

SHORT RECORD
NO. 18-3408
FILED 11/09/2018

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.

STATE DEFENDANTS' NOTICE OF APPEAL

NOTICE is hereby given that Defendants State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Robert J. Conlin, in his official capacity as Secretary of the Department of Employee Trust Funds, and Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurlburt,¹ Theodore Neitzke, J.P. Wieske, Bob Ziegelbauer, Jennifer Stegall, Robert Wimmer, Herschel Day, and Nancy Thompson, in their official capacities as members of the State of Wisconsin Group Insurance Board (hereafter collectively "State Defendants"), appeal to the United States Court of Appeals for the Seventh Circuit from the District Court's final judgment entered in this action on

¹ Mr. Hurlburt's name was misspelled as "Hurburt" in the district court caption.

October 11, 2018. (Dkt. 240.) A true and correct copy of the final judgment is being filed with this Notice of Appeal.

The counsel of record for State Defendants on appeal will be Assistant Attorney General Steven C. Kilpatrick. State Defendants have paid the applicable filing fee.

Dated this 9th day of November, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
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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.

STATE DEFENDANTS' DOCKETING STATEMENT

Defendants State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Robert J. Conlin, in his official capacity as Secretary of the Department of Employee Trust Funds, and Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurlburt,¹ Theodore Neitzke, J.P. Wieske, Bob Ziegelbauer, Jennifer Stegall, Robert Wimmer, Herschel Day, and Nancy Thompson, in their official capacities as members of the State of Wisconsin Group Insurance Board (hereafter collectively "State Defendants"), concurrent with their Notice of Appeal filed today, hereby submit this docketing statement. *See* 7th Cir. R. 3(c)(1).

¹ Mr. Hurlburt's name was misspelled as "Hurburt" in the district court caption.

I. The district court's jurisdiction.

The district court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights) over this civil case commenced by a complaint filed by Plaintiffs Alina Boyden and Shannon Andrews in United States District Court for the Western District of Wisconsin on April 4, 2017. (Dkt. 1.) Plaintiffs pursued claims for monetary, declaratory, and injunctive relief under 42 U.S.C. § 18116 (the Patient Protection and Affordable Care Act), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution brought pursuant to 42 U.S.C. § 1983.

Plaintiffs filed an amended complaint on June 16, 2017. (Dkt. 27.) The district court, through an order dated June 25, 2018, accepted Plaintiffs' second amended complaint (Dkt. 108-1), as modified by the order, as the operative pleading in the case. (Dkt. 109.)

II. The court of appeals' jurisdiction.

The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction pursuant to 28 U.S.C. § 1291 over this appeal from the district court's final judgment. (Dkt. 270.)

On this date, November 9, 2018, State Defendants timely filed their Notice of Appeal within 30 days of the entry of final judgment on October 11,

2018, in favor of the plaintiffs and against them, along with a copy of the final judgment. *See* Fed. R. App. P. 4(a)(1)(A).

III. Prior or related appellate proceedings.

None.

IV. Current identities of parties named in an official capacity.

Robert J. Conlin, in his official capacity as Secretary of the Department of Employee Trust Funds, and Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurlburt, Theodore Neitzke, J.P. Wieske, Bob Ziegelbauer, Jennifer Stegall, Robert Wimmer, Herschel Day, and Nancy Thompson, in their official capacities as members of the State of Wisconsin Group Insurance Board, are defendants.

V. Counsel of Record.

Steven C. Kilpatrick, Assistant Attorney General, Wisconsin Department of Justice, 17 W. Main St., Post Office Box 7857, Madison, Wisconsin 53707-7857, Telephone: (608) 266-1792, Facsimile: (608) 267-2223, kilpatricksc@doj.state.wi.us.

[signature page follows]

Dated this 9th day of November, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and SHANNON
ANDREWS,

Plaintiffs,

v.

OPINION AND ORDER

17-cv-264-wmc

ROBERT J. CONLIN, BOARD OF REGENTS
OF THE UNIVERSITY OF WISCONSIN
SYSTEM, RAYMOND W. CROSS, REBECCA
M. BLANK, UNIVERSITY OF WISCONSIN
SCHOOL OF MEDICINE AND PUBLIC HEALTH,
ROBERT N. GOLDEN, STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST FUNDS, and
STATE OF WISCONSIN GROUP INSURANCE BOARD,

Defendants.

Plaintiffs Alina Boyden and Shannon Andrews are both employees of the State of Wisconsin and transgender women, who assert claims against various state officials and entities for excluding gender transition care from coverage under group health insurance plans for state employees. Before the court is state defendants' motion to dismiss. (Dkt. #28.) For the reasons explained below, the court will grant that motion in part and deny it in part. Specifically, the court will grant the motion based on plaintiffs' lack of legal standing to pursue claims against the Board of Regents of the University of Wisconsin System, Raymond W. Cross and Rebecca M. Blank. The court will also grant the motion to dismiss plaintiffs' claim under the Patient Protection and Affordable Care Act against the Wisconsin Group Insurance Board for failing to allege that it is a recipient of federal funding.¹ In all other respects, the motion is denied.

¹ Plaintiffs also agreed in their opposition brief to dismiss: (1) the University of Wisconsin School

UNDISPUTED FACTS²

Plaintiffs Alina Boyden and Shannon Andrews are transgender women. Each were assigned male identities at birth, but self-identify as female and have done so throughout their lives. Both have received diagnoses of gender dysphoria, a widely recognized medical diagnosis marked by “feeling[s] of incongruence between one’s gender identity and one’s sex assigned at birth, and the resulting stress from that incongruence.” (Am. Compl. (dkt. #27) ¶ 31.)

As employees of the State of Wisconsin, plaintiffs receive state-provided health insurance. Boyden is a graduate student and teaching assistant in the Department of Anthropology at the University of Wisconsin-Madison. Andrews works at the University of Wisconsin School of Medicine and Public Health. Both are employed by the Board of Regents, which is the governing body of the University of Wisconsin System. The Board of Regents is named as a defendant, along with University of Wisconsin-Madison Chancellor Rebecca M. Blank, University of Wisconsin System President Raymond W. Cross, and School of Medicine Dean Robert N. Golden (collectively, “Employer Defendants”). All Employer Defendants have some employment relation to the plaintiffs.

As state employees, the parties agree that plaintiffs are eligible for state group health

of Medicine and Public Health as a non-suable entity, and (2) dismiss their claim for punitive damages. (Pls.’ Opp’n (dkt. #39) 23 n.11.)

² In resolving a motion to dismiss under Rule 12(b)(6), the court takes all of the factual allegations in the complaint as true and draws all inferences in plaintiff’s favor. *Killingsworth v. HSBC Bank Nev.*, 507 F.3d 614, 618 (7th Cir. 2007).

insurance.³ The Wisconsin Department of Employee Trust Funds (“ETF”) administers group health insurance, along with retirement and other employee benefits. ETF Secretary Robert J. Conlin heads that department. ETF and the secretary oversee implementation of employee health insurance, but they do not set policy. Instead, policymaking -- including the contractual terms for group health insurance -- is delegated to the Wisconsin Group Insurance Board (“GIB”). As an “attached board,” GIB is located within ETF, but with separate membership and autonomy from ETF.⁴ GIB made the decision to exclude gender transition-related care from group health insurance, and ETF is bound by that decision.

Both plaintiffs receive state group health insurance plans through ETF. Due to GIB’s decision to exclude gender transition treatment, both plaintiffs were denied coverage for sex reassignment surgery. Both filed complaints and requested right-to-sue letters from the EEOC. Boyden’s efforts to receive treatment are more fully described in this court’s earlier order dismissing Dean Health. (Dkt. #44.)

Due to the lack of coverage, Boyden never received surgery. Andrews, however, did not wait for the state to lift the restriction. In 2015, she was medically referred to the Papillon Gender Wellness Center in Pennsylvania, and she received sex reassignment surgery there that same year. Andrews paid Papillon \$14,750 out-of-pocket, and in

³ The court draws facts from the amended complaint, but also takes judicial notice of Wisconsin’s statutory scheme to address employee benefits.

⁴ The Governor appoints six of the eleven GIB members, and the remaining seats are filled by the Governor, Attorney General, Secretary of the Department of Administration, Director of the Office of State employment Relations, and the Commissioner of Insurance. The Secretary of ETF is not a member of GIB.

February 2016, she filed a claim with her health insurance administrator, Wisconsin Physicians Service Insurance Corporation (“WPS”).⁵ WPS denied the claim because of Wisconsin’s transition-related care exclusion. It also denied a second claim for reimbursement of additional hospital fees and anesthesia.⁶ Andrews appealed her denial, to no avail, and submitted a complaint to ETF. She has not been reimbursed for the procedure.

OPINION

The parties agree that the School of Medicine and Public Health is not a suable entity and should be dismissed from this case. They also agree that punitive damages are not available under Title VII, and all claims for punitive damages under Title VII and should be dismissed. As for the remainder of their motion, defendants are trying to perform a sort of “magic trick.” By arguing that only GIB is responsible for health insurance, but that neither GIB nor ETF is an employer, defendants are essentially arguing that the State of Wisconsin is entirely immunized from Title VII claims. That is not the case. In addition to challenges to standing and to the Title VII claims, the court will also address defendants’ motion to dismiss the § 1983 claims against the individual defendants and defendants’ challenge to the ACA claims.

I. Article III Standing

To begin, this court is certainly one of limited authority. *See Kokkonen v. Guardian*

⁵ WPS previously was terminated as a defendant by stipulation. (Dkt. #24.)

⁶ In total, Andrews paid \$21,000, but the hospital claimed fees of \$52,467.95.

Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction.”). Most fundamentally, the United States Constitution restricts the jurisdiction of federal courts to the adjudication of “cases” or “controversies.” U.S. Const. art. III, § 2, cl. 1. To establish a case or controversy, a plaintiff must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Defendants do not challenge the first prong of constitutional standing -- that plaintiffs have suffered an injury in fact. They do challenge the second and third prongs for all defendants, except GIB. Defendants argue that GIB is the *sole* defendant responsible for denying coverage of transition-related care and the *sole* defendant empowered to make coverage decisions. Therefore, defendants argue, plaintiffs’ injury is neither caused by the conduct of any other defendant, nor redressable by any other defendant, meaning that the claims against all other defendants must be dismissed for lack of standing.

For reasons explained below, defendants are only partially correct. The Employer Defendants do indeed fall outside the court’s jurisdiction and must be dismissed. Based upon the information alleged, however, plaintiffs’ injuries can be fairly traced to GIB, ETF and ETF’s Secretary Conlin. A judgment against these defendants would also provide the plaintiffs redress.

A. Causation

The causation element of standing demands that the injury be fairly traceable to the challenged action of a defendant, rather than the result of independent action by some

third party not before the court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Article III causation is a fairly modest bar: proximate causation is not required, *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014), nor must the defendant be the only party responsible for the alleged injury, *see Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 500 (7th Cir. 2005). Generally, the complaint need only allege that “but for” some act or omission of the defendant, the injury would not have occurred. *See, e.g., id.* at 501 (plaintiff had standing to sue U.S. Secretary of Interior because the regulable third party would not have harmed plaintiff but for Secretary’s inaction).

There are some exceptions even to this “but for” bar. When the injury is caused by an unconstitutional rule of law, the proper defendant is the state official designated to enforce that rule. *See Am. Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (*ACLU*) (citing *Diamond v. Charles*, 476 U.S. 54, 64 (1986)). For example, if preemptively challenging a criminal statute, the plaintiff should sue the Attorney General’s office or the local district attorney. *See Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987); *Doe v. Bolton* 410 U.S. 179 (1973). Likewise, if a statute creates state-enforced civil penalties, a plaintiff may preemptively sue state officials tasked with enforcing that statute. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 794-795 (7th Cir. 2013). This enforcement exception applies even when the challenged rule of law was not created by a legislature. For example, in *ACLU*, the plaintiff was found to have standing to challenge the constitutionality of the Florida Code of Judicial Conduct (promulgated by the Supreme Court of Florida) by suing the State Bar and the Judicial

Qualifications Commission (charged with enforcement of the code). *ACLU*, 999 F.2d at 1490; *see also Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (finding standing for plaintiffs to challenge rules promulgated by the Supreme Court of Illinois, by suing entities charged with enforcing them).

Finally, plaintiffs argue that under *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), the United States Supreme Court recognizes plaintiffs' standing to sue ETF and Conlin. While *Norris* is inapplicable on its face,⁷ the court agrees with plaintiffs that the causation element is satisfied when a defendant enforces or administers a challenged policy. In applying this rule, the court separately analyzes the roles of the Employer Defendants and ETF.

1. Employer Defendants

For legal purposes, plaintiffs are employed by the State of Wisconsin. Much like the divisions of a large corporation, however, the Wisconsin Legislature has seen fit to divide up the employment responsibilities of the state, delegating them to various government agencies. The Employer Defendants are the persons and entities most immediately connected to plaintiffs' day-to-day employment, but appear to play no role in the administration of state health insurance. Health insurance falls under the domain of ETF and GIB. As a result, while plaintiffs urge the court to apply a "but for" test of causation, they do not and cannot allege any acts or omissions by the Employer Defendants

⁷ *Norris* involved a Title VII claim against a state employer, but the facts have little applicability in analyzing the standing issues here given that the defendant in *Norris* was an Arizona agency most analogous to GIB, for which defendants already concede standing.

that would satisfy this test, nor do they argue that the Employer Defendants are charged with administering the insurance policy at issue here.

Instead, plaintiffs allege that the Employer Defendants did nothing more than hire the plaintiffs, making them *eligible* for group health insurance through ETF. When employees elected to receive group health insurance, they obtained it through ETF. The Employer Defendants themselves, therefore, played no role in selecting, offering or providing that health insurance.⁸ As such, plaintiffs are unable to trace causation back fairly to the Employer Defendants, and those defendants must be dismissed for lack of standing.

2. ETF and Secretary Conlin

Although plaintiffs' injury cannot be traced to the Employer Defendants, the court finds that the injury can be fairly traced to ETF. ETF's role as administrator of the group health program makes it and Conlin proper defendants.⁹ While the parties disagree about whether GIB should be considered "part" of ETF for standing purposes, there appears no dispute that GIB sets policy, ETF administers it. Moreover, GIB is an "attached board"

⁸ If plaintiffs wished to argue that the Employer Defendants could have provided additional insurance options outside of ETF, their arguments are both undeveloped and implausible. From the court's review of Wisconsin statutes and administrative code, it is unlikely that the Employer Defendants *could* offer separate, unapproved insurance plans or provide specific coverage extensions for gender reassignment. Nevertheless, if plaintiffs have a good faith belief that the Employer Defendants have the legal authority to offer benefits without ETF's and GIB's approval, then plaintiffs may certainly seek leave to amend their complaint accordingly.

⁹ As Secretary of ETF, Conlin is vested with all administrative powers and duties of the department. Wis. Stat. §§ 15.04(1)(a), 40.03(2). In particular, his duties include the administration of group health plans. Wis. Stat. § 40.03(2)(ig). Therefore, any injury fairly traceable to ETF is also fairly traceable to Conlin.

“created in the department of employee trust funds.” Wis. Stat. § 15.165(2).

As an attached board, GIB is certainly legally distinct from the rest of ETF, and it is free to exercise its rulemaking powers independent from the Secretary of ETF. Wis. Stat. § 15.03. From this, defendants argue that GIB’s independent nature means it is not really “part” of ETF, but the distinction is academic; it does not affect standing. Again, what matters is that while GIB is responsible for contracting with health insurers and setting benefit terms, Wis. Stat. §§ 40.03(6), 40.52(1), 40.52(3), ETF is the entity actually empowered with administering the policies, Wis. Stat. §§ 40.03(2)(a), 40.03(2)(ig). Indeed, even defendants concede that ETF has a “statutory duty to execute GIB’s decision” albeit with “no power to do otherwise.” (Defs.’ Reply (dkt. #43) 7.) Discretion or not, ETF’s execution of the policy makes it a proper defendant.

Reaching for contrary authority, defendants argue that two district court decisions suggest that plaintiffs are able to prove causative injury only if ETF were empowered to craft new policy. However, neither of those decisions change the outcome here. In *Parker v. Stranburg*, No. 14-CIV-24010, 2015 WL 3863804 (S.D. Fla. June 22, 2015), a class of motorists challenged as unconstitutional fines issued by local municipalities. Seeking to recover those fines, the motorists sued the Florida Department of Revenue, but their claims were dismissed for lack of standing. *Id.* at *1. Defendants argue that just as the Florida Department of Revenue was statutorily compelled to receive money from municipal fines in *Parker*, so, too, is ETF statutorily compelled to follow GIB policy. Defendants misunderstand the reasoning of *Parker*. The *Parker* plaintiffs lacked standing not because the Department of Revenue was compelled to accept funds by statute, but because the

Department of Revenue's enrichment was a result of the plaintiffs' injury, not a cause. In *Parker*, municipalities caused plaintiffs' injury, afterwards money passively flowed to the Department of Revenue. In contrast, ETF's role in administering the group health plan was part of the *cause* of plaintiffs' injury, not a result of it.

Likewise, *Bloch v. Executive Office of the President*, 164 F. Supp. 3d 841 (E.D. Va. 2016), has no bearing on plaintiffs' standing to sue ETF. Bloch was appointed by President George W. Bush, to serve as a former federal Special Counsel, and later removed from office amidst scandal and criminal proceedings. Bloch sued for improper termination. Since only President Bush had the power to remove Bloch, the *Bloch* court ruled that President Bush himself was the only proper defendant to whom causation could be fairly traced. *Id.* at 848-49 (citing 5 U.S.C. § 1211(b)). If anything, the *Bloch* decision supports plaintiffs' standing to sue ETF here. Just as § 1211(b) of Title 5 of the United States Code empowered President Bush to hire and fire the Special Counsel, so, too, Section 40.51(6) of Wisconsin Statutes empowers the ETF to administer the state group health program.

B. Redressability

In order to have Article III standing, plaintiffs must also show that their injury is likely to be redressed by a favorable decision. *Spokeo*, 136 S. Ct. at 1547. Again, this is a modest bar on a motion to dismiss; plaintiffs need only plead that there is a substantial likelihood that the relief requested will redress the injury claimed. *See Norton*, 422 F.3d at 501 (citing *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 75 n. 20 (1978)). Neither the merits of plaintiffs' claims, nor the likelihood of success, are not relevant for redressability -- only whether the relief requested would alleviate the harm. *Id.*

at 502.

