

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

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

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

Defendants.

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**STATE DEFENDANTS' PROPOSED FINDINGS OF FACT**

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Defendants State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, and Robert J. Conlin, Secretary of the Department of Employee Trust Funds submit the following proposed findings of fact in support of their motion for summary judgment.

**I. The Parties and the Dispute**

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

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

3. Both Boyden and Andrews have already transitioned to a gender that differs from their birth sex. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 24, 29, Feb. 19, 2018).)

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

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

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

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

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

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

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

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

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

12. Most insurance plans offered through the Wisconsin Group Health Insurance Program (the “Group Health Program”) are fully-insured. In these plans, benefit claims are processed and paid by third-party insurance

carriers with whom GIB contracts (such as Dean and Quartz); state employees and their employers both pay a share of the insurance premium to ETF, which transmits those funds to third-party carriers. (Mallow Decl. ¶ 5, May 24, 2018.)

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

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

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

16. Insurance carriers that contract to provide health insurance to state employees must offer the coverage terms defined in the Uniform Benefits; those terms are not subject to negotiation and may not be modified. (Dkt. 68 (Ellinger Dep. 38:9–19, Apr. 4, 2018); Roth Decl. Ex. B, May 29, 2018)

(State Defs' Resp. to Req. For Admis. No. 13 (Set 2), State Defs' Resp. to Interrogatory No. 1 (Req. for Admis. No. 10) (Set 2)); Mallow Decl. ¶ 9, May 24, 2018.)

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

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

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

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

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

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

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

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

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

26. GIB originally added the Exclusion because was standard industry practice; services associated with gender reassignment surgery were generally accepted by health insurance companies and health care providers to be experimental and not medically necessary. (Roth Decl. Ex. A, May 29, 2018 (State Defs' Resp. to Interrogatory 10).)

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

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

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

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

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

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

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

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

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

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

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

### **III. GIB Removes the Exclusion and then Reinstates it**

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

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

40. Segal opined that the financial impact of such a change would be “moderate” and said its position was “neutral” regarding whether to remove

the Exclusion. (Roth Decl. Ex. C, May 29, 2018 (Ellinger Dep. Ex. 2, Apr. 4, 2018).)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. On August 11, 2016, ETF submitted a memorandum to the GIB responding to DOJ's August 10, 2016 memorandum. ETF recommended continuing with removal of the Exclusion as adopted at the July 12, 2016 GIB

meeting. In this memorandum, ETF cited concerns about possible fiduciary liability for declining to follow federal regulations. (Roth Decl. Ex. I, May 29, 2018 (Farrell Dep. Ex. 6, Apr. 11, 2018).)

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

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

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

59. But since the HHS regulations had not yet been enjoined, the DOJ attorney advised that GIB continue with its July 2016 decision to

remove the Exclusion. (Roth Decl. Ex. L, May 29, 2018 (Day Dep. Ex. 5:8–9, Apr. 2, 2018).)

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

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

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

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

64. The third contingency adopted by GIB at its December 30, 2017 meeting for reinstatement of the Exclusion was a DOJ opinion that the

decision would not breach GIB members' fiduciary duties. (Roth Decl. Ex. M, May 29, 2018 (Day Dep. Ex. 6:3, Apr. 2, 2018).)

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

66. Under GIB's decision, the Exclusion would be removed from the Uniform Benefits as of January 1, 2017, but would be added back to the Uniform Benefits if and when all four contingencies were met. (Roth Decl. Ex. M, May 29, 2018 (Dkt. 51 (Day Dep. Ex. 6:3, Apr. 2, 2018)).)

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

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

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

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

#### **IV. The Exclusion and Transgender Status**

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

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

73. Medical procedures that can assist a transgender individual with achieving primary or secondary sex characteristics aligned with their gender identity include hormone therapy, chest/breast surgery, vaginoplasty (surgical creation of vagina and vulva), orchietomy (surgical removal of the testes), phalloplasty (surgical creation of a penis), surgery on facial features, and body contouring. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 9, 11, Feb. 19, 2018).)

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

75. According to Plaintiffs' expert, Dr. Stephanie Budge, "[g]ender confirmation surgery is considered medically necessary for many transgender individuals due to its efficacy in relieving psychological distress associated

with gender dysphoria and improving quality of life.” (Roth Decl. Ex. P, May 29, 2018 (Budge Report 10, Feb. 19, 2018).)

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

77. Gender dysphoria is a psychiatric condition codified in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5). It is the term used for the psychological distress caused by the incongruence between a transgender person’s gender at birth and their gender identity. It affects both males and females. (Roth Decl. Ex. P, May 29, 2018 (Budge Report 9, 12, Feb. 19, 2018).)

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

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

80. A hypothetical cisgender female member diagnosed with severe depression due to negative body self-image could not obtain coverage for surgical procedures that modify her outward appearance, such as breast

augmentation or rhinoplasty, in an effort to treat her depression. (Mallow Decl. ¶ 20, May 24, 2018.)

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

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

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

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

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

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

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

#### **V. The State’s Interests**

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

89. For the self-insured pharmacy benefit in the Group Health Program, if the Exclusion were removed from the Uniform Benefits, state employers, through their contributions to ETF’s health coverage reserves, would directly bear all costs associated with procedures, services, and supplies related to gender reassignment surgery, beyond those costs

covered by members' premiums, co-pays, and deductibles. (Mallow Decl. ¶ 27, May 24, 2018.)

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

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

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

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

94. A number of factors explain the wide range in estimated costs, such as the relatively low proportion of covered members who will seek the treatment, the high range in costs of the treatment, the low amount of

available claims data, and ambiguities in the claims data itself. (Roth Decl. Ex. R, May 29, 2018 (Williams Report 11–14, Apr. 19, 2018).)

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

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

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

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

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

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

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

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

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

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

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

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

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

108. Secretary Conlin testified that he recalled hearing Wieske discuss concerns regarding the nature and efficacy of gender reassignment surgery

at one or more GIB meetings in 2016. (Dkt. 54 (Conlin Dep. 150:3–18; 195:25–196:25, Apr. 18, 2018).)

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

## **VI. Secretary Conlin’s Personal Involvement**

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

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

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

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

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

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

116. Even after the Wisconsin Department of Justice issued its August 10, 2016 memorandum to GIB stating it should reconsider its decision regarding removal of the Exclusion, it was Conlin's position that GIB should continue with removal of the Exclusion. (Dkt. 54 (Conlin Dep. 118:13–19, Apr. 18, 2018).)

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

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

*[Signature page follows]*

Dated this 1st day of June, 2018.

Respectfully submitted,

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