus, Dr. Mayer has adequately explained his methodology in assessing the appropriate evidentiary weight to various publications and studies. Plaintiffs disagree with his conclusions, but they do not adequately undermine his methodology. This disagreement is best left to a jury to resolve.

Lastly, Plaintiffs challenge Dr. Mayer's reliance on his amicus brief in the *Gloucester County* case, arguing that one study cited in the brief was outdated and widely-criticized, and that it cites findings made by the American College of Pediatricians—a minority professional organization that Plaintiffs claim conveys "plain anti-transgender animus." (Dkt. 170:17–21.) Plaintiffs' arguments, though, are not with Dr. Mayer's methodology—rather, they again

argue that his conclusions are not popular or correct. As noted above, this is not grounds for exclusion under *Daubert*. Issues of credibility and accuracy are for the jury to decide. *Lapsley*, 689 F.3d at 805. Dr. Mayer's opinion, which is supported by his amicus brief, is both relevant and reliable. The accuracy of his opinion is an issue for trial, where Plaintiffs are free to employ "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id.* (citation omitted).

Here, Dr. Mayer considered and analyzed scientific articles and studies to reach his opinion that science does not support the efficacy of surgery to treat gender dysphoria. He presents an unpopular but objectively sound conclusion. Any inconsistencies or discrepancies in his opinion go to its weight, not its admissibility, and Plaintiffs are free to raise their contentions during cross-examination. *See Daubert,* 509 U.S. at 596 (the "appropriate means of attacking shaky but admissible evidence" is through cross examination, not a *Daubert* challenge).

III. Dr. Mayer is sufficiently qualified to support statements made in his expert report.

Plaintiffs contend that Dr. Mayer is unqualified to make clinical judgments and, as a result, portions of his expert report should be excluded. Specifically, Plaintiffs seek to exclude Paragraphs 24, 25, and 26 of Dr. Mayer's report. (*See* Dkt. 170:24–25; 90:9.) These paragraphs contain general

statements regarding the treatment of distress. "Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness." *Tuf Racing Prod., Inc. v. Am. Suzuki Motor Corp.,* 223 F.3d 585, 591 (7th Cir. 2000). Dr. Mayer's education, training, and experience as an epidemiologist, research physician and a psychiatry professor sufficiently qualify him to make these types of statements, which are helpful in understanding the issues in this case. Contrary to Plaintiffs' assertions, he is not prescribing treatment to a specific patient through these statements—he is opining as to general psychiatric principles.

Nonetheless, even if there were "minor holes in [Dr. Mayer's] curriculum vitae," they would not be "a proper basis for excluding his opinion under Rule 702 and *Daubert*." *Cage v. City of Chicago*, 979 F. Supp. 2d 787, 824 (N.D. Ill. 2013). While the fact that Dr. Mayer is not a treating clinician "may affect the weight a factfinder ultimately gives his testimony," it does not preclude him from opining on the subject of his expertise. *Srail*, 249 F.R.D. at 561. As an experienced research physician, epidemiologist, biostatistician, and psychiatry professor, Dr. Mayer is qualified to make the statements in Paragraphs 24, 25, and 26 of his expert report regarding the treatment of distress; that testimony should not be excluded.

IV. The Court should strike the additional opinions of Dr. Budge submitted in support of Plaintiffs' motion to exclude Dr. Mayer's opinion.

In support of their motion to exclude Dr. Mayer's opinion in this case, Plaintiffs submit another untimely opinion from Dr. Budge in the form of a declaration. (Dkt. 172.) In her declaration, Dr. Budge criticizes Dr. Mayer's expert report and the authority he relies on in support of his opinion. (*See* Dkt. 172:2–3.) Dr. Budge's declaration evinces yet another attempt to disregard the Court's deadline for disclosing rebuttal expert reports. For Plaintiffs, that deadline was May 31, 2018. Dr. Budge's declaration focuses entirely on Dr. Mayer's expert report, which was provided to Plaintiffs well-before their May 31 deadline. Neither Dr. Budge nor Plaintiffs provide any explanation for why the opinions expressed in her declaration were not timely disclosed by their rebuttal report deadline.

Defendants are undisputedly prejudiced by Plaintiffs' untimely disclosure of Dr. Budge's additional opinions in her declaration. Discovery is closed, Dr. Budge's deposition has already been taken, and pretrial materials are being submitted. For the same reasons cited in Defendants prior motions to strike Dr. Budge's supplemental reports (*see* Dkt. 124, 134, 140), the Court should also strike Dr. Budge's September 6, 2018 declaration (*See* Dkt. 172.)

CONCLUSION

Plaintiffs' motion in limine seeking to preclude Defendants from offering testimony or evidence from Dr. Lawrence Mayer should be denied.

Dated this 14th day of September, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 264-6219 (CTR)
(608) 266-3094 (JJS)
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us
rothct@doj.state.wi.us
schmelzerjj@doj.state.wi.us