Even when the defendant lacks legal authority to prevent or fix the injury, the redressability prong can be met. For example, in *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), this court allowed same-sex couples to seek redress against their local county clerks for denial of marriage licenses despite the Wisconsin Constitution barring clerks from doing so. *See* Wis. Const. Art. XIII, § 13. Nevertheless, the court found the couples' injury could be redressed by a favorable decision enjoining the clerks from denying marriage licenses. *Wolf v. Walker*, No. 14-cv-64, slip. op. at 12-13 (W.D. Wis. June 13, 2014) (dkt. #134) (permanently enjoining clerks "from denying a marriage license to a couple because both applicants for the license are the same sex").

Similarly, as plaintiffs point out, the Ninth Circuit recognized the standing of a judicial candidate to sue the Arizona Commission on Judicial Conduct to challenge the Arizona Code of Judicial Conduct, even though the commission lacked any authority to change the code. *See Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010). The Ninth Circuit reasoned that a change in the code was not necessary because the commission could be enjoined from enforcing it. *Id.* (citing *Lujan*, 504 U.S. at 561-62) (if defendant's action or inaction causes injury, then ordinarily a judgment preventing or requiring the action will redress it).

Following the same reasons, plaintiffs here satisfy the redressability prong with respect to ETF and its secretary. Indeed, a number of possible rulings directed against these defendants would likely afford plaintiffs redress. For example, plaintiffs specifically request compensatory damages and injunctive relief ordering defendants to provide

transition-related care. A court order requiring ETF to pay damages for Andrews's surgical costs would provide her redress. Likewise, an order requiring ETF to pay for Boyden's treatment would provide her redress, as would an order that ETF contract for insurance coverage apart from GIB approval.

Conflating redressability with causation, defendants argue that redressability is absent if the defendants have no power to prevent the plaintiffs' injury. As explained above, redressability does not require a defendant to have *pre-existing* legal authority that will prevent the injury. None of the cases cited by defendants hold otherwise. In *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007), a Utah county clerk denied a marriage license to three people in a polygamous relationship. *Id.* at 1103. The *Bronson* plaintiffs then sued the clerk, asserting constitutional challenges to both Utah's civil *and* criminal prohibitions of polygamy. *Id.* at 1101. While the Tenth Circuit held that plaintiffs lacked standing to challenge the constitutionality of the *criminal* statute, this was because the county clerk, and her denial of a marriage license, played no role in plaintiffs' claim to redress from the threat of a future criminal prosecution.¹⁰ *Id.* at 1109-1110. Indeed, the threat of criminal prosecution would exist whether or not the court enjoined the clerk to issue a marriage license. *Id.* at 1112.¹¹

¹⁰ Utah criminalizes and prosecutes polygamous marriage, whether or not state-sanctioned. *Bronson*, 500 F.3d at 1102 (citing *State v. Holm*, 137 P.3d 726, 734 (Utah 2006)).

¹¹ The *Bronson* plaintiffs could likely have satisfied the standing requirements by seeking a marriage license, even though the clerk had no power to change the civil code. *See e.g. Bostic v. Schaefer*, 760 F.3d 352, 370-72 (4th Cir. 2014). Even if plaintiffs wished to challenge the criminal code, they could have sued the Utah Attorney General, even though the attorney general lacked any authority to change the code itself. *Bolton*, 410 U.S. 179.

Defendants also cite to *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001). In that case, plaintiffs sought to enjoin as unconstitutional a Louisiana statute that created a private right of action for recipients of abortions to sue their providers. The plaintiffs, however, filed suit against the governor and attorney general. The Fifth Circuit dismissed the suit, holding that none of the elements of Article III standing were satisfied since the named defendants had no power to enforce the statute and entry of an injunction against them would not stop individual citizens from pursuing claims in courts.

Unlike the cases cited by defendants, a ruling against ETF could wholly resolve the plaintiffs' injury. Defendants acknowledge as much by arguing that plaintiffs' requested relief, while redressing their injury, would have dire consequences. In particular, defendants argue a court order against any non-GIB defendant would be overly intrusive and overturn the state's statutorily-created insurance model. But this puts the cart before the horse since a motion to dismiss is not the time to analyze the merits, or to even address the appropriateness of the requested relief. *Norton*, 422 F.3d at 501. Constitutional standing only requires that the requested relief be *capable* of redressing the injury. Plaintiffs' requested relief accomplishes that much; the merits of their claims are for another day.

II. Section 1983 Claim

Defendants also seek dismissal of the § 1983 Equal Protection claims asserted against the four individual defendants in both their individual and official capacities. Having dismissed the claims against individual defendants Cross, Blank and Golden for lack of standing, the court need not consider the challenge against them. This leaves

plaintiffs' § 1983 claim against defendant Conlin, the ETF's Secretary.

Defendants contend that plaintiffs fail to allege Conlin's personal involvement with sufficient specificity to proceed against him on an individual capacity claim. In response, plaintiffs contend that they have adequately alleged the "'some causal connection' or 'affirmative link' between the action complained about and the official sued to obtain damages under § 1983." (Pl.'s Opp'n (dkt. #39) 18 (quoting *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983)).) Generally emphasizing the state statutory scheme for providing and administering health insurance for state employees already discussed in this opinion, plaintiffs contend that the allegations in the complaint, coupled with reasonable inferences, satisfy the personal involvement requirement, at least at the pleading stage. More specifically, plaintiffs point out that as its Secretary, Conlin is in charge of the administration of ETF, which includes providing health insurance coverage to state employees and promulgating all rules required for the administration of health insurance plans. (Pls.' Opp'n (dkt. #39) 19.) The court agrees that these allegations are sufficient to satisfy the personal involvement requirement at the pleading stage.

Defendants also seek dismissal of the claims asserted against Conlin in his official capacity based on immunity under the Eleventh Amendment. A state, its agencies and officials are only subject to suit in federal court if one of the following conditions is present: "(1) a state official is sued for prospective equitable relief under *Ex parte Young*, 209 U.S. 123, 159-60 (1908); (2) Congress abrogates the State's immunity pursuant to its powers under section 5 of the Fourteenth Amendment; or (3) the State consents and waives its immunity." *Nelson v. Miller*, 570 F.3d 868, 883 (7th Cir. 2009).

Here, plaintiffs concede that any claim against Conlin in his official capacity would be for injunctive relief. Still, defendants persist that the *Ex parte Young*, 209 U.S. 123 (1908), exception does not apply because Conlin lacks the authority to grant prospective relief. The requirement, however, is not that exacting. Instead, all that is required is “that the state officer by virtue of his office has some connection with the enforcement of the action.” 209 U.S. at 157. While the court agrees with defendants that any ordered prospective relief will almost certainly fall primarily on GIB and ETF to implement, Conlin’s position as ETF’s Secretary means he has at least “some connection” at the pleading stage to allow the § 1983 claims to go forward against Conlin in his official capacity.

III. Title VII Claims

Plaintiffs next assert Title VII discrimination claims against ETF and GIB.¹² In their motion, defendants argue that Title VII claims against ETF should be dismissed because it did not intentionally discriminate against plaintiffs, and that those same claims against both ETF and GIB must be dismissed because neither is an “employer” under Title VII. Since plaintiffs allege sufficient facts to show that ETF acted in some capacity to discriminate against plaintiffs, and both ETF and GIB are “employers” under Title VII, defendants’ motion to dismiss those claims is denied.

¹² Plaintiffs also asserted claims against the Board of Regents and the School of Medicine, but since the Board of Regents is dismissed for lack of standing and the parties now agree that the School of Medicine is not a suable entity, the court need only analyze the claims against ETF and GIB.

A. Intentional Discrimination

To state a viable claim under Title VII, a plaintiff must allege that: (1) an employer discriminates against her with respect to compensation, terms, conditions, or privileges of employment; (2) she is a member of a protected class; and (3) the discriminatory decision was made because the individual is a member of that class. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015). Defendants do not argue that plaintiffs fail to allege that they are members of a protected class; nor do defendants argue that plaintiffs fail to allege employment discrimination. Instead, defendants argue that plaintiffs' allegations fail to satisfy the first element of a Title VII claim: that ETF committed a discriminatory action.

For defendants, the issue once again is *who* plaintiffs allege discriminated against them. In particular, defendants again argue that ETF took no intentionally discriminatory action, but that is not at all clear at this stage. While GIB made the decision to discriminate against transgender persons, plaintiffs still allege that ETF had an active role in administering that decision by (1) discriminating against plaintiffs, (2) who were transgender, (3) because they were transgender. For example, when plaintiff Andrews was unable to receive reimbursement for her surgery, she filed appeals with WPS. When WPS denied her appeals, Andrews took the next step: appealing to ETF. (Am. Compl. (dkt. #27) ¶¶ 78-79.) At this stage, it is not yet clear how much discretionary power ETF has during the appeal process, if any, or whether it could act to rectify a policy that it found illegal under federal law. Since the scope of ETF's role is uncertain, however, the question of ETF's liability is best addressed on a more fulsome record than an initial pleading can

afford.

Insofar as defendants argue that plaintiffs must show a specific intention to discriminate, the court also agrees with plaintiffs. When an employment practice involves explicit facial discrimination, as alleged here, the existence of a disparate treatment does *not* depend on the employer's intent. *See Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991). Instead, disparate treatment is demonstrated by the terms of the policy itself.¹³ *Id.*; *see also Kentucky Ret. Sys. v. E.E.O.C.*, 554 U.S. 135, 147–48 (2008) (describing in an ADEA context the longstanding rule “that a statute or policy that facially discriminates . . . suffices to show disparate treatment”).

B. Employer Status

Defendants also seek dismissal of plaintiffs' Title VII claims on the basis that ETF and GIB are not the plaintiffs' employer. In a prior opinion and order, the court considered whether Dean Health Plan, Inc. was an employer for purposes of Title VII liability, concluding that it was not. (11/20/17 Op. & Order (dkt. #44).) After reviewing the relevant cases -- which were the same as those cited by the parties in their briefing on the pending motion -- the court concluded that to be an agent under Title VII, “one must be empowered with respect to employment practices, like the right to hire and fire, supervise work, set schedules, pay salary, withhold taxes, *or provide benefits.*” (*Id.* at 6 (emphasis

¹³ Parties argue about the different types of liability under Title VII, but they do not seem to have a real disagreement. Plaintiffs are not making a disparate impact claim, nor do they claim that facial discrimination is a third form of liability. Rather, plaintiffs correctly assert that facial discrimination is a flavor of disparate treatment -- one in which the burden-shifting framework of *McDonnell Douglas* is inappropriate. *See Reidt v. Cty. of Trempealeau*, 975 F.2d 1336, 1340–41 (7th Cir. 1992) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

added); *see also id.* at 7 (“If anything, an agency relationship exists between plaintiff’s employers and ETF/GIB, as the factual allegations suggest that plaintiff’s employers delegated to ETF/GIB the responsibility to determine which series should be covered under all of the offered health insurance plans.”).) Here, again for the reasons explained above with regard to standing, defendants GIB and ETF are empowered to provide health insurance benefits to state employees, including plaintiffs. As such, the court finds that both are proper suable entities under Title VII, and will deny the motion to dismiss on this basis.

IV. ACA claims

Finally, plaintiffs assert claims against GIB and ETF for violating Section 1557 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C § 18116(a), which prohibits discrimination on the basis of sex. Defendants seek dismissal of this claim against GIB based on plaintiffs’ failure to allege that GIB is a recipient of federal funds. In addition, defendants seek a stay of this claim pending resolution of another lawsuit challenging this provision of the ACA and related rulemaking proceedings.

A. Receipt of federal funds

While agreeing that an ACA claim may only be brought against recipients of federal funding, plaintiffs argue that “GIB is part of ETF” and that “ETF receives federal funds. (Pls.’ Opp’n (dkt. #39) 35.) The parties dispute the extent of the connection between GIB and ETF, but more importantly for purposes of the pending motion, plaintiffs’ reliance on the fact that GIB is a part of ETF does not in and of itself bring it within the scope of a

covered entity under the ACA. Instead, as explained with respect to a similar requirement for federal funding under the Rehabilitation Act claim, “Congress limited the scope of § 504 to those who actually ‘receive’ federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds.” *Grzan v. Charter Hosp. of Nw. Indiana*, 104 F.3d 116, 120 (7th Cir. 1997), *abrogated on other basis by Amundson v. Wis. Dept. of Health Servs.*, 721 F.3d 871 (7th Cir. 2013) (quoting *United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986)).

The mere allegation that ETF receives federal funding does not, therefore, support a reasonable inference that GIB also received federal funding. *Grzan*, 104 F.3d at 120. (“The coverage of the Rehabilitation Act does not follow federal aid past the intended recipient to those who merely derive a benefit from the aid or receive compensation for services rendered pursuant to a contractual arrangement.” (internal citation omitted)). On the other hand, as the Seventh Circuit explained in *Schroeder v. City of Chicago*, 927 F.2d 957 (7th Cir. 1991) -- a case relied on by plaintiffs -- if federal money can be traced to the separate part or division *within* a larger governmental agency then that part or division may be a covered entity under the Rehabilitation Act: “if the office of a mayor received federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor’s office are covered along with the departments or agencies *which actually get the aid.*” *Id.* at 962 (emphasis added). Accordingly, the court will grant this portion of defendants’ motion to dismiss *without prejudice* so that plaintiffs may file an amended complaint *if* they can allege in good faith that GIB actually received federal funding, either

from ETF or otherwise.

B. Stay of ACA claim

As for the remaining ACA claim against ETF, defendants seek a stay until the resolution of ongoing litigation in the Northern District of Texas. *See Franciscan Alliance, Inc. v. Price*, No. 7:16-cv-00108-O (N.D. Tex.). The *Franciscan Alliance* lawsuit challenges the legality of certain regulations adopted by HHS that define the sex discrimination prohibition in the ACA to include gender identity discrimination. The district court previously granted a preliminary injunction, staying enforcement of those regulations. *Id.* (dkt. #69) (N.D. Tex. 1/24/17). More recently, that same court stayed the case pending issuance of new regulations. *Id.* (dkt. #105) (N.D. Tex. 7/10/17). As defendants explain, the Trump administration has signaled that it intends either revise or eliminate the challenged regulations.

In considering whether to grant a stay, the court is to consider: “(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.” *Hy Cite Corp. v. Regal Ware, Inc.*, No. 10-cv-168-WMC, 2010 WL 2079866, at *1 (W.D. Wis. May 19, 2010).

In response, plaintiffs point out that they are relying on the language of the statute itself, rather than regulations under them. According to plaintiffs, their ACA claim does not, therefore, rise and fall with the existence or enforceability of those regulations. Moreover, even if the challenge in *Franciscan Alliance* to the ACA claims is not entirely

mooted by the adoption of new regulations, any resulting decision will not be controlling authority in this case. Accordingly, in light of plaintiffs' focus on the ACA language itself, the uncertainty of whether and when the stay in the *Franciscan Alliance* case will be lifted, and when and if the court will ever issue an opinion, a stay is neither likely to simplify the issues in question nor streamline the trial. Moreover, since plaintiffs' Title VII and Equal Protection claims are proceeding, a stay will not reduce the burden of litigation on the parties or on the court in this case. Accordingly, the court will deny defendants' motion to stay.

ORDER

IT IS ORDERED that defendants' motion to dismiss and, alternatively to stay (dkt. #28) is GRANTED IN PART AND DENIED IN PART as set forth above.

Entered this 11th day of May, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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

ALINA BOYDEN and SHANNON
ANDREWS,

Plaintiffs,

v.

ORDER

17-cv-264-wmc

ROBERT J. CONLIN, STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST FUNDS, and
STATE OF WISCONSIN GROUP INSURANCE BOARD,

Defendants.

Plaintiffs move to file a second amended complaint, which seeks to add: (1) a new plaintiff Wren Logan, another transgender state employee; and (2) seven of the eleven members of the Government Investment Board (“GIB”) as defendants in their individual and official capacities, as well as the four additional members of the GIB in their official capacities only for purposes of plaintiffs’ equal protection claims under § 1983. (Pls.’ Mot. to Amend (dkt. #74); Proposed 2d Am. Compl. (dkt. #108-1).)¹ Defendants oppose the motion, largely on the basis that plaintiffs’ undue delay would unfairly prejudice their preparation of a defense to plaintiffs’ claims to date.

Generally, leave to amend should be “freely” given. Fed. R. Civ. P. 15(a)(2). Notwithstanding this “liberal attitude towards the amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed

¹ In their motion and original proposed second amended complaint, plaintiffs also sought leave to add as defendants proposed plaintiff Wren Logan’s employers, the University of Wisconsin Hospitals and Clinics Authority, and its chief executive. In their reply brief, plaintiffs withdraw this request in light of defendants’ serving of a Rule 11 motion. In light of the court’s decision to deny plaintiffs’ leave to add a new plaintiff, any request to add her employers as defendants is moot.

in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile.” *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (internal quotation omitted).

Taking each proposed amendment in turn, the court agrees with defendants that adding a new plaintiff after the parties have already filed their motions for summary judgment is simply too late. Nothing about this decision precludes the proposed plaintiff Wren Logan from filing her own lawsuit, and a decision by this court on the merits in favor of Boyden and Andrews’ claims will likely be dispositive of Logan’s claims as well.² But it is unfair to defendants to introduce a third plaintiff in this case given the current procedural posture. Indeed, at minimum, the addition of Logan would require a range of discovery as to her specific circumstances and potentially new issues as to both parties’ motions for summary judgment. Accordingly, that portion of the motion is denied.

The addition of the seven GIB individual defendants in their individual capacity, however, presents a different set of considerations.³ Here, the court credits plaintiffs’ explanation for seeking leave to add these defendants until after the court ruled on defendants’ challenges to standing. (*See* Pls.’ Reply (dkt. #107) 8-9.) While recognizing that the summary judgment motion deadline has passed, defendants have not articulated what additional discovery, claims, or other grounds for summary judgment would be

² The reverse is not necessarily so, because: (1) Logan will not be bound by an adverse ruling against plaintiffs; and (2) even if this court would be inclined to rule similarly in a subsequent suit, Logan would be able to assert new claims under different theories.

³ Defendants focus their opposition on the assertion of individual capacity claims against the four GIB members who did *not* vote for the exclusion, which plaintiffs do not oppose in reply. However, at least as to the futility issue, defendants do not appear to oppose plaintiffs’ request to add claims for injunctive relief against all members in their official capacities.

unique to these new defendants, even as to the remaining seven sued in their individual capacity. Instead, it seems likely that these defendants could simply join in the motion for summary judgment previously filed, and specifically, in defendant Conlin's motion for qualified immunity.⁴

Accordingly, IT IS ORDERED that:

- 1) Plaintiffs' motion for leave to file a second amended complaint (dkt. #74) is GRANTED IN PART AND DENIED IN PART as described above.
- 2) The clerk's office is directed to amend the caption to add GIB members Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, J.P. Wieske and Bob Ziegelbauer as defendants in their individual and official capacities, and add GIB members Jennifer Stegall, Francis Sullivan, Herschel Day and Nancy Thompson as defendants in their official capacities. Defendants' counsel may have seven (7) days to accept service on behalf of these new defendants. Otherwise, plaintiffs should proceed to effect formal service.
- 3) Plaintiffs' proposed second amended complaint (dkt. #108-1) is accepted as the operative pleading, except the court strikes as parties plaintiff Wren Logan and defendants University of Wisconsin Hospitals and Clinics Authority and Alan S. Kaplan. No additional, answer, motion or response is required by any defendant, except as they may choose to assert it.

Entered this 25th day of June, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

⁴ Regardless, to the extent that these newly-added defendants want to advance unique grounds for summary judgment, defendants may so move no later than August 1, 2018.

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

ALINA BOYDEN and SHANNON ANDREWS,

Plaintiffs,

OPINION AND ORDER

v.

17-cv-264-wmc

ROBERT J. CONLIN, STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST
FUNDS, STATE OF WISCONSIN GROUP
INSURANCE BOARD, MICHAEL S. FARRELL,
STACEY ROLSON, CHARLES GRAPENTINE,
WAYLON HURBURT, THEODORE NIETZKE,
J.P. WIESKE, BOB ZIEGELBAUER, JENNIFER
STEGALL, FRANCIS SULLIVAN, HERSCHEL
DAY, and NANCY THOMPSON,

Defendants.

As transgender women and employees of the State of Wisconsin, plaintiffs challenge the State's exclusion of "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" from health insurance coverage provided to state employees under Title VII, 42 U.S.C. § 2000e *et seq.*, the anti-discrimination provision of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("ACA" or "Section 1557"), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Before the court are the parties' cross-motions for summary judgment. (Dkt. ##80, 95, 141.) The court recently considered a similar exclusion for Wisconsin Medicaid recipients, though on a motion for preliminary injunction. *See Flack v. Wis. Dep't of Health Servs.*, No. 18-cv-309-wmc, 2018 WL 3574875 (W.D. Wis. July 25, 2018). Now, with the benefit of a full record, the court concludes here that the challenged exclusion constitutes sex discrimination in violation of Title VII and the ACA. As for

plaintiffs' Equal Protection claim, the court concludes that the claim is subject to heightened scrutiny, and defendants have failed to put forth evidence to find that proffered concerns about cost or efficacy were genuine and not *post hoc* inventions in response to litigation. However, relief for violating the Equal Protection Clause is injunctive only, because the named, individual defendants are entitled to qualified immunity.

PRELIMINARY ISSUE

Before turning to the parties' motions for summary judgment, the court must first address defendants' motions to strike supplemental reports submitted by plaintiffs' experts. (Defs.' Mots. (dkt. ##124, 138).) Plaintiffs timely served expert reports of Stephanie Budge, Ph.D., a licensed psychologist specializing in issues of gender identity and gender transition processes, and Loren S. Schechter, M.D., a board certified plastic surgeon specializing in performing gender confirming surgery. (Budge Original Rept. (dkt. #89); Schechter Original Rept. (dkt. #106).) Plaintiffs later filed an arguably untimely set of "supplemental expert reports" along with their brief in opposition to defendants' motion for summary judgment, and yet another set of so-called "supplemental expert reports" at the time of filing a reply brief in support of their own motion for summary judgment. (Schechter Suppl. Rept. (dkt. #116); Budge Suppl. Rept. (dkt. #119); Schechter 2d Suppl. Rept. (dkt. #137); Budge 2d Suppl. Rept. (dkt. #136).)

Defendants contend that these reports are not proper supplemental reports within the meaning of Federal Rule of Civil Procedure 26(e)(2), and instead are untimely rebuttal reports. As such, defendants seek an order striking them under Federal Rule of Civil Procedure 37 for violating the court's scheduling order.

For the most part, in comparing the topics in the original, timely reports to those covered in the supplemental reports, the *opinions* are not new; rather, plaintiffs' experts simply provide some additional support. Critically, with respect to the topics in the supplemental reports, the *original* reports contain the experts' conclusions, as well as an explanation of how and why they each reached those conclusions. *See Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) (describing disclosure requirements under Rule 26(a)(2)(B)).

Starting with Dr. Budge's supplemental reports, the following topics were already covered in her original report:

- Supplemental Report Topic 1 and Second Supplemental Report Topics 4 and 5, all concerning whether treatments for gender dysphoria are similar to cisgender persons seeking cosmetic surgery (*see* Budge Original Rept. (dkt. #101) 16-17, 20 (opining that gender confirming surgery is reconstructive, not cosmetic));
- Supplemental Report Topic 3 and Second Supplemental Report Topic 1, addressing studies showing hormone therapy and surgery are safe and effective (*see id.* at 15-18, 20-21 (reviewing studies showing safety and efficacy of medical transition procedures));
- Supplemental Report Topic 5 and Second Supplemental Report Topic 2, concerning whether there is any dispute over whether a person's status as transgender can be changed (*see id.* at 8, 19-20 (defining "gender identity" as generally immutable, and discussing danger of treatment for transgender individuals seeking to align gender identity with natal sex));
- Second Supplemental Report Topic 2, addressing whether treatments aimed at aligning one's gender identity with the gender assigned at birth may be successful (*see id.* at 19-20 (discussing positions of various medical associations about harm caused by such treatments)); and
- Second Supplemental Report Topic 3, addressing the basis for statement that every major medical association recognizes the medical necessity of treatment for gender dysphoria (*see id.* at 18-19 (summarizing positions)).

At least one of Dr. Schechter's supplemental topics similarly falls within the topics

addressed in his original report: Supplemental Report Topic 2, concerning whether insurance coverage is typically provided for medically necessary breast reduction surgery due to back pain and related problems, as well as breast reconstruction post-mastectomy, falls within the scope of his initial opinions describing billing insurance codes. (*See* Schechter Original Rept. (dkt. #106) 11-12.)

None of these opinions are new. As such, it is questionable whether supplementation was required at all. If plaintiffs had not filed supplemental reports, their experts would likely have been able to offer most, if not all, of this testimony at trial since it falls properly within their timely, original expert disclosures. Plaintiffs presumably supplemented in an effort to cover the specific arguments raised by defendants in their summary judgment briefs, largely relying on defendants' expert's deposition testimony. If anything, by providing defendants with this additional detail, plaintiffs ensured that defendants would not be blind-sided at trial *and* helped avoid otherwise needless dissection by the court as to whether some detail was adequately disclosed in the original expert reports. The court is not going to penalize plaintiffs for either effort. Regardless, as already alluded to, because the court ultimately concludes that defendants failed to put forth evidence in support of a finding that efficacy was a genuine, contemporaneous concern in the Government Insurance Board's decision to reinstate the exclusion, the dispute between the parties as to the efficacy of gender confirming surgery and hormone therapy is not material to the issues before the court on summary judgment.

A few topics, however, appear to extend beyond the opinions in the original reports. For Dr. Budge, Supplemental Report Topic 2 -- concerning the difference between gender

dysphoria and anxiety and mood disorders -- extends beyond her initial report, which was limited to defining gender dysphoria and the fact that it can cause depression and anxiety. Similarly, Supplemental Report Topic 4 -- concerning whether medical interventions can save transgender people's lives -- extends beyond her first report, although her first report did touch on suicide rates for transgender individuals. For Dr. Schechter, his supplemental opinions concerning whether cosmetic surgery is provided to treat depression and whether breast reconstructive surgery has both a reconstructive or functional aspect as well as a cosmetic component (*see* Supplemental Report Topics 1, 3 and 4, and Second Supplemental Report (dkt. ##116, 137)) extend beyond that offered in his original report.

Still, striking these arguably “new” opinions as a sanction under Rule 37(c)(1) would normally only be warranted if plaintiffs’ supplemental reports were not “substantially justified” or “harmless.” Again, here, these arguably new opinions were obviously offered in response to the expansive deposition testimony of defendants’ expert Lawrence Mayer, M.D., M.S., Ph.D. Indeed, Mayer’s report is quite thin and presents his opinions in a general manner without much detail. *See Salgado*, 150 F.3d at 742 (“Expert reports must include ‘how’ and ‘why’ the expert reached a particular result, not merely the expert's conclusory opinions.”). For example, in opining on the studies on gender confirming surgery and hormone therapy in his report, Dr. Mayer simply states, “[t]he evidence that these interventions are safe, effective, and optimal is minimal,” and cross-references three other sources. (Mayer Rept. (dkt. #90) ¶ 21.)

At his deposition, however, Mayer expanded significantly on this opinion, providing more concrete and specific criticisms of studies that purport to show the efficacy of surgery,

which go well beyond his report or even the review of these studies contained in his 2016 article and 2017 amicus brief -- two of the three sources cited in support of his original opinion. (Mayer Dep. (dkt. #112) 49-60, 62-63, 65-55, 71-72.) Mayer's deposition testimony also touched on topics not addressed in his report, including critiquing Dr. Budge's opinion that all major medical associations have recognized the necessity of transition-related care. (*Id.* at 5-16, 19-20.) Moreover, in responding to plaintiffs' proposed findings and in proposing their own, defendants rely heavily on this testimony. (*See, e.g.*, Defs.' Add'l PFOFs (dkt. #121) ¶¶ 120-33, 137; Defs.' Resp. to Pls.' PFOFs (dkt. #122) ¶¶ 9, 32.)¹

For all of these reasons, the court declines to strike the supplemental reports. To the extent expert testimony is warranted in any remaining trial on damages, plaintiffs' experts may provide testimony consistent with their supplemental reports. To be fair, the court will similarly allow Dr. Mayer's testimony at trial to extend to those opinions and bases for opinions offered at his deposition.

¹ In part, defendants fault plaintiffs for not offering some of their expert responses by the rebuttal deadline, arguing that they should have noticed Dr. Mayer's deposition *before* the rebuttal expert report deadline. But this argument presupposes that plaintiffs knew Mayer's testimony was going to be significantly more detailed and extend beyond that offered in his cursory expert report. Moreover, it is *defendants* that are relying heavily on Mayer's deposition testimony in their proposed findings of facts at summary judgment. The court is decidedly disinclined to penalize plaintiffs for choosing to supplement their experts' reports to respond to the expansive deposition of defendants' expert when plaintiffs would instead have been within their rights to seek to strike Mayer's new opinions and bases for opinions outright at summary judgment.

UNDISPUTED FACTS²

A. Health Care Coverage for State Employees

As set forth in Wisconsin Statute § 40.01(1), the State provides insurance coverage to “aid 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.” The Government Insurance Board (“GIB”) adopts “Uniform Benefits” that define the coverage terms applicable to all insurance plans offered to state employees through the Group Health Insurance Program and that govern all state employee health insurance plans. GIB then contracts with private insurance companies to administer these insurance plans for state employees consistent with the Uniform Benefits. 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.

Eligible employees may participate in the Wisconsin Group Health Insurance Program through their state employers. Most insurance plans offered through the Group Health Insurance Program are fully-insured. Under 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 the Employee Trust Fund (“ETF”), which transmits those funds to the third-

² Unless otherwise noted, the court finds the following facts undisputed and material for the purpose of deciding the present motions.

party insurance carriers. The pharmaceutical portion of the Group Health Program is self-insured. For 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.

B. Defendants

In addition to having the express 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), and contracting with third-party insurance carriers to provide coverage, defendant GIB sets policy and oversees administration of the group health insurance, life insurance and income continuation insurance plans for state employees and retirees, as well as the group health and life insurance plans for local employers who choose to offer them. GIB is made up of 11 appointees and designees of the Governor and heads of various state agencies.

Defendant ETF is an executive branch department created by Wisconsin Statute § 15.16 and charged with providing and administering retirement, health insurance and other benefits to state and local government employees and retirees. Defendant Robert Conlin, the Secretary of ETF, is “in charge of the administration of the department and exercise[s] . . . all powers and duties” exercised by other state department secretaries. Wis. Stat. § 40.03(2)(a). Conlin and subordinate ETF staff with the Office of Strategic Health Policy (“OSHP”) administer health insurance plans for state employees, including ensuring that the OSHP staff carry out GIB’s decisions. GIB is one of five boards within ETF.

Typically, defendant GIB considers recommendations from ETF and establishes

health insurance benefits for Wisconsin state employees each contract year. ETF then implements the decisions of the GIB to confirm that the benefits offered by each carrier are uniform. ETF's implementation of GIB's benefit decisions includes incorporating the benefit changes into contracts with private health insurance plans who administer employee coverage.

C. Gender Identity, Gender Dysphoria and Treatment

For purposes of medical diagnosis, as well as increasingly for purposes of common usage, "gender identity" is the internal core sense of one's own sex, such as male or female. All human beings have a gender identity. Plaintiffs contend that gender identity is innate and generally considered to be an immutable characteristic. Defendants dispute this, instead positing that "sex is immutable, whereas gender identity is a developmental process." (Defs.' PFOFs (dkt. #88) ¶ 84.) "Transgender" means there is an incongruence between a person's sex at birth (also referred to as one's "natal sex" in medical texts) or the gender assigned at birth and the individual's gender identity. Transgender people make up a small percentage of the overall population, between 0.38% and 0.6% of the United States population and approximately 0.43% of the population in Wisconsin.

For transgender individuals, transitioning from the gender assigned at birth to the individual's gender identity can be psychologically healthy,³ although for many this

³ Defendants purport to dispute the concept of transitioning, pointing to Dr. Mayer's testimony 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 to transition? . . . They need to have a long-term identification, not any particular body configuration." (Mayer Dep. (dkt. #112) 76-77.) Mayer's claimed (or feigned) confusion departs from accepted psychiatric diagnosis. Regardless, the concept of transitioning is not difficult to understand, nor can it really be in dispute since transgender individuals transition from the gender assigned to them at birth --

transition is largely social, rather than medical. A medical transition usually involves any medical procedure to assist a transgender individual with achieving primary or secondary sex characteristics that are closely aligned with their gender identity, ranging from hormone therapy to surgeries. As already noted, not all transgender persons will want or need these medical interventions. Hormone replacement therapy (“HRT”) includes the administration of feminizing or masculinizing hormones to induce changes in physical appearance. Gender confirming surgery (“GCS”) includes any surgery to alter or adjust an individual’s primary or secondary sex characteristics to align with their gender identity. Plaintiffs maintain that GCS and HRT are medically necessary procedures for some transgender individuals to treat gender dysphoria, including themselves.

While defendants dispute both this characterization generally, and the plaintiffs’ medical need specifically, the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”) defines gender dysphoria as “incongruence between one’s experienced/expressed gender and assigned gender,” as well as “clinically significant distress or impairment in social, school, or other important areas of functioning.” *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 451-53 (5th ed. 2013). When individuals diagnosed with gender dysphoria do not obtain competent and necessary treatment, serious and debilitating psychological distress often occurs, including depression, anxiety, self-harm, and suicidal ideation/attempts. The American Medical Association (“AMA”), the American Psychiatric

which is the gender that aligns with their natal sex -- to the gender that conforms with their identity.

Association (“APA”), the American Psychological Association, the American Counseling Association, the American Psychoanalytic Association, and the World Professional Association of Transgender Health (“WPATH”), all recognize the medical necessity of transition-related care for transgender people with gender dysphoria.⁴

The parties dispute the efficacy of hormone therapy and surgery. Plaintiffs’ experts, Drs. Budge and Schechter, both provide a survey of medical research confirming the safety and effectiveness of these treatments, as well as the harm caused by denying such care to those who need it. Plaintiffs also point to the WPATH Standards of Care (“SOC”) for treatment of gender dysphoria, which are widely recognized guidelines for the management of transgender individuals with gender dysphoria and outline 37 years of data that focuses on the beneficial outcomes of HRT and GCS. Defendants dispute that this data “conclusively” demonstrates such beneficial outcomes, again primarily relying on the testimony of their expert, Dr. Mayer. (Defs.’ Resp. to Pls.’ PFOFs (dkt. #122) ¶ 36.) Specifically, Dr. Mayer would call into question this medical research by directing the court to three items in support: (1) an article he co-authored in *The New Atlantis*, a non-peer-reviewed medical journal, in which he appears to rely solely on a handful of studies, all of which Mayer conceded during his deposition have various deficiencies (*see* Mayer Rept., Ex. D (dkt. #90-4) 106-13); (2) an amicus brief he authored -- but did not attach to his report -- in which he describes the lack of medical support for treating gender dysphoric

⁴ Defendants purport to dispute this proposed fact, although the basis is a cite to defendants’ expert, Dr. Mayer, who generally calls into question the value of the AMA’s endorsement by pointing out now-discredited past positions of the AMA. (Defs.’ Resp. to Pls.’ PFOFs (dkt. #122) ¶ 33 (citing Mayer Dep. #112) 97-98.)

children in accordance with their gender identity (*see* Brief of Amici Curiae, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-273 (U.S. Jan. 10, 2017)); and (3) a 2016 decision of the U.S. Department of Health & Human Services Center for Medicare and Medicaid Service (“CMS”), in which the Department declined to issue a “National Coverage Determination at this time on gender reassignment surgery for Medicare beneficiaries with gender dysphoria because the clinical evidence is inconclusive for the Medicare population” (*see* CMS, Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) (Aug. 30, 2016), *available at* <https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282>)). (Mayer Rept. (dkt. #90) ¶ 21.) Defendants concede, however, that Mayer testified that “he would not argue with a clinical recommendation that reassignment was ‘absolutely critical,’” though they point out that this “reflects his role as an epidemiologist rather than a treating physician.” (Defs.’ Resp. to Pls.’ Suppl. PFOFs (dkt. #127) ¶ 24.)

D. The Exclusion

As mentioned in the introduction above, this case concerns a specific exclusion to the Uniform Benefits adopted by GIB. Under Section (A)(1)(c) of the exclusions, having the heading of “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 (dkt. #82-1) 51.) This Exclusion has existed in materially the same form since 1994, although GIB adopted a modification of its language in 2015, changing the language from “sex transformation” to “gender reassignment.” In 1994, GIB originally added the Exclusion because “benefits and

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 (dkt. #83-1) 24.)

In application, defendants maintain (and plaintiffs do not appear to dispute, at least as currently applied) that the Exclusion does *not* apply to hormone therapy or mental health counseling when used to treat gender dysphoria *unless* specifically made a course of treatment *leading to or involving gender confirming surgery*, although plaintiffs nevertheless maintain that the actual language of the Exclusion does not contain this express limitation. (Defs.’ PFOFs (dkt. #88) ¶ 27; Pls.’ Resp. to Defs.’ PFOFs (dkt. #113) ¶ 27.) Still, there is no dispute that mental health counseling as a stand-alone treatment for gender dysphoria is covered, whereas hormone therapy involving gender reassignment surgery is not covered; and there is no dispute that the surgery itself is not covered. The Uniform Benefits also exclude from coverage “treatment, services and supplies for cosmetic . . . purposes,” explaining that “[p]sychological reasons do not represent a medical/surgical necessity.” (Mallow Decl., Ex. A (dkt. #82-1) 58-59.)

For a brief period in 2016, it appeared that GIB’s position might change. In 2015, as part of defendant GIB’s considerations in defining Uniform Benefits for the Group Health Insurance Program for the plan year starting January 1, 2016, ETF advised that while it would not recommend “add[ing] coverage for gender reassignment benefits with strict protocols” for 2016, it would consider doing so for 2017. (Pls.’ PFOFs (dkt. #96) ¶ 100 (quoting Godbe Decl., Ex. L (dkt. #103-12) 8).) In 2015, GIB was also considering a broad redesign of the Group Health Insurance Program, including a possible shift to self-

insurance for all program aspects, with the hope to hold current benefits stable. Moreover, the 2015-2017 state budget required GIB to identify \$25 million in savings in the Group Health Insurance Program over those two fiscal years, and as such, ETF's recommendations to GIB were focused on cost reduction strategies, not expanding benefits.

Nevertheless, in a June 22, 2016, memorandum, ETF staff first recommended to GIB that the Exclusion for coverage of gender reassignment surgery be removed. In particular, ETF analyzed the federal Department of Health and Human Services' regulations implementing the Affordable Care Act's anti-discrimination provision, and it concluded that ETF was a "covered entity" for the purpose of the HHS regulations, because of its receipt of federal financial assistance in the form of Medicare Part D subsidies and the fact that it is "principally engaged in administering health insurance coverage." (Roth Decl., Ex. H (dkt. #83-8) 2-3.) Therefore, ETF concluded in its memo that the Exclusion was prohibited. At its July 12, 2016, meeting, GIB agreed, voting unanimously to amend the uniform benefits to remove the Exclusion effective January 1, 2017.

As described in detail below, however, GIB reconsidered that decision. (*See infra* Undisputed Facts § H.) On December 29, 2016, the GIB voted to reinstate the Exclusion once four contingencies were satisfied. In January 2017, ETF Secretary Conlin determined that those four contingencies were satisfied and reinstated the Exclusion, effective February 1, 2017.

E. Coverage of Same Surgical Procedures for Other Medical Needs

There is no dispute that when performing GCS, surgeons use many of the same

procedures used to treat other medical conditions.⁵ For example, surgeons regularly perform mastectomies and chest/breast reconstruction, hysterectomies, salpingo-oophorectomies (surgical removal of fallopian tubes and ovaries), and orchiectomies (surgical removal of testes) to treat individuals with cancer or a genetic predisposition to cancer, such as the BRCA genes, or as part of treatment for a traumatic injury.

Moreover, Uniform Benefits adopted by GIB for state employees cover “surgical procedures, wherever performed, when needed to care for an illness or injury.” (Godbe Decl., Ex. C (dkt. #103-3) 32.) The parties have stipulated that this coverage extends to breast reduction surgery, mastectomy, mammoplasty (breast reduction surgery), penectomy (surgical removal of penis), orchiectomy, phalloplasty (surgical creation of a penis), vaginoplasty (surgical creation of a vagina), hysterectomy, and salpingo-oophorectomy, to treat various medical conditions, subject to a medical necessity determination by third-party health plans. (Pls.’ Reply to Pls.’ PFOFs (dkt. #133) ¶ 42 (citing Madden Decl., Ex. B (dkt. #131-2)).)

Because of the Exclusion, however, Uniform Benefits do not permit coverage of these procedures for transgender individuals suffering from gender dysphoria. When billing insurers for reimbursement, health care providers use Current Procedural Terminology (“CPT”) codes, which are developed and maintained by the AMA. The same code or codes apply to a particular procedure regardless of whether the procedure is performed on a transgender person as part of a medical transition or on a cisgender person

⁵ The fact that these surgical procedures are used to treat other medical conditions would also appear to support a finding that the procedures are safe. (Pls.’ Reply to Pls.’ PFOFs (dkt. #133) ¶ 48.)

for some other medical reason. 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. The same CPT code (19304) would be used for both procedures and the charge per CPT code would be the same. 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.

F. Cost Implications for Coverage

If the Exclusion were removed from the Uniform Benefits for fully-insured plans in the Group Health Insurance Program, both ETF and all covered members would bear a share of costs associated with procedures, services and supplies related to GCS through their respective contributions to health insurance premiums. If the Exclusion were removed from the Uniform Benefits for the self-insured pharmacy benefit in the Group Health Insurance Program, state employers would directly bear all costs associated with procedures, services and supplies related to GCS through contributions to ETF's health coverage reserves beyond costs covered by members' premiums, co-pays and deductibles.

Based on actual claims data from 2016 and the risk posed by uncertainties in that data, plaintiffs' actuarial expert, Joan Barrett, estimated the cost of removing the Exclusion to be \$140,000 per year. Even defendants' expert, David Williams, a health care consultant with an independent actuarial consulting firm, using the same data and methodology, estimated that the State could expect to incur a total of \$300,000 in annual costs by removing the Exclusion. Williams estimated that the per member per month

health care cost would be \$0.04 to \$0.10.⁶

From an actuarial standpoint, the removal of the Exclusion of coverage of transition-related care is immaterial, since it represents less than 0.1% of the overall costs of medical care. Defendant and GIB member Herschel Day, an actuary who reviewed publicly-available information about the pricing impact of removing the Exclusion, determined that the impact would be “negligible” and would not exceed 0.1 to 0.2 percent. (Day Dep. (dkt. #51) 52-53.)⁷

G. Defendant Conlin’s Role in Administering and Reinstating the Exclusion

ETF Secretary Robert J. Conlin and other staff with the OSHP periodically provide recommendations on health insurance benefits coverage to GIB, which it generally accepts. Indeed, ETF staff have significant control over what new benefits are added to the state employee health plans, because the GIB does not usually adopt new benefits that are not recommended by ETF. In particular, policy analysts at OHSP evaluate the Uniform Benefits throughout the year, and they typically make recommendations to the GIB about changes to that package in late winter and early spring. GIB then votes at its quarterly meetings in May or August on the Uniform Benefits recommendations of the ETF staff for possible inclusion in contracts with the private insurance companies that provide coverage

⁶ Ms. Barrett determined that Williams’ estimate presents a “worst case” scenario that effectively doubles the expected costs. (Barrett Rept. (dkt. #105) 9.) At his deposition, Williams conceded that his estimate assumes a “pretty bad” case scenario. (Williams Dep. (dkt. #111) 178.)

⁷ These cost estimates appear to be in line with those provided by ETF to the Teaching Assistants Association in response to bargaining demands for such coverage in the mid-2000s. (See Pls.’ PFOFs (dkt. #96) ¶¶ 96-98.)

to state employees.

As Secretary, Conlin specifically took a number of actions to review the Exclusion at issue in this case, including (1) reviewing the final Health and Human Services rule on nondiscrimination, (2) requesting a legal opinion from ETF as to the applicability of that rule to ETF, (3) reviewing memos by OHSP and ETF relating to the proposed removal of the Exclusion, and (4) discussing the coverage Exclusion with ETF attorneys on multiple occasions. While GIB relies on the ETF secretary and staff when making policy decisions, defendants point out that both Conlin and ETF staff consistently recommended *removing* the Exclusion from the Uniform Benefits, including before GIB voted to reinstate the Exclusion. After GIB's reinstatement of the Exclusion, Secretary Conlin was involved in preparing the contract amendment reinstating the Exclusion that was sent to the health insurance plans under his name, including insisting that the amendment be signed by someone with authority to bind the plans.

H. Reinstatement of Exclusion

Following its decision to remove the Exclusion, GIB board member J.P. Wieske brought up the issue for reconsideration. ETF staff member Tara Pray and OSHP Director Ellinger also testified at their depositions that the Wisconsin Department of Justice ("DOJ") requested reconsideration. On August 10, 2016, Deputy Attorney General Andy Cook, at the behest of the Governor's office, submitted a memorandum to GIB via ETF, asking the Board to reconsider its vote to eliminate the Exclusion "[t]o the extent the Board believes that the new HHS rules compel it to accept ETF's recommended changes." (Defs.' Resp. to Pls.' PFOFs (dkt. #122) ¶ 114 (quoting Godbe Decl., Ex. P (dkt. #103-16) 3-7).)

The memorandum went on to state 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.” (Godbe Decl., Ex. P (dkt. #103-16) 3.)

In response, David Nispel and Diana Felsmann, attorneys for ETF, provided a memorandum to GIB members, noting as fiduciaries that they “must ensure that the Group Health Insurance Program complies with state and federal law.” (Godbe Decl., Ex. P (dkt. #103-16) 8-12.) The ETF memorandum further explained that the HHS non-discrimination rule prevents health insurance issuers from contracting away their nondiscrimination obligations, and that reinstating the Exclusion could “jeopardize ETF’s ability to contract with its health insurance issuers.” (*Id.* at 8.) The ETF memorandum also noted that the cost of removing the Exclusion was “anticipated to be low” and the requirement that the services be “medically necessary” would remain in place. (*Id.* at 9.)

Attorney Kevin Potter from the DOJ attended the December 13, 2016, GIB meeting and stated that “the DOJ recommends the Board follow the law as it currently stands.” (Godbe Decl., Ex. Q (dkt. #103-17) 12.) He further 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.*) Potter did not elaborate on what he meant by “follow the law as it currently stands,” though defendants represent that he counseled the GIB to continue with its July 2016 decision to remove the Exclusion. (Defs.’ PFOFs (dkt. #88) ¶ 59.) Potter also explained that Wisconsin had moved for an injunction against enforcement of the HHS regulations, which would be heard by a federal court in Texas on

December 20, 2016. GIB took no action at that meeting, noting that it would revisit the issue if and when an injunction was issued.

On December 29, 2016, GIB's Chair, Michael Farrell, instructed Conlin to call a GIB meeting for the next day. GIB convened in closed session at the December 30, 2016, meeting to discuss the Exclusion again. After deliberating in closed session for approximately three hours regarding GIB's legal strategy in light of pending or potential litigation, GIB reconvened in open session and voted to reinstate the Exclusion subject to the following four contingencies being satisfied:

- 1) "a court ruling or an administrative action that enjoins, rescinds or invalidates the HHS Rule";
- 2) "compliance with Wis. Stat. section 40.03(6)(c)";⁸
- 3) "renegotiation of cont[r]acts that maintain or reduce premium costs for the state"; and
- 4) an "opinion of the DOJ that the action taken does not constitute a breach of board members' fiduciary duties."

(Godbe Decl., Ex. S (dkt. #103-19) 4.)

In January 2017, Conlin determined that the four contingencies described above

⁸ That provision provides in pertinent part that ETF:

(c) Shall not enter into any agreement to modify or expand benefits under any group insurance plan, unless the modification or expansion is required by law or would maintain or reduce premium costs for the state or its employees in the current or any future year. A reduction in premium costs in future years includes a reduction in any increase in premium costs that would have otherwise occurred without the modification or expansion. This paragraph shall not be construed to prohibit the group insurance board from encouraging participation in wellness or disease management programs or providing optional coverages if the premium costs for those coverages are paid by the employees.

had been met and approved a reinstatement of the Exclusion, effective February 1, 2017. Conlin, GIB members Thompson and Farrell, and ETF staff members all acknowledge 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. (Pls.' PFOFs (dkt. #133) ¶ 143.)

I. Proffered Reasons for Exclusion

During their depositions, various GIB members testified that the board's decision to reinstate the Exclusion related to an injunction entered by the district court in Texas, which prevented HHS from enforcing the ACA regulations. GIB Chair Farrell testified that he voted to reinstate the Exclusion solely based on the Texas injunction. GIB member Wieske similarly explained that the Exclusion was reinstated 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. (dkt. #79) 87-88.)

Wieske also testified generally that there was a discussion of costs, but he did not remember specifically the contents of that discussion and agrees that there was no quantification of that cost. (*Id.* at 88-89.) Wieske also testified that he was not considering whether surgery was medically necessary or efficacious in voting to reinstate the Exclusion, and that he did not recall any discussion of whether the procedures were medically necessary. (*Id.* at 91-92.)⁹ In contrast, GIB member Nancy Thompson, who voted against

⁹ Wieske also testified that he had a concern that removal of the Exclusion would provide a "false sense" that there would be coverage, because some health insurance providers may not deem it as a medical necessity. (Wieske Dep. (dkt. #79) 90-91.)

reinstatement, testified at her deposition that she could not recall any discussions about the cost of providing coverage or the safety or effectiveness of the procedures, and, if anything, the January 2017 actuarial and benefits consultant report estimated that the cost of removing the Exclusion would be “a very minor potential increase . . . , but it was nothing major.” (Thompson Dep. (dkt. #93) 35.)¹⁰

Finally, GIB member Herschel Day testified at his deposition that he was supportive of the removal of the Exclusion in 2016 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. (dkt. #51) 49-50.)

When asked during discovery to identify the reasons for the Exclusion, defendants initially responded that the information would be addressed by expert testimony. After being asked to supplement their response, defendants offered “avoiding potential costs associated with the coverage at issue,” adding that the Exclusion “furthers the state interests in . . . declining to provide coverage for treatments that are experimental and have not been demonstrated to be safe and effective for treating gender dysphoria.” (Defs.’ Suppl. Resp. (dkt. #83-1) Interrog. 2.) At no time, however, did the Wisconsin Department of Justice or ETF present evidence of medical research to the GIB members that suggested GCS was experimental or had not been demonstrated to be safe and

¹⁰ A consultant report dated January 23, 2017, estimated the total annual cost to range from \$100,000 to \$250,000, resulting in a cost estimate per member of \$0.05 to \$0.13 per month, and representing approximately 0.007% to 0.0018% of total premiums. (Roth Decl., Ex. F (dkt. #83-6) 3.)

effective for the treatment of gender dysphoria. Defendants do not dispute this but contend that “concerns regarding the nature and efficacy of gender reassignment surgery were discussed at one or more GIB meetings.” (Defs.’ Resp. to Pls.’ PFOFs (dkt. #122) ¶ 111.) Specifically, defendants point to Conlin’s deposition, in which he testified that he recalled hearing GIB member Wieske discuss concerns regarding the nature and efficacy of GCS, although Wieske himself testified that he did not recall raising this issue; instead, he testified, that “this was part of my thinking process.” (Pls.’ Resp. to Defs.’ PFOFs (dkt. #113) ¶ 107.)

J. Plaintiffs

Plaintiff Alina Boyden has been employed by the University of Wisconsin since April 2013, working as either a teaching assistant or a graduate fellow on at least a “one-third full-time” basis. Plaintiff Shannon Andrews works at the University of Wisconsin School of Medicine and Public Health as a researcher in the Carbone Cancer Center. Both plaintiffs are state employees eligible for state-provided health insurance. Both are also transgender women.

Boyden first started to recognize her gender identity around the age of five. Boyden has been formally diagnosed with gender dysphoria, and she has been prescribed hormone therapy and GCS to treat her dysphoria. Plaintiffs’ treating physicians and designated experts have concluded that both hormone therapy and GCS are medically necessary treatments for Boyden’s gender dysphoria. Defendants dispute this characterization, largely relying on their own expert Dr. Mayer, who criticizes these opinions largely based on a lack of studies using a proper control group to show that GCS decreases gender

dysphoria. On her part, Boyden avers that: (1) she cannot afford her prescribed GCS without insurance coverage; and (2) she was denied coverage for GCS (specifically, a vaginoplasty), because of the Exclusion. Boyden also avers that she experiences emotional and physical suffering as a result of the denial of this prescribed treatment.

Andrews also reports first starting to recognize her gender identity around the age of five. She, too, suffers from gender dysphoria and has been prescribed hormone therapy and GCS to treat her dysphoria. Andrews actually underwent a vaginoplasty in 2015 at her own expense, which she represents was medically necessary, although defendant challenges this characterization based again on Dr. Mayer's opinions. Andrews further represents that if she had not been able to transition, she would have killed herself. Andrews claims monetary harm as a result of having to pay for her GCS, after coverage was denied by her state employee health insurance.¹¹ She also claims emotional harm as a result of the denial of benefits because she is transgender.¹²

OPINION

Plaintiffs pursue claims for sex discrimination under Title VII against ETF and GIB, and under Section 1557 of the ACA against ETF alone. The court will address these claims together, since the anti-discrimination provisions are substantially the same. Plaintiffs also

¹¹ Andrews appealed this original denial of coverage to ETF.

¹² Plaintiffs extensively briefed their respective standing to bring the asserted claims. (Pls.' Opening Br. (dkt. #97) 13-19.) Defendants concede standing in light of the court's opinion and order on defendants' motion to dismiss, while preserving that challenge for any appeal. (Defs.' Opp'n (dkt. #120) 8.) For the reasons provided in its previous opinion and order on standing, the court has no independent basis for questioning the core elements of standing -- namely injury, causation and redressability. See *Boyden v. Conlin*, No. 17-cv-26-wmc, 2018 WL 2191733, at *2-7 (W.D. Wis. May 11, 2018).

pursue a claim under the Equal Protection Clause against the individual defendants pursuant to 42 U.S.C. § 1983, which the court will address separately.

I. Title VII and ACA Claims

Under Title VII, it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2. Employee-sponsored benefits, like health insurance at issue in this case, are part of an employee’s wages and benefits for purposes of asserting an anti-discrimination claim. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1081 (1983) (considering differential treatment on the basis of sex in retirement benefits under Title VII).

Similarly, Section 1557 of the ACA provides in pertinent part, “an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance.” 42 U.S.C. § 18116. Title IX, in turn, prohibits discrimination on the basis of sex. 20 U.S.C. § 1681.

Defendants challenge plaintiffs’ core theory that the Exclusion of coverage of GCS and HRT constitutes sex discrimination, but also argue that: neither GIB and ETF, the defendants named in this claim, are proper defendants under Title VII; there is no private right of action under the ACA; and the State is entitled to immunity under the Eleventh

Amendment from liability under the ACA. The court addresses each of these four challenges in turn below.

A. Exclusion of Coverage Based on Sex

Defendants argue that Title VII does not apply to the challenged Exclusion because plaintiffs were denied coverage for reasons other than their sex. This court recently considered a very similar argument in some depth in the *Flack* case and ultimately rejected it, at least for purposes of entering a preliminary injunction. Like the Medicaid exclusion at issue in that case, the Exclusion at issue here “denies coverage for medically necessary surgical procedures based on a patient’s *natal* sex.” *Flack*, 2018 WL 3574875, at *12. For example, as noted in the fact section above, a natal female born without a vagina qualifies for coverage of a vaginoplasty, but not the plaintiffs here because their natal sex is male. (*See supra* Undisputed Facts § E.) As such, this is a “straightforward case of sex discrimination.” *Flack*, 2018 WL 3574875, at *12; *see also Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that school policy precluding transgender individual from using the bathroom that conformed with his gender identity constituted sex discrimination because the policy “cannot be stated without referencing sex”).

Defendants counter that the Exclusion does not discriminate on the basis of sex because the Uniform Benefits exclude coverage for all cosmetic treatments for psychological conditions. Specifically, defendants analogize GCS with a “hypothetical cisgender female diagnosed with severe depression due to negative body self-image who could not obtain coverage for a breast augmentation or rhinoplasty.” (Defs.’ Opening Br.

(dkt. #81) 21.) In support of this argument, defendants cite the opinion of their expert, Dr. Mayer, which is limited to the following:

If we disregard the principle of optimality, problems of equity arise: If a transgendered woman is entitled to feminization procedures to reduce her distress, surely a cis-gendered woman, similarly distressed, should be entitled to the same procedure.

(Mayer Rept. (dkt. #90) ¶ 25.)

An opinion as to what is *equitable* would appear to fall outside the scope of Dr. Mayer's expertise as an epidemiologist, and he cites no other authority in support. Regardless, his opinion rests on at least two factual premises requiring some support: (1) that a cisgender woman's depression because of small breast size is medically comparable to gender dysphoria; and (2) that the appropriate treatment for a cisgender woman's depression is cosmetic surgery. Defendants offer none. Moreover, if GCS were simply cosmetic surgery, even if required to treat depression, then presumably the Uniform Benefits' cosmetic surgery exclusion would apply. If anything, defendants' position renders the challenged Exclusion duplicative. Regardless, on this record, the court concludes that no reasonable factfinder could credit Mayer's unsupported analogy.

Relatedly, defendants argue that the Exclusion simply prohibits coverage for gender reassignment, meaning plaintiffs were denied coverage for an excluded *procedure*, not because they are transgender. Certainly, the Exclusion does not impact *all* transgender individuals. Indeed, as discussed above, not all transgender individuals suffer from gender dysphoria; even those who do, do not necessarily need nor are recommended for GCS; some transgender state employees have already medically transitioned; and still others choose not to proceed for individual reasons. However, the Exclusion need not injure *all*

members of a protected class for it to constitute sex discrimination.

As the Seventh Circuit explained in *Whitaker*, “there is no requirement that every girl or every boy, be subjected to the same sex stereotyping. It is enough that [plaintiff] has experienced this form of sex discrimination.” 858 F.3d at 1051; *see also Diaz v. Kraft Foods Glob., Inc.*, 653 F.3d 582, 588 (7th Cir. 2011) (an employer cannot rebut plaintiff’s prima facie showing of discrimination by pointing to an employee of the same protected class as plaintiff who was not discriminated against). Moreover, as explained in the *Flack* opinion, even if defendants were correct in arguing that this is not a straight-forward case of sex discrimination in light of the Seventh Circuit’s 1984 decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), “the scope of what qualifies as prohibited sex discrimination has changed over time.” 2018 WL 3574875, at *13. Recently, the Seventh Circuit recognized this expansion in holding that: (1) Title VII’s prohibition extends to discrimination based on sexual orientation, *Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc); and (2) even more pertinent to this case, differential treatment based on sex-based stereotypes as applied to transgender individuals implicates Title IX, *Whitaker*, 858 F.3d at 1048. For this reason, *Ulane* has been at least “drastically undercut,” if not entirely called into question. *Flack*, 2018 WL 3474875, at *13 (discussing *Hively*, 853 F.3d at 341, and *Whitaker*, 858 F.3d at 1047).¹³

¹³ Other district courts in this circuit similarly have recognized the Seventh Circuit’s implicit rejection of *Ulane*. *See Students v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *19 (N.D. Ill. Oct. 18, 2016), *R. & R. adopted sub nom. Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017) (detailing the Seventh Circuit’s apparent movement away from the narrow definition of “sex” in *Ulane*); *U.S. Equal Emp’t Opportunity Comm’n v. Rent-A-Ctr. E., Inc.*, 264 F. Supp. 3d 952, 955 (C.D. Ill. 2017) (similarly calling into question the validity of the holding in *Ulane* in light of more recent Seventh Circuit opinions).

Finally, defendants argue that the Exclusion does not compel plaintiffs to adopt certain cultural stereotypes or risk punishment. To the contrary, defendants creatively argue that to *require* coverage would “insert the State directly into the business of encouraging surgeries meant to conform peoples’ appearances to their own perceived sex stereotypes.” (Defs.’ Opening Br. (dkt. #81) 29-30.) However, defendants’ position appears unhinged from reality. As an initial matter, removing the Exclusion does *not* compel surgery, nor any other treatment for gender dysphoria. Again, as explained above and in *Flack*, a portion of transgender individuals do not suffer from gender dysphoria; and for some portion of those individuals who do, GSC and/or hormone therapy will not be a recommended course of treatment.

Viewed more generally, all individuals, whether transgender or cisgender, have their own understanding of what it means to be a woman or a man, and the degree to which one’s physical, sexual characteristics need to align with their identity. For example, a cisgender woman who has a mastectomy for treatment of breast cancer may opt not to have reconstructive surgery. That choice, however, may be untenable to another cisgender woman placed in the same position. Similarly, a transgender woman may require breast augmentation to address her gender dysphoria, whereas another transgender woman may not. *Nothing* about offering coverage without regard to one’s natal sex *forces* individuals to have surgery to conform their physical traits to their identified gender.

Instead, the Exclusion implicates sex stereotyping by limiting the availability of medical transitioning, if not rendering it economically infeasible, thus requiring transgender individuals to maintain the physical characteristics of their natal sex. In other

words, the Exclusion entrenches the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference, but specific medical and psychological recommendations to the contrary. In this way, defendants' assertion that the Exclusion does not restrict transgender individuals from living their gender identity is entirely disingenuous, at least for some portion of that population who will suffer from profound and debilitating gender dysphoria without the necessary medical transition.

Whether because of differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics, the Exclusion on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of Title VII and the ACA's anti-discrimination provision.

B. GIB and ETF as Proper Defendants of Title VII Claim

Defendants also challenge plaintiffs' Title VII claim on the basis that neither ETF nor GIB is a proper defendant. With respect to ETF, defendants argue that plaintiffs have failed to put forth any evidence that (a) the Board of Regents delegated authority to ETF to determine covered services under the Uniform Benefits, or (b) ETF had the freedom to select the plans, rather than simply offer plans for GIB's approval. With respect to GIB, defendants argue that it does not have the required 15 employees to be an "employer" as required by Title VII. *See* 42 U.S.C.A. § 2000e(b).

In its earlier opinion and order on defendants' motion to dismiss for lack of standing, the court criticized defendants for "arguing that only GIB is responsible for health

insurance, but that neither GIB nor ETF is an employer,” effectively allowing the only responsible entities for setting health insurance for state employees to skirt the reach of Title VII. *Boyden v. Conlin*, No. 17-cv-26-wmc, 2018 WL 2191733, at *2 (W.D. Wis. May 11, 2018). Acknowledging the court’s concern, defendants now explain they are “not arguing . . . the State of Wisconsin or state agencies can **never** be liable under Title VII—that argument obviously would be wrong. Rather, state defendants argue that Title VII simply does not apply to GIB and ETF under the circumstances presented here.” (Defs.’ Opp’n (dkt. #120) 11.) Notwithstanding this attempted explanation, however, since ETF and GIB have been charged with determining benefits offered to state employees, defendants’ position is effectively still that state employees cannot bring a claim for discrimination under Title VII based on the State’s administration of healthcare benefits. This position remains untenable.

Defendants’ position also lacks merit. As the court previously explained in its opinion and order on defendants’ motion to dismiss, ETF’s role in administering the Group Health Insurance Program makes it a proper defendant on plaintiffs’ Title VII claim. *See Boyden*, 2018 WL 2191733, at *4-5. Indeed, the facts presented at summary judgment suggest, at minimum, that ETF’s role extends well beyond the simple administration of health care benefits, as it recommends inclusions and Exclusions to GIB. Moreover, having been actually empowered by the State to administer the policies, *see* Wis. Stat. § 40.03(2)(a), (ig), this forms a sufficient basis to hold ETF, as an agent of the State and the ultimate employer, liable for sex discrimination under Title VII.

Defendants similarly argue that GIB is not an employer because it does not meet

the statutory definition of employer under Title VII, having less than 15 employees. This is a non-sequitur. Like ETF, GIB is not liable under Title VII as an employer of plaintiffs; rather, it is on the hook as an agent of plaintiffs' state employers or the State as the ultimate employer, as GIB is tasked with setting benefits terms and contracting with health insurers for all state employers. *See* Wis. Stat. §§ 40.03(6), 40.52(1), 40.52(3). There is no dispute that plaintiffs' employers have more than 15 employees, much less the State.

C. Availability of Private Rights of Action under ACA

Next, defendants challenge the right of plaintiffs as private citizens to bring a claim under the ACA against defendant ETF.¹⁴ The ACA expressly provides that “[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of this subsection.” 42 U.S.C. § 18116. As noted in *Flack*, this language indicates Congress intended to provide a private right of action to enforce the anti-discrimination provision of the ACA. 2018 WL 3574875, at *11 (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). As such, this court continues to join other district courts in finding a private right of action under the ACA. *See, e.g., Edmo v. Idaho Dep’t of Corr.*, No. 1:17-CV-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018); *Audia v. Briar Place, Ltd.*, No. 17 CV 6618, 2018 WL 1920082, at *3 (N.D. Ill. Apr. 24, 2018) (citing additional cases).

¹⁴ Defendants concede that ETF is a “covered entity” under the ACA with respect to the health insurance plans it offers to state employees because it receives Medicare Part D subsidies. (Defs.’ Opp’n (dkt. #120) 42.)

D. Eleventh Amendment Immunity for ACA Claim

Finally, defendants argue that the GIB and ETF are entitled to immunity from suit under the Eleventh Amendment to the United States Constitution. The court agrees that no provision of the ACA purports to abrogate state sovereign immunity, nor has the State expressly declined to waive its immunity. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 469 U.S. 89, 99 (1984). As plaintiffs point out, however, the State's acceptance of federal funds acts as a waiver of immunity:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(1) (emphasis added). Section 1557 of the ACA is such a federal statute prohibiting discrimination against an entity receiving federal financial assistance.

42 U.S.C. § 18116(a).

Acknowledging as much, defendants still argue that “Congress lacked power under the Spending Clause to abrogate immunity in cases like this one,” because “States would not have known that Title IX or Section 1557 reached [transgender status] claims when originally deciding to accept federal funding.” (Defs.’ Opening Br. (dkt. #81) 62.) Defendants cite *no* support for this novel argument. Regardless, the Seventh Circuit has already held to the contrary. *See, e.g., Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 555 (7th Cir. 2001) (upholding waiver provided under 42 U.S.C. § 2000d-7). Moreover, defendants’ argument that a state’s implied waiver under § 2000d-7 turns on

some kind of informed consent extending the reach of federal antidiscrimination law only so far as anticipated at the time a state accepted federal funds would be wholly unworkable in practice, to say nothing about absurd on the facts here, which would require the court to find that the State of Wisconsin would have turned down tens, if not hundreds, of millions of dollars in federal funding each year to avoid funding GCS at a cost of one to three hundred thousand dollars per year if Section 1557 prohibits the Exclusion of coverage at issue. Accordingly, the court rejects defendants' claim of immunity from suit under the ACA.

II. Equal Protection Claim

In addition to the Title VII and ACA claims, plaintiffs assert an Equal Protection claim under 42 U.S.C. § 1983 against ETF Secretary Robert Conlin and GIB members Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurburt, Theodore Nietzsche, J.P. Wieske and Bob Ziegelbauer, all in their individual and official capacities. Plaintiffs assert a similar claim against defendants GIB members Jennifer Stegall, Francis Sullivan, Herschel Day and Nancy Thompson, but only in their official capacities.

A. Standard of Review

In *Flack*, this court considered whether something more than rational basis was required to uphold a state's singling out gender confirming surgery from insurance coverage, concluding that "heightened scrutiny may be appropriate either on the basis of sex discrimination or through the recognition of transgender as a suspect or quasi-suspect class." 2018 WL 3574875, at *15 (citing *Whitaker*, 858 F.3d at 1051, among other cases).

In defending against the equal protection claim, defendants characterize the Exclusion as merely denying “cosmetic surgery to treat psychological conditions,” and as such, argue that the court should only apply rational basis review. (Defs.’ Opening Br. (dkt. #81) 20.) In support, defendants direct the court to *Gedulig v. Aiello*, 417 U.S. 484 (1974) -- a decision predating the Pregnancy Discrimination Act, *see* 42 U.S.C. § 2000e(k) -- in which the Supreme Court applied rational basis review in holding that the denial of coverage for pregnancy-related disabilities under California’s insurance plan did not run afoul of the Equal Protection Clause. 417 U.S. at 497. Defendants’ reliance on *Gedulig*, however, rests on a finding that the Exclusion does not treat individuals differently based on sex.¹⁵ For the reasons explained above, the court has rejected this argument. As such, the court finds that some form of heightened scrutiny applies.

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court set forth the standard of review to be applied in evaluating sex-based classifications, like that at issue here. *See also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (applying same standard of review in recent decision holding that statute governing acquisition of United States citizenship by child born abroad, which distinguished based on the sex of the parent, violated the Equal Protection Clause); *Whitaker*, 858 F.3d at 1050 (citing same standard in case concerning differential treatment of transgender students). Under this standard,

¹⁵ In partial support of their argument, defendants point out that the Uniform Benefits exclude other procedures a health care provider may deem medically necessary for his or her patient -- namely, bariatric or weight-loss surgery and coverage for infertility services. However, these procedures do *not* touch on any protected status, and as such, they are not entitled to a heightened standard of review. The fact that not all medically necessary procedures are covered, therefore, *does not* relieve defendants of their duty to ensure that the insurance coverage offered to state employees does not discriminate on the basis of sex or some other protected status.

the proffered justification must be “exceedingly persuasive.” *Virginia*, 518 U.S. at 533. Moreover, the burden coming forward with such a reason “rests entirely on the State.” *Id.* As such, “[t]he State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* (internal citations and quotation marks omitted). Finally, and importantly here, in proffering a justification, the State must proffer reasons that are “genuine, not hypothesized or invented *post hoc* in response to litigation.” *Id.*¹⁶

B. Purported Reasons for Exclusion

Defendants specifically contend that the Exclusion was reinstated for two reasons: (1) the cost of providing coverage; and (2) the safety and efficacy of GCS and hormone therapy. From an actuarial perspective, there appears to be no dispute that the cost of

¹⁶ Plaintiffs also assert that their status as transgender individuals affords them heightened scrutiny review. In determining whether heightened scrutiny should apply based on being a member of a suspect or quasi-suspect class, the court consider the following factors:

- (1) whether the class has been subjected to a history of discrimination;
- (2) whether individuals in the class are able to contribute to society to the same extent as others;
- (3) whether the characteristic defining the class is immutable; and
- (4) whether the class is politically powerless.

Wolf v. Walker, 986 F. Supp. 2d 982, 1012 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (internal citation and quotation marks omitted). Based largely on the expert opinion of Dr. Mayer, defendants challenge whether the third and fourth elements are satisfied here, arguing that “transgender status is not ‘immutable’” and that the “the robust legislative, social, and political movement in favor of transgender rights” undercuts a finding that they are politically powerless. (Defs.’ Opp’n (dkt. #120) 22-23.) Because heightened scrutiny is warranted based on the Exclusion implicating sex-based classifications, however, the court need not decide whether there is a legitimate legal or factual dispute that transgender individuals qualify as a suspect or quasi-suspect class.

coverage is immaterial at 0.1% to 0.2% of the total cost of providing health insurance to state employees, even adopting defendants' cost estimation. Based on the testimony of their own expert David Williams, however, defendants argue that "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." (Defs.' Resp. to Pls.' PFOFs (dkt. #122) ¶ 144.) In contrast, plaintiffs' expert Joan Barrett states that in her experience, "no employer has made a benefits decision based on cost for a benefit that costs less than 0.1%." (Barrett Rept. (dkt. #105) 10.)

More critically, defendants' evidence that the GIB *actually* considered cost of coverage in reinstating the Exclusion is contradicted by the record. Indeed, on this record, the court is hard-pressed to find that a reasonable factfinder could conclude that the cost justification was an "exceedingly persuasive" reason or that this miniscule cost savings would further "important governmental objectives." *Virginia*, 518 U.S. at 533. In support, defendants only offer the deposition testimony of a single GIB member that there was a discussion of costs, but even he did not remember the specific content of that discussion, and he acknowledged that there was no quantification of that cost. (Wieske Dep. (dkt. #79) 88-89.) Moreover, no other GIB member is able to corroborate his vague memory, nor are there any contemporaneous documents supporting a claim that cost was a reason in *either* removing *or* reinstating the Exclusion. Moreover, testimony from board members who voted against reinstating the Exclusion establish that the *lack* of a cost concern was the reason for their vote.

Defendants maintain that there was a second reason for GIB's decision to reinstate

the Exclusion -- efficacy and safety. Here, too, the evidence that those concerns were genuine is limited. Defendants point to ETF Secretary Conlin's deposition testimony that he recalled hearing GIB member Wieske discuss concerns regarding the nature and efficacy of GCS, though Wieske himself testified that he did not recall raising this issue. Instead, Wieske testified, that "this was part of my thinking process." (Pls.' Resp. to Defs.' PFOFs (dkt. #113) ¶ 107.) Defendants also rely on the DOJ's August 10, 2017, memo, stating that ETF could "point to . . . medical research suggesting that such procedure . . . may in fact harm patients." (Def.' Reply to Defs.' PFOFs (dkt. #128) ¶ 109.) However, the memo provides no support for this statement.

Still, GIB originally added the Exclusion in 1994 because "benefits and 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 (dkt. #83-1) 24.) While this evidence provides a basis for a reasonable trier of fact to conclude that concerns about efficacy were part of the justification for adoption of the *original* Exclusion, it is also *not* evidence permitting a reasonable finding that a concern about efficacy was the reason for voting *either* to exclude *or* to reinstate the Exclusion.

In defending against a sex-discrimination Equal Protection claim under heightened scrutiny, a defendant's failure to put forth evidence of a "genuine, not hypothesized or invented *post hoc* in response to litigation" reason forms a sufficient basis to find in favor of the plaintiff. *Virginia*, 518 U.S. at 533; *see also Whitaker*, 858 F.3d at 1052 ("What the record demonstrates here is that the School District's privacy argument is based upon sheer

conjecture and abstraction.”); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, No. 3:18-CV-37-WTL-MPB, 2018 WL 3708049, at *5 (S.D. Ind. Aug. 3, 2018) (granting summary judgment in favor of plaintiff on Equal Protection claim because defendants “presented no evidence to support this justification beyond [their expert] Dr. Smith’s testimony”); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (“[Defendant] presented insufficient evidence to show that he was actually motivated by concern over litigation regarding Glenn’s restroom use.”). In other words, without any evidence to support a finding that defendants were *actually* concerned about efficacy in reinstating the Exclusion, the court need not consider whether defendants have raised a genuine issue of material fact -- largely via their expert’s testimony -- as to the efficacy of GSC and hormone therapy for the treatment of gender dysphoria. Such an inquiry would only be relevant if rational basis review were appropriate. *See Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992) (explaining that under rational basis review, a government’s classification “will not be set aside if any facts reasonably may be conceived to justify it” (citing *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961))).

Not only is the record devoid of any evidence to show that GIB members voted as they did for cost or efficacy reasons, the evidence is overwhelming that the actual or genuine reason for the reinstatement had to do with the DOJ’s guidance -- specifically, the belief that the Texas court’s entry of an injunction absolved defendants of any legal obligation to provide coverage. In opposing plaintiffs’ motion to compel privileged information, namely a DOJ memo concerning reinstatement of the Exclusion and the substance of GIB members’ conversations with DOJ attorneys, however, defendants

expressly disavowed this as a justification for GIB's action in reinstating the Exclusion:

Although this case will turn partly on GIB's reasons for reinstating the Exclusion, GIB has never asserted "advice of counsel" as a defense or otherwise relied (at least in this litigation) on the confidential legal advice that Plaintiffs seek to discover. Instead, GIB has identified two state interests that justify the Exclusion, neither of which has anything to do with the attorney-client communications at issue here: (1) the potential cost of covering gender reassignment surgery, and (2) concerns about the medical efficacy of those procedures.

(Defs.' Opp'n to Pls.' Mot. to Compel (dkt. #63) 2.)

For all these reasons, defendants have failed to create a genuine issue of material fact as to whether a genuine, and not *post hoc*, reason for the reinstatement of the Exclusion was either cost or efficacy. See *Nichols v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 509 F. Supp. 2d 752, 760 (W.D. Wis. 2007) ("[S]ummary judgment is 'not a dress rehearsal or practice run,' but the 'put up or shut up moment' in which a proponent of facts must show what evidence it has to convince a trier of fact to accept its version of events." (quoting *Schacht v. Wis. Dep't of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999))).¹⁷ Accordingly, the court

¹⁷ The court would be remiss not to note its serious concerns with the reliability of Dr. Mayer's opinion that no credible studies demonstrate that gender confirming surgery and hormone therapy are effective treatments for gender dysphoria. As detailed above, there are serious flaws with each of the three sources Mayer cites in support of this opinion. (See *supra* Facts § E; Mayer Rept. (dkt. #90) ¶ 21.) To begin, *The New Atlantis* is not a peer-reviewed medical journal, but rather a quarterly publication from the Ethics and Public Policy Center, a socially conservative advocacy group. (Schechter Original Rept. (dkt. #106) 17.) And the studies cited by Mayer are outdated and suffer from various flaws, which even he conceded at his deposition. (*Id.*; Mayer Dep. (dkt. #112) 142-43 ("absolutely" agreeing that the Meyer/Reter article has "important limitations," that neither the Dhejne article nor the Kuhn study address effectiveness of GCS, and recognizing, albeit downplaying, the conclusion of the Murad article that gender reassignment with the use of hormone therapy *was* "associated with improvements in gender dysphoria").) Next, the opinion expressed in Mayer's amicus brief only concerns gender dysphoria among children, and it was discredited by major medical associations. (Schechter Original Rept. (dkt. #106) 18 (citing Br. of Amici Curiae American Academy of Pediatrics, *et al.* at 21-24, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16-273 (U.S. Mar. 2, 2017)).) Finally, as for the CMS 2016 decision, the Department of Health and Human Services declined to issue national standards regarding how to determine medical

concludes that the Exclusion does not survive heightened scrutiny.

C. Personal Involvement

In their original motion, defendants also seek summary judgment as to plaintiffs' Equal Protection claim asserted against defendant Conlin on the basis that he was not personally involved in the alleged discriminatory act. Specifically, defendants argue that "[t]he fact that ETF, under Conlin's direction administers GIB's decision does not suffice, since Conlin had no control over those decisions." (Defs.' Opening Br. (dkt. #81) 41.) *See Minix v. Canarecci*, 597 F.3d 824, 833-34 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'").¹⁸

On this record, however, a reasonable jury could find that Conlin was personally involved: (1) in his capacity as Secretary of ETF administering health care coverage to state employees; (2) in the reinstatement of the Exclusion by personally determining that the four contingencies set by GIB at the December 2017 meeting were satisfied; and (3) in drafting contract amendments to health plans. The cases cited by defendants are

necessity among the Medicare population, finding a lack of studies specific to that group. (*Id.* at 15.) In contrast, the Department had already concluded in 2014 that there was "a consensus among researchers and mainstream medical organizations that transsexual surgery is an effective, safe and medically necessary treatment for [gender dysphoria]." (*Id.* (citing (Schechter Original Rept., Ex. B (dkt. #106-2) 20).) Not only has Medicare since 2014 provided coverage based on a patient's individual needs, Mayer fails to address more recent studies cited by plaintiffs' experts, which appear to address his core criticism of a lack of credible studies measuring the reduction of gender dysphoria after medical inventions. (*See, e.g.*, Budge Original Rept. (dkt. #89) 15-18; Budge Suppl. Rept. (dkt. #119) 6.)

¹⁸ Defendants also point to ETF's stance in support of removing the Exclusion to undermine a finding of personal involvement on the part of Conlin. State of mind, however, is not relevant since plaintiffs are challenging the Exclusion as an "overtly discriminatory classification." (Pls.' Opp'n (dkt. #115) 28 (citing *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985)).)

distinguishable from these facts primarily because liability is asserted against Conlin based on *his* actions, and not on those of a subordinate or other entity. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (reiterating long-standing rule in § 1983 cases that a superior cannot be liable under a *respondeat superior* theory, but instead must have participated in or at least know about the actions of his or her subordinate); *Alicea v. Luzerne Cnty. Housing Auth.*, No. 3:15-CV-01387, 2017 WL 489686, at *3 (M.D. Pa. Jan. 3, 2017) (rejecting *respondeat superior* theory of liability against the City based on actions of housing authority); *Nolan v. Cuomo*, No. 11 CV 5827 DRH AKT, 2013 WL 168674, at *10 (E.D.N.Y. Jan. 16, 2013) (holding that defendant who had a role in maintaining sex offender registry was not personally involved in denial of plaintiff's request to be declassified where defendant was not authorized to make "any determinations or recommendations").¹⁹

In their supplemental motion, defendants also seek summary judgment in favor of defendant Nietzsche, a GIB member, on plaintiffs' claim asserted against him in his individual capacity, because he did not vote to reinstate the Exclusion. (Dkt. #141.) As such, defendants maintain that he should only be sued in his official capacity like the other GIB members who did not vote for the Exclusion. Plaintiffs oppose this on the theory that Nietzsche "may have supported the Exclusion in discussions that led to reinstating the Exclusion in the closed session meeting that took place on December 30, 2016 or elsewhere" and also pointing to Nietzsche's vote to not remove the Exclusion in May 2017.

¹⁹ Indeed, *Alicea* supports a finding that the facts at issue here are sufficient to implicate Conlin, with that court holding that the housing authority's role in *administering* the City's public housing program under Pennsylvania law was sufficient to find that it was personally involved in the discriminatory conduct. 2017 WL 489686, at *3.

(Pls.' Opp'n to Suppl. Mot. (dkt. #148) 4.) In light of plaintiffs' earlier line-drawing -- that GIB members who did not vote to reinstate the Exclusion would only be sued in their official capacity -- the court would be inclined to dismiss the individual capacity claim against Nietzke. As addressed below, however, the court need not reach this issue in light of its decision to grant qualified immunity to all individual defendants.

D. Qualified Immunity

Finally, defendants argue that the individual defendants are entitled to qualified immunity on any claim for damages based on a violation of the Equal Protection Clause.²⁰ The court agrees.

“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Whether a qualified immunity defense is available involves a two-part test to determine: (1) whether the facts alleged show defendants violated a constitutional right when viewed in the light most favorable to the party asserting the injury; and (2) whether those rights were clearly established at the time of the alleged violation. *Board v. Farnham*, 394 F.3d

²⁰ In their original motion, defendants sought summary judgment on this basis as to ETF Secretary Conlin. In response to the court granting plaintiffs leave to add certain GIB members as defendants in their individual capacities, the court allowed defendants an opportunity to file a supplemental motion for summary judgment asserting the qualified immunity defense as to these newly-added, individual defendants. (Dkt. #141.) More recently, plaintiffs filed a motion for leave to file a supplemental motion for summary judgment, seeking a finding of liability against the newly-added, individual GIB members. (Dkt. #157.) In light of the court's decision to grant defendants' motion for summary judgment on the individual defendants' qualified immunity defense, plaintiffs' motion has been rendered moot.

469, 477 (7th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Here, defendants' qualified immunity defense turns on the question of whether the denial of insurance coverage for GCS and hormone therapy for the treatment of gender dysphoria violated a clearly established right under the Equal Protection clause -- either because (1) such an Exclusion constitutes clear sex discrimination or (2) transgender individuals are clearly a suspect or quasi-suspect class entitled to heightened scrutiny. As to the latter theory, there are no Supreme Court or Seventh Circuit cases finding that as a class, transgender individuals are entitled to heightened scrutiny. Indeed, the Seventh Circuit declined most recently in *Whitaker* to reach this question. *See Whitaker*, 858 F.3d at 1051 ("But this case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny."). Neither has the Supreme Court or the Seventh Circuit definitively decided that a denial of insurance coverage for GCS and hormone therapy for transgender individuals only constitutes *sex* discrimination under the Fourteenth Amendment's Equal Protection Clause.²¹

In finding no clearly established precedent for purposes of qualified immunity to date, the court is cognizant of the risk that it may be defining the liability question here too narrowly by considering differential treatment specific to *a denial of insurance coverage*. As the Seventh Circuit recently cautioned in *Mitchell*, "this particularity requirement does not go so far as to mandate a mirror-image precedent from the Supreme Court or this court." *Mitchell v. Kallas*, 895 F.3d 499 (7th Cir. 2018). Perhaps the correct question is

²¹ Even so, having considered whether a denial of such care implicates the Eighth Amendment, *see Mitchell v. Kallas*, 895 F.3d 492 (7th Cir. 2018), the Seventh Circuit has at least signaled what its decision *might* be.

whether any differential treatment of transgender individuals is clearly subject to heightened protection under the Equal Protection clause. If so, in the context of upholding the grant of a preliminary injunction, the Seventh Circuit already held in *Whitaker* that the bathroom policy at issue, which targeted transgender students, constituted sex discrimination subject to heightened scrutiny under the Equal Protection Clause. 858 F.3d at 1051-52.²²

In fairness, however, *Whitaker* was issued on May 30, 2017, approximately five months after GIB decided to reinstate the Exclusion if four conditions were satisfied and approximately four months after the Exclusion was reinstated. Moreover, as previously discussed, GIB's reversal appears to have been motivated, at least in part, by a Texas district court decision going the opposite way. Given that plaintiffs' Equal Protection claim turns on those actions, the court finds that the law was not clearly established at the time the individual defendants were taking steps to reinstate the Exclusion. This line drawing may still seem too narrow by plaintiffs, but given the rapid development of the law in this area, the court declines to find that the "the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Becker v. Elfreich*, 821 F.3d 920, 928 (7th Cir. 2016).

²² The concept that differential treatment based on sex-stereotyping constitutes sex discrimination is not a new concept, dating back to the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). However, the sex stereotyping involved in that case -- that the plaintiff should "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry," *id.* at 235 -- is arguably sufficiently distinct from the kind of stereotyping here -- that transgender individuals' physical sex characteristics should conform with their natal sex -- to preclude a finding that the rights at issue in plaintiffs' Equal Protection claim were clearly established by that decision or its progeny.

III. Trial Plan

So, where does this leave us? Having found liability in favor of plaintiffs on their Title VII and ACA claims, plaintiffs have a right to pursue: (1) equitable relief, *see* 42 U.S.C. § 2000e-5(g) (Title IX remedies provision); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979) (holding private right of action under Title IX for injunctive or equitable relief existed);²³ (2) compensatory and punitive damages, *see* 42 U.S.C. § 1981a(a)(1) (Civil Rights Act of 1991, applied to Title VII claims); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (holding that compensatory damages are available under Title IX);²⁴ and (3) an award of attorneys' fees and cost, *see* 42 U.S.C. § 2000e-5(k) (Title VII remedy); 42 U.S.C. § 1988(b) (providing for fees for Title IX claims). Moreover, the court's finding of liability on the Equal Protection claim also entitles plaintiffs to equitable relief and attorney's fees. *See* 42 U.S.C. §§ 1983, 1988(b). While the court will determine any equitable relief at trial, as well as award of attorneys' fees and costs, defendants have demanded a jury trial as to plaintiffs' claims for compensatory and/or punitive damages, which is their right. And so a jury there shall be.²⁵

²³ The court looks to Title IX in understanding the remedies available for a violation of Section 1557 of the ACA. *See also* 42 U.S.C. § 18116.

²⁴ The punitive damages provision of § 1981a only applies to Title VII claims, and there is no similar provision under Title IX for an award of punitive damages.

²⁵ Of course, the court would be open to crafting an equitable remedy for reimbursement of plaintiff Andrews' outlay of funds to cover her GCS, assuming that plaintiffs can direct the court to some authority that such an award falls under "any other equitable relief as the court deems appropriate" under 42 U.S.C.A. § 2000e-5(g)(1). A court mediator is available to facilitate these discussions, but failing that, the court will plan to address the scope and manner of trial at next week's Final Pretrial Conference.

ORDER

IT IS ORDERED that:

- 1) Defendants' motion for summary judgment (dkt. #80) and supplemental motion for summary judgment (dkt. #141) are GRANTED IN PART AND DENIED IN PART. The motions are granted as to defendants' argument that the individual defendants are entitled to qualified immunity against plaintiffs' Equal Protection claim asserted against those defendants in their individual capacity. In all other respects, the motions are denied.
- 2) Plaintiffs' motion for partial summary judgment (dkt. #95) is GRANTED.
- 3) Defendants' motions to strike plaintiffs' supplemental expert reports (dkt. #124) and second supplemental expert reports (dkt. #138) are DENIED.
- 4) Plaintiffs' motion for leave to file supplemental motion for summary judgment (dkt. #157) is DENIED AS MOOT.

Entered this 18th day of September, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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

ALINA BOYDEN and SHANNON ANDREWS,

Plaintiffs,

OPINION AND ORDER

v.

17-cv-264-wmc

ROBERT J. CONLIN, STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST
FUNDS, STATE OF WISCONSIN GROUP
INSURANCE BOARD, MICHAEL S. FARRELL,
STACEY ROLSON, CHARLES GRAPENTINE,
WAYLON HURBURT, THEODORE NIETZKE,
J.P. WIESKE, BOB ZIEGELBAUER, JENNIFER
STEGALL, FRANCIS SULLIVAN, HERSCHEL
DAY, and NANCY THOMPSON,

Defendants.

This case is set for a jury trial on damages, commencing October 9, 2018. In advance of the final pretrial conference, scheduled for September 25, 2018, the court issues the following opinion and order on the parties' respective motions in limine and related motions.

OPINION

I. Plaintiffs' Motions

A. MIL to Exclude Evidence or Testimony from Dr. Lawrence S. Mayer (dkt. #169)

In light of the court's finding of liability in favor of plaintiffs on their Equal Protection claim, Dr. Mayer's testimony would no longer appear relevant at trial on plaintiffs' damages claim. Therefore, this motion is DENIED AS MOOT.¹

¹ To the extent this understanding is incorrect, and defendants do intend to call Dr. Mayer to

B. MIL to Exclude Evidence or Testimony from David V. Williams (dkt. #173)

In light of the court's finding of liability in favor of plaintiffs on their Equal Protection claim, Williams' testimony similarly appears to have no relevance at trial on plaintiffs' damages claim. Therefore, this motion is DENIED AS MOOT.

C. Motion for Attorney Conducted Voir Dire (dkt. #167)

Plaintiffs seek leave for their counsel to conduct "no more than 15 minutes of non-repetitive examination of prospective jurors." (Pls.' Mot. (dkt. #167) 1-2.) In support of their motion, plaintiffs point to Federal Rule of Civil Procedure 47(a), which provides that the court "may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination." While defendants did not file an opposition, the court is still strongly disinclined to grant this motion.

The court has invited questions from the parties as part of their pretrial filings, incorporated those questions or similar ones into a draft set of questions, and then will seek input from the parties as part of the final pretrial conference. During voir dire, the parties are also invited at side bar to suggest follow-up questions with particular juror members. While the court is cognizant that this case touches on sensitive, politically charged topics, this is not uncommon, with other recent trials concerning race discrimination, excessive use of force by police officers and other sensitive topics. Moreover, plaintiffs have not offered any reasons why the court should depart from its

testify, defendants should clarify that intent at the final pretrial conference and explain the relevance of any proposed testimony, and the court will reconsider this motion. This is true for all of the motions that the court has deemed mooted by the court's summary judgment opinion, including the exclusion of testimony of plaintiffs' expert witnesses.

typical practice. As such, the motion is DENIED, but plaintiffs and defendants are free, as always, to provide input on the questions to be posed to prospective jurors and to ask the court for follow-up questions where appropriate.

II. Defendants' Motions

Defendants brings four motions in limine challenging the scope of plaintiffs' damages claims. As a backdrop for all, defendants point to the requirement that any finding of injury, as required for an award of compensatory damages, must be based, in turn, on a finding of causation, namely that the violation here -- the exclusion discriminated against plaintiffs based on their sex -- caused the alleged injury, rather than some intervening cause. (Defs.' Mot. (dkt. #187) 3-4.)

A. MIL 1: Exclude Damages Evidence Related to Shannon Andrews' Facial Feminization Surgical Procedures (dkt. #187)

In the first motion, defendants seek exclusion of any damages theory related to Shannon Andrews' denial of coverage for facial feminization procedures, arguing that the denial of coverage was independent of the Exclusion. Specifically, defendants contend that Andrews' third-party health insurer, WPS Health Insurance, "categorically does not provide coverage for facial feminization procedures." (Defs.' Mot. (dkt. #187) 5 (citing WPS's treatment for gender dysphoria coverage policy).)

In response, plaintiffs contend that the third-party coverage policy does not bar Andrews' claim for damages based on her February 2018 facial feminization surgery because: (1) she was not enrolled in WPS when she received her surgery; and (2) the third-party insurer's coverage policies are irrelevant since the only document that provides

criteria for coverage for state employees is the Uniform Benefits. (Pls.' Opp'n (dkt. #198) 3 (citing Fairweather Decl., Exs. A, B (dkt. ##199-1, 199-2)).)

The court's understanding of the interplay between the Uniform Benefits and a third-party insurer's own coverage policies is not entirely clear -- and may warrant additional explanation from the parties -- but the fact that as of January 1, 2018, WPS was no longer participating in the Group Health Insurance Program, and, therefore, was not Andrews' insurer appears to undermine defendants' basis for excluding this theory of damages. As such, this motion is DENIED, but without prejudice to defendants providing further clarification about the status of WPS as a third-party insurer at the time of Andrews' surgery and, in particular, if there is a basis to dispute plaintiffs' representations.

B. MIL 2: Exclude Damages Evidence Related to Shannon Andrews' Distress Before She Began Employment Covered by Uniform Benefits (dkt. #187)

Next, defendants seek to exclude any damages theory based on distress plaintiff Shannon Andrews may have experienced before being covered by the Uniform Benefits as a state employee. This motion is based on plaintiffs' responses to defendants' interrogatories, in which Andrews stated that "she first took steps to receive GCS in 2012 and then discovered the coverage exclusion, which made it harder to find a therapist to treat her dysphoria because there were no in-network resources to do so, which in turn delayed her GCS." (Defs.' Mot. (dkt. #187) 7 (citing Roth Decl., Ex. A (dkt. #189-1) 4).) Defendant point out, however, that Andrews did not begin her employment with the University of Wisconsin until 2014, and therefore any damages based on emotional

distress between 2012 and 2014 was not caused by the Exclusion of coverage.²

In their response, plaintiffs concede that “prior emotional distress cannot provide the basis for Plaintiffs’ damages as there is no causal connection between it and the coverage exclusion,” plaintiffs nonetheless argue that the “evidence related to the prior distress contextualizes, and is inseparable from, the emotional distress caused by the coverage exclusion.” (Pls.’ Opp’n (dkt. #198) 4-5.)

Up to a point, the court agrees with plaintiffs that Andrews’ testimony about her gender dysphoria and early attempts to receive GCS, which predate her employment with the State, may be relevant to provide context for the jury’s consideration of the claimed impact of the Exclusion’s application. Nonetheless, if Andrews offers testimony dating back to her experience in 2012 and 2013, it would be presented as such, without dwelling on the specific hurtful acts of others predating her employment by the State. In addition, the court will consider an appropriate instruction to the jury that past acts of discrimination as to be considered for context only, that defendants are not responsible for past acts by third-parties, and that any award of damages is limited solely to the time period during which plaintiffs were state employees and subject to the Exclusion. As such, the motion is GRANTED IN PART AND DENIED IN PART.

² Plaintiffs do not respond directly to defendants’ representation that Andrews began her employment with the University of Wisconsin until 2014, though in response to another motion in limine, plaintiffs represent that “Andrews as employed by the Board of Regents that University of Wisconsin in 2012.” (Pls.’ Opp’n (dkt. #198) 6.) The parties can clarify that timeline during trial.

C. MIL 3: Exclude Damages Evidence Related to Shannon Andrews' Distress Over the Exclusion's Prior Wording (dkt. #187)

Defendants also challenge any damages theory based on Andrews' distress over the prior wording of the Exclusion, which denied coverage for "sexual transformation," rather than the current language excluding from coverage procedures and services associated with "gender reassignment." Defendants argue that this theory of damages does not fall within the scope of plaintiffs' claim that she was discriminated against in violation of Title VII and the ACA because of the Exclusion. Defendants also point out that Andrews was not working for the University of Wisconsin during the time the prior language of the Exclusion was in effect.

Putting aside the apparent dispute as to the start date of Andrews' employment, the court agrees with defendants that any distress caused by the prior language of the Exclusion is too remote from the sex discrimination claim she has alleged in this case, even as context. Moreover, the court did not find that plaintiffs were discriminated against because the prior exclusion was framed in terms of "sexual transformation," rather than "gender reassignment." Accordingly, this motion is GRANTED.

D. MIL 4: Exclude Damages Evidence Related to Alina Boyden's Distress Before She Began Employment Covered by the Uniform Benefits (dkt. #187)

In defendants' final motion in limine bearing on plaintiffs' damages, defendants seek to exclude any evidence of distress Boyden suffered before her coverage in the Uniform Benefits in May 2015. For the reasons as described above with respect to Andrews, the court will allow such evidence as important context subject to the same caveats and possible limiting jury instruction. As such, this motion is GRANTED IN PART AND DENIED IN

PART.

E. MIL 5: Exclude Testimony by Dr. Budge Regarding the Costs to Insurance Plans of Covering Transition-Related Care for Transgender Individuals (dkt. #178)³

In light of the court's finding of liability in favor of plaintiffs on their Equal Protection claim, the court sees no relevance to Budge's testimony as to the costs of insuring transition-related care at a trial on damages. Therefore, this motion is DENIED AS MOOT.

F. MIL 6: Exclude Testimony Offered by Dr. Schechter Regarding the Medical Efficacy of Surgical Treatments on Patients Suffering from Gender Dysphoria (dkt. #178)

In light of the court's finding of liability in favor of plaintiffs on their Equal Protection claim, the court similarly sees no relevance to Schechter's testimony as to the efficacy of surgical treatment at a trial on damages. Therefore, this motion is DENIED AS MOOT.

ORDER

IT IS ORDERED that:

- 1) Plaintiffs' motion for attorney-conducted voir dire (dkt. #167) is DENIED.
- 2) Plaintiffs' motions in limine (dkt. ##169, 173) are DENIED AS MOOT.

³ Defendants filed two separate motion in limine documents, the first covering Motions in Limine No. 1-4 and the second covering Motions in Limine Nos. 4-5. (Dkt. ##178, 187.) Given the overlap in numbers, the court has renumbered the second MIL No. 4 as No. 5, and MIL No. 5 as No. 6.

3) Defendants' motions in limine nos. 1-4 (dkt. #187) are GRANTED IN PART AND DENIED IN PART as set forth above.

4) Defendant's motions in limine nos. 5-6 (dkt. #178) are DENIED AS MOOT.

Entered this 24th day of September, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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

ALINA BOYDEN and SHANNON
ANDREWS,

Plaintiffs,

v.

ROBERT J. CONLIN, STATE OF
WISCONSIN DEPARTMENT OF
EMPLOYEE TRUST FUNDS, STATE OF
WISCONSIN GROUP INSURANCE
BOARD, MICHAEL S. FARRELL, STACEY
ROLSTON, CHARLES GRAPENTINE,
WAYLON HURBURT, THEODORE
NIETZKE, J.P. WIESKE, BOB
ZIEGELBAUER, JENNIFER STEGALL,
ROBERT WIMMER, HERSCHEL DAY, and
NANCY THOMPSON,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 17-cv-264-wmc

This action came before the court and a jury for consideration with District Judge William M. Conley presiding. The issues have been tried and the jury has rendered its verdict.

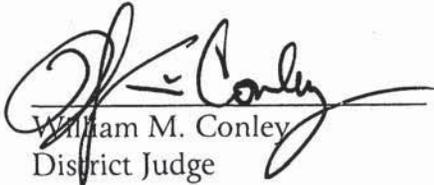
IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff Alina Boyden in the amount of \$301,000.00 and plaintiff Shannon Andrews in the amount of \$479,500.00 against defendants State of Wisconsin Department of Employee Trust Funds and State of Wisconsin Group Insurance Board, jointly and severally.

IT IS FURTHER ORDERED AND ADJUDGED that defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurburt, Theodore Nietzsche, J.P. Wieske, Bob Ziegelbauer, Jennifer Stegall, Robert Wimmer, Herschel Day, and

Nancy Thompson, are PERMANENTLY ENJOINED from enforcing the State of Wisconsin's exclusion of coverage for "[p]rocedures, services and supplies related to surgery and sex hormones associated with gender reassignment" from health insurance coverage provided to state employees.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' claims asserted against defendants Board of Regents of the University of Wisconsin System, Raymond W. Cross, Rebecca M. Blank, University of Wisconsin School of Medicine and Public Health, Robert N. Golden, and Dean Health Plan are DISMISSED.

Approved as to this 11th day of October, 2018.


William M. Conley
District Judge


Peter Oppeneer
Clerk of Court

**U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #: 3:17-cv-00264-wmc**

Boyden, Alina et al v. Conlin, Robert J. et al
Assigned to: District Judge William M. Conley
Referred to: Magistrate Judge Stephen L. Crocker
Cause: 42:2000e Job Discrimination (Employment)

Date Filed: 04/07/2017
Date Terminated: 10/11/2018
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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V.

Defendant

**State of Wisconsin Department of
Employee Trust Funds & Group
Insurance Board**

TERMINATED: 04/10/2017

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**Board of Regents of the University of
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TERMINATED: 04/10/2017

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Wisconsin Physicians Service Insurance Corporation
d/b/a WPS Health Solutions
TERMINATED: 05/25/2017

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TERMINATED: 11/20/2017

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Date Filed	#	Docket Text
04/07/2017	<u>1</u>	COMPLAINT against All Defendants. (Filing fee \$ 400 receipt number 0758-2003648.), filed by All Plaintiffs. (Fairweather, Nicholas) (Additional attachment(s) added on 4/7/2017: # <u>1</u> New Case Party Information Sheet) (lak). Modified on 4/10/2017: Terminated defendant State of Wisconsin Department of Employee Trust Funds & Group Insurance Board; Terminated defendant Dean Health Insurance. Added defendant State of Wisconsin Department of Employee Trust Funds; Added defendant State of Wisconsin Group Insurance Board; Added defendant Dean Health Plan, Inc. Added party text for individual defendants. (lak) # <u>2</u> JS-44 Civil Cover Sheet) (Entered: 04/07/2017)
04/07/2017	<u>2</u>	Exhibit to <u>1</u> Complaint filed by Alina Boyden, Shannon Andrews (Attachments: # <u>1</u> Summons - State of Wisconsin Department of Employee Trust Funds, # <u>2</u> Summons - State of Wisconsin Group Insurance Board, # <u>3</u> Summons - Robert J. Conlin, # <u>4</u> Summons - Board of Regents of the University of Wisconsin System, # <u>5</u> Summons - Raymond W. Cross, # <u>6</u> Summons - Rebecca M. Blank, # <u>7</u> Summons - University of Wisconsin School of Medicine and Public Health, # <u>8</u> Summons - Robert N. Golden, MD, # <u>9</u> Summons - Dean Health Plan, Inc., # <u>10</u> Summons - Wisconsin Physicians Service Insurance Corporation) (Fairweather, Nicholas) Modified on 4/10/2017. (lak) (Entered: 04/07/2017)
04/10/2017		Case randomly assigned to Magistrate Judge Stephen L. Crocker. (jls) (Entered: 04/10/2017)
04/10/2017		Standard attachments for Magistrate Judge Stephen L. Crocker required to be served on all parties with summons or waiver of service: <u>Corporate Disclosure Statement</u> , <u>Order Regarding Assignment of Cases</u> , <u>Notice of Assignment to a Magistrate Judge and Consent/Request for Reassignment</u> , <u>Order on Dispositive Motions</u> . (jls) (Entered: 04/10/2017)

Case: 18-3408 Document: 1-1 Filed: 11/09/2018 Pages: 116		
04/10/2017	<u>3</u>	Summons Issued as to Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Dean Health Plan, Inc., Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health, and Wisconsin Physicians Service Insurance Corporation. (jls) (Entered: 04/10/2017)
04/13/2017		Case randomly reassigned to District Judge William M. Conley and Magistrate Judge Stephen L. Crocker. (cak) (Entered: 04/13/2017)
04/21/2017	<u>4</u>	Waiver of Service Returned Executed by Defendant Dean Health Plan, Inc. Dean Health Plan, Inc. waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 04/21/2017)
04/21/2017	<u>5</u>	Waiver of Service Returned Executed by Defendant Wisconsin Physicians Service Insurance Corporation. Wisconsin Physicians Service Insurance Corporation waiver sent on 4/21/2017, answer due 6/20/2017. (Fairweather, Nicholas) (Entered: 04/21/2017)
05/12/2017	<u>6</u>	Disregard. See <u>14</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>7</u>	Disregard. See <u>15</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>8</u>	Disregard. See <u>16</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>9</u>	Disregard. See <u>17</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>10</u>	Disregard. See <u>18</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>11</u>	Disregard. See <u>19</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>12</u>	Disregard. See <u>20</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>13</u>	Disregard. See <u>21</u> . Modified on 5/12/2017. (lak) (Entered: 05/12/2017)
05/12/2017	<u>14</u>	Waiver of Service Returned Executed by Defendant State of Wisconsin Department of Employee Trust Funds. State of Wisconsin Department of Employee Trust Funds waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>15</u>	Waiver of Service Returned Executed by Defendant Rebecca M. Blank. Rebecca M. Blank waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>16</u>	Waiver of Service Returned Executed by Defendant Raymond W. Cross. Raymond W. Cross waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>17</u>	Waiver of Service Returned Executed by Defendant University of Wisconsin School of Medicine and Public Health. University of Wisconsin School of Medicine and Public Health waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>18</u>	Waiver of Service Returned Executed by Defendant Robert J. Conlin. Robert J. Conlin waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>19</u>	Waiver of Service Returned Executed by Defendant Board of Regents of the University of Wisconsin System. Board of Regents of the University of Wisconsin System waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>20</u>	Waiver of Service Returned Executed by Defendant Robert N. Golden. Robert N. Golden waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)
05/12/2017	<u>21</u>	Waiver of Service Returned Executed by Defendant State of Wisconsin Group Insurance Board. State of Wisconsin Group Insurance Board waiver sent on 4/20/2017, answer due 6/19/2017. (Fairweather, Nicholas) (Entered: 05/12/2017)

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05/15/2017	<u>22</u>	Notice of Appearance filed by Steven Carl Kilpatrick for Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health. (Kilpatrick, Steven) (Entered: 05/15/2017)
05/15/2017	<u>23</u>	Notice of Appearance filed by Colin Thomas Roth for Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health. (Roth, Colin) (Entered: 05/15/2017)
05/24/2017	<u>24</u>	Notice of Voluntary Dismissal by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 05/24/2017)
05/24/2017	<u>25</u>	Notice of Appearance filed by Lynn Marie Stathas for Defendant Dean Health Plan, Inc. (Stathas, Lynn) (Entered: 05/24/2017)
05/24/2017	<u>26</u>	Notice of Appearance filed by Monica Ann Mark for Defendant Dean Health Plan, Inc. (Mark, Monica) (Entered: 05/24/2017)
05/25/2017		Party Wisconsin Physicians Service Insurance Corporation (d/b/a WPS Health Solutions) terminated pursuant to Fed. R. Civ. P. 41(a)(1) without further order of the court. (jat) (Entered: 05/25/2017)
06/16/2017	<u>27</u>	AMENDED COMPLAINT against All Defendants, filed by All Plaintiffs. (Attachments: # <u>1</u> Exhibit 1 – Notice of Right to Sue, # <u>2</u> Exhibit 2 – Notice of Right to Sue, # <u>3</u> Exhibit 3 – Notice of Right to Sue) (Fairweather, Nicholas) (Entered: 06/16/2017)
06/22/2017	<u>28</u>	MOTION TO DISMISS (RULE 12(B)(1) AND (6)) AND, ALTERNATIVELY, MOTION TO STAY by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health. Brief in Opposition due 7/13/2017. Brief in Reply due 7/24/2017. (Kilpatrick, Steven) Modified on 6/22/2017. (lak) (Entered: 06/22/2017)
06/22/2017	<u>29</u>	Brief in Support of <u>28</u> Motion to Dismiss <i>and, Alternatively, Motion to Stay</i> by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health. (Kilpatrick, Steven) Modified on 6/22/2017. (lak) (Entered: 06/22/2017)
06/23/2017		Set Telephonic Pretrial Conference: Telephonic Pretrial Conference set for 7/26/2017 at 01:00 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. [<u>Standing Order Governing Preliminary Pretrial Conference</u> attached] (jls) (Entered: 06/23/2017)
06/28/2017	<u>30</u>	MOTION TO DISMISS by Defendant Dean Health Plan, Inc. Brief in Opposition due 7/19/2017. Brief in Reply due 7/31/2017. (Stathas, Lynn) (Entered: 06/28/2017)
06/28/2017	<u>31</u>	Brief in Support of <u>30</u> Motion to Dismiss by Defendant Dean Health Plan, Inc. (Stathas, Lynn) (Entered: 06/28/2017)
06/29/2017	<u>32</u>	Motion for Extension of Time by Plaintiffs Shannon Andrews, Alina Boyden. Motions referred to Magistrate Judge Stephen L. Crocker. (Fairweather, Nicholas) (Entered: 06/29/2017)
06/30/2017	33	** TEXT ONLY ORDER ** ORDER granting <u>32</u> Motion for Extension of Time. Plaintiffs should not expect another extension of this deadline. Brief in Opposition due 8/11/2017. Brief in Reply due 8/21/2017. Signed by Magistrate Judge Stephen L. Crocker on 6/30/2017. (jls) (Entered: 06/30/2017)

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07/10/2017	<u>34</u>	Motion for Extension of Time by Plaintiffs Shannon Andrews, Alina Boyden. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 7/17/2017. (Fairweather, Nicholas) (Entered: 07/10/2017)	
07/12/2017	35	** TEXT ONLY ORDER ** ORDER granting <u>34</u> Motion for Extension of Time. Brief in Opposition due 8/11/2017. Brief in Reply due 8/21/2017. Signed by Magistrate Judge Stephen L. Crocker on 7/12/2017. (jls) (Entered: 07/12/2017)	
07/21/2017	<u>36</u>	Joint Report of Rule 26(f) Planning Meeting. (Fairweather, Nicholas) (Entered: 07/21/2017)	
07/26/2017		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Preliminary Pretrial Conference held on 7/26/2017 [:25] (mfh) (Entered: 07/26/2017)	
08/03/2017	<u>37</u>	Pretrial Conference Order – Dispositive Motions due 5/11/2018. Settlement Letters due 8/31/2018. Motions in Limine due 9/7/2018. Response to Motion due 9/21/2018. Final Pretrial Submissions due 9/11/2018. Final Pretrial Conference set for 10/2/2018 at 04:00 PM. Court Trial set for 10/9/2018 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 8/3/2017. (jls) (Entered: 08/03/2017)	
08/11/2017	<u>38</u>	Joint Motion for Extension of Time <i>to File Reply to Plaintiffs' Response to Their Motions to Dismiss</i> by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Dean Health Insurance, Dean Health Plan, Inc., Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Department of Employee Trust Funds & Group Insurance Board, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health, Wisconsin Physicians Service Insurance Corporation. Motions referred to Magistrate Judge Stephen L. Crocker. (Kilpatrick, Steven) Modified on 8/13/2017: This was filed on behalf of terminated defendants. (lak) (Entered: 08/11/2017)	
08/11/2017	<u>39</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>28</u> Motion to Dismiss, filed by Rebecca M. Blank, Raymond W. Cross, State of Wisconsin Department of Employee Trust Funds, Robert J. Conlin, University of Wisconsin School of Medicine and Public Health, Board of Regents of the University of Wisconsin System, State of Wisconsin Group Insurance Board, Robert N. Golden. (Dupuis, Laurence) (Entered: 08/11/2017)	
08/11/2017	<u>40</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>30</u> Motion to Dismiss filed by Dean Health Plan, Inc. (Dupuis, Laurence) (Entered: 08/11/2017)	
08/14/2017	41	** TEXT ONLY ORDER ** ORDER granting <u>38</u> Motion for Extension of Time. Brief in Reply due 8/28/2017. Signed by Magistrate Judge Stephen L. Crocker on 8/14/2017. (jls) (Entered: 08/14/2017)	
08/28/2017	<u>42</u>	Brief in Reply by Defendant Dean Health Plan, Inc. in Support of <u>30</u> Motion to Dismiss. (Stathas, Lynn) (Entered: 08/28/2017)	
08/28/2017	<u>43</u>	Brief in Reply by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health in Support of <u>28</u> Motion to Dismiss. (Roth, Colin) (Entered: 08/28/2017)	
11/20/2017	<u>44</u>	ORDER granting defendant Dean Health Plan, Inc.'s <u>30</u> Motion to Dismiss and dismissing Dean Health Plan, Inc. as a defendant. Signed by District Judge William M. Conley on 11/20/2017. (jls) (Entered: 11/20/2017)	
02/15/2018	45	**TEXT ONLY ORDER** Judge Conley recently modified his attachments to the Preliminary Pretrial Conference Order, which you may access via this hyperlink: Attachments to Preliminary Pretrial Conference Order . Please note that occasionally Judge Conley makes changes to these attachments. As such, unless you do not have access to the attachments electronically (e.g., you are a pro se litigant), you should review the most recent version of the appropriate attachment to assure compliance when preparing summary judgment or	

		other pre-trial submissions. (lak) (Entered: 02/15/2018)
02/26/2018	<u>46</u>	Stipulated Motion for Protective Order by Plaintiffs Shannon Andrews, Alina Boyden. (Dupuis, Laurence) (Entered: 02/26/2018)
02/27/2018	<u>47</u>	Notice of Appearance filed by Caitlin Marie Madden for Plaintiffs Shannon Andrews, Alina Boyden. (Madden, Caitlin) (Entered: 02/27/2018)
02/28/2018	48	** TEXT ONLY ORDER ** The parties' <u>46</u> stipulated protective order is accepted and entered as the court's order. Signed by Magistrate Judge Stephen L. Crocker on 2/28/2018. (jls) (Entered: 02/28/2018)
03/06/2018	<u>49</u>	Notice of Appearance filed by Asma Imtiazali Kadri for Plaintiffs Shannon Andrews, Alina Boyden. (Kadri, Asma) (Entered: 03/06/2018)
03/09/2018	<u>50</u>	Notice by Plaintiffs Shannon Andrews, Alina Boyden of <i>Stipulation Regarding Disclosure of Expert Witnesses</i> . (Fairweather, Nicholas) Modified on 3/12/2018. (lak) (Entered: 03/09/2018)
04/27/2018	<u>51</u>	Deposition of Herschel E. Day taken on 4/2/2018. (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>52</u>	Deposition of David H. Nispel taken on 4/3/2018. (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>53</u>	Deposition of Michael S. Farrell taken on 4/11/2018. (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>54</u>	Deposition of Robert J. Conlin taken on 4/18/2018. (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>55</u>	Motion to Compel by Plaintiffs Shannon Andrews, Alina Boyden. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 5/4/2018. (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>56</u>	Brief in Support of <u>55</u> Motion to Compel by Plaintiffs Shannon Andrews, Alina Boyden. (<u>Sealed Document</u>) (Fairweather, Nicholas) Modified on 4/27/2018. (lak) (Entered: 04/27/2018)
04/27/2018	<u>57</u>	Declaration of Caitlin M. Madden filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>55</u> Motion to Compel, (<u>Sealed Document</u>) (Attachments: # <u>1</u> Exhibit A – December 30, 2016 Open Meeting Minutes, # <u>2</u> Exhibit B – Defendants' Supplemental Responses to Discovery Requests, # <u>3</u> Exhibit C – January 30, 2017 ETF Memorandum, # <u>4</u> Exhibit D – December 30, 2016 GIB Closed Session Meeting Minutes, # <u>5</u> Exhibit E – DOJ Fiduciary Duty Memo, # <u>6</u> Exhibit F – Defendants' Claw Back Requests, # <u>7</u> Exhibit G – Plaintiffs' Response to Defendants' Claw Back Requests, # <u>8</u> Exhibit H – Defendants' Reply to Plaintiffs' Response to Claw Back Requests) (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>58</u>	Redaction to <u>57</u> Declaration of <i>Caitlin M. Madden</i> by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> Exhibit A – December 30, 2016 Open Meeting Minutes, # <u>2</u> Exhibit B – Defendants' Supplemental Responses to Discovery Requests, # <u>3</u> Exhibit C – January 30, 2017 ETF Memorandum, # <u>4</u> Exhibit D – December 30, 2016 GIB Closed Session Meeting Minutes, # <u>5</u> Exhibit E – DOJ Fiduciary Duty Memo, # <u>6</u> Exhibit F – Defendants' Claw Back Requests, # <u>7</u> Exhibit G – Plaintiffs' Response to Defendants' Claw Back Requests, # <u>8</u> Exhibit H – Defendants' Reply to Plaintiffs' Response to Claw Back Requests) (Fairweather, Nicholas) (Entered: 04/27/2018)
04/27/2018	<u>59</u>	Redaction to <u>56</u> Brief in Support of <i>Motion to Compel</i> by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) Modified on 4/30/2018. (lak) (Entered: 04/27/2018)

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04/30/2018		Set Deadlines as to <u>55</u> Motion to Compel. Brief in Opposition due 5/7/2018. Brief in Reply due 5/14/2018. (jls) (Entered: 04/30/2018)
05/01/2018	<u>60</u>	Notice of Appearance filed by Jody J. Schmelzer for Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health. (Schmelzer, Jody) (Entered: 05/01/2018)
05/03/2018	<u>61</u>	Unopposed Motion to Amend Scheduling Order by Plaintiffs Shannon Andrews, Alina Boyden. Motions referred to Magistrate Judge Stephen L. Crocker. (Fairweather, Nicholas) Modified on 5/4/2018. (lak) (Entered: 05/03/2018)
05/04/2018	<u>62</u>	** TEXT ONLY ORDER ** Plaintiffs' unopposed motion to amend the schedule is granted in part and denied in part. The expert disclosure deadlines and dispositive motion deadline are extended to the dates requested. The October 9, 2018 trial date remains in place, which means that the August 31, 2018 discovery cutoff remains in place as well. Signed by Magistrate Judge Stephen L. Crocker on 5/4/2018. (jls) (Entered: 05/04/2018)
05/07/2018	<u>63</u>	Brief in Opposition by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health re: <u>55</u> Motion to Compel filed by Alina Boyden, Shannon Andrews. (Roth, Colin) Modified on 5/8/2018. (lak) (Entered: 05/07/2018)
05/07/2018	<u>64</u>	Declaration of Colin T. Roth filed by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, University of Wisconsin School of Medicine and Public Health re: <u>55</u> Motion to Compel, (Attachments: # <u>1</u> Exhibit A – Agenda/Notice) (Roth, Colin) Modified on 5/7/2018: Added exhibit description. Detailed e-mail to counsel. (lak) (Entered: 05/07/2018)
05/08/2018	<u>65</u>	** TEXT ONLY ORDER ** Defendants have filed their response (dks. <u>63</u> – <u>64</u>) to plaintiffs' motion to compel discovery (dks. <u>55</u> – <u>57</u>). To assist the court, defendants are directed to submit, ex parte and in camera, a copy of the minutes of the closed session and the DOJ memo, and plaintiff is allowed the opportunity for a terse reply, due by May 14, 2018. Signed by Magistrate Judge Stephen L. Crocker on 5/8/2018. (jls) (Entered: 05/08/2018)
05/08/2018	<u>66</u>	Response re: 65 Text Only Order, by Defendants Rebecca M. Blank, Board of Regents of the University of Wisconsin System, Robert J. Conlin, Raymond W. Cross, Robert N. Golden, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Department of Employee Trust Funds & Group Insurance Board, State of Wisconsin Group Insurance Board. (Roth, Colin) (Entered: 05/08/2018)
05/11/2018	<u>67</u>	ORDER granting in part and denying in part <u>28</u> Motion to Dismiss. Signed by District Judge William M. Conley on 5/11/2018. (jls) (Entered: 05/11/2018)
05/14/2018	<u>68</u>	Deposition of Lisa M. Ellinger taken on 4/4/2018. (Fairweather, Nicholas) (Entered: 05/14/2018)
05/14/2018	<u>69</u>	Deposition of Tara S. Pray taken on 4/10/2018. (Fairweather, Nicholas) (Entered: 05/14/2018)
05/14/2018	<u>70</u>	Brief in Reply by Plaintiffs Shannon Andrews, Alina Boyden in Support of <u>55</u> Motion to Compel. (Fairweather, Nicholas) (Entered: 05/14/2018)
05/21/2018		Set Hearing as to <u>55</u> Motion to Compel. Telephonic Motion Hearing set for 5/24/2018 at 08:00 AM before Judge William M. Conley. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5087. (jls) (Entered: 05/21/2018)
05/23/2018		Reset Hearing as to <u>55</u> Motion to Compel. Telephonic Motion Hearing reset for 5/24/2018 at 08:30 AM before Judge William M. Conley. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5087. (jls) (Entered: 05/23/2018)

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05/24/2018		Minute Entry for proceedings held before District Judge William M. Conley: Telephone Motion Hearing held on 5/24/2018 re <u>55</u> Motion to Compel filed by Alina Boyden, Shannon Andrews [:40] (Court Reporter JD.) (mfh) (Entered: 05/24/2018)
05/24/2018	<u>71</u>	ORDER granting in part and denying in part <u>55</u> Motion to Compel. Signed by District Judge William M. Conley on 5/24/2018. (jls) (Entered: 05/24/2018)
05/24/2018	<u>72</u>	Transcript of Telephonic Motion Hearing, held 5/24/2018 before Judge William M. Conley. Court Reporter: JD. Please review the court's new policy regarding electronic transcripts of court proceedings: see <u>Electronic Transcript Instructions</u> . (jls) (Entered: 05/24/2018)
05/24/2018	<u>73</u>	ANSWER to Amended Complaint by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Department of Employee Trust Funds & Group Insurance Board, State of Wisconsin Group Insurance Board. (Kilpatrick, Steven) Modified on 5/25/2018: Filed on behalf of terminated defendant. (lak) (Entered: 05/24/2018)
05/25/2018	<u>74</u>	Motion for Leave to File Second Amended Complaint by Plaintiffs Shannon Andrews, Alina Boyden. Brief in Opposition due 6/1/2018. Brief in Reply due 6/8/2018. (Attachments: # <u>1</u> Exhibit – Second Amended Complaint, # <u>2</u> Exhibits 1, 2 and 3 – Right to Sue Letters) (Dupuis, Laurence) Modified on 5/29/2018. (lak) (Entered: 05/25/2018)
05/25/2018	<u>75</u>	Brief in Support of <u>74</u> Motion for Leave to File by Plaintiffs Shannon Andrews, Alina Boyden. (Dupuis, Laurence) Modified on 5/29/2018. (lak) (Entered: 05/25/2018)
05/25/2018	<u>76</u>	Declaration of Nicholas Fairweather filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>74</u> Motion for Leave to File. (Dupuis, Laurence) Modified on 5/29/2018. (lak) (Entered: 05/25/2018)
05/31/2018	<u>77</u>	Disregard. See <u>78</u> . Modified on 5/31/2018. (lak) (Entered: 05/31/2018)
05/31/2018	<u>78</u>	Deposition of Jeffrey E. Bogardus taken on 4-3-18. (Roth, Colin) (Entered: 05/31/2018)
06/01/2018	<u>79</u>	Deposition of J.P. Wieske taken on May 30, 2018. (Roth, Colin) (Entered: 06/01/2018)
06/01/2018	<u>80</u>	MOTION FOR SUMMARY JUDGMENT by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board. Brief in Opposition due 6/22/2018. Brief in Reply due 7/2/2018. (Roth, Colin) (Entered: 06/01/2018)
06/01/2018	<u>81</u>	Brief in Support of <u>80</u> Motion for Summary Judgment, by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board. (Roth, Colin) (Entered: 06/01/2018)
06/01/2018	<u>82</u>	Declaration of Eileen Mallow filed by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board re: <u>80</u> Motion for Summary Judgment, (Attachments: # <u>1</u> Exhibit A – 2018 Uniform Benefits) (Roth, Colin) Modified on 6/5/2018. (lak) (Entered: 06/01/2018)
06/01/2018	<u>83</u>	Declaration of Colin Roth filed by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board re: <u>80</u> Motion for Summary Judgment, (Attachments: # <u>1</u> Exhibit A – Defendants' Supplemental Responses to Plaintiffs' Discovery Set 1, # <u>2</u> Exhibit B – Defendants' Responses to Plaintiffs' Discovery Set 2, # <u>3</u> Exhibit C – Ellinger Deposition (4-4-18) Exhibit 2 – ETF Spreadsheet, # <u>4</u> Exhibit D – Ellinger Deposition (4-4-18) Exhibit 3 – ETF Correspondence, # <u>5</u> Exhibit E – Ellinger Deposition (4-4-18) Exhibit 7 – GIB Minutes, # <u>6</u> Exhibit F – Ellinger Deposition (4-4-18) Exhibit 16 – Cost Estimate Memo, # <u>7</u> Exhibit G – Bogardus Deposition (4-3-18) Exhibit 2 – GIB Correspondence, # <u>8</u> Exhibit H – Nispel Deposition (4-3-18) Exhibit 1 – GIB Correspondence, # <u>9</u> Exhibit I – Farrell Deposition (4-11-18) Exhibit 6 – GIB Correspondence, # <u>10</u> Exhibit J – Farrell Deposition (4-11-18) Exhibit 15 – GIB Minutes, # <u>11</u> Exhibit K – Day Deposition (4-2-18) Exhibit 4 – GIB Correspondence,

		# <u>12</u> Exhibit L – Day Deposition (4–2–18) Exhibit 5 – GIB Minutes, # <u>13</u> Exhibit M – Day Deposition (4–2–18) Exhibit 6 – GIB Minutes, # <u>14</u> Exhibit N – Conlin Deposition (4–18–18) Exhibit 1 – ETF Document re: Secretary, # <u>15</u> Exhibit O – Conlin Deposition (4–18–18) Exhibit 17 – GIB Correspondence, # <u>16</u> Exhibit P – Disregard., # <u>17</u> Exhibit Q – Disregard., # <u>18</u> Exhibit R – Disregard.) (Roth, Colin) Modified on 6/5/2018. (lak) (Entered: 06/01/2018)
06/05/2018	<u>84</u>	Motion for Leave to File by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board. (Attachments: # <u>1</u> Exhibit A – Response in Opposition to Plaintiffs' Motion to Amend, # <u>2</u> Exhibit B – Roth Declaration re: Opposition to Plaintiffs' Motion to Amend) (Roth, Colin) Modified on 6/6/2018. (lak) (Entered: 06/05/2018)
06/05/2018	<u>85</u>	** TEXT ONLY ORDER ** The court is in receipt of defendants' motion for leave to file a late response in opposition to plaintiffs' motion for leave to file second amended complaint. (Dkt. # <u>84</u> .) While defendants' filing skirts the "excusable neglect" standard under Rule 6(b)(1), the lack of prejudice to plaintiffs in granting defendants' motion — especially when viewed in light of the timing of plaintiffs' own motion for leave to amend their complaint — weighs in favor of defendants' requested four-day extension. <i>See Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.</i> , 646 F.3d 401, 405 (7th Cir. 2011) ("The stronger the excuse and the graver the adverse consequences of rejecting it relative to the adverse consequences to the opposing party if the excuse is allowed, the more the balance leans toward granting."). The court also notes that this is an unusual mistake for the government's counsel to make. Were that to change, the court is unlikely to be as lenient. Moreover, the court will extend the deadline for plaintiffs' reply in support of their motion for leave to amend to ameliorate any prejudice to plaintiffs. Accordingly, defendants' motion for leave to file a late response (dkt. # <u>84</u>) is GRANTED. Plaintiffs' reply in support of their motion for leave to amend is now due June 15, 2018. Signed by District Judge William M. Conley on 6/5/18. (jat) (Entered: 06/05/2018)
06/06/2018	<u>86</u>	Brief in Opposition by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board re: <u>74</u> Motion for Leave to File, filed by Alina Boyden, Shannon Andrews. (Roth, Colin) (Entered: 06/06/2018)
06/06/2018	<u>87</u>	Declaration of Colin T. Roth filed by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board re: <u>74</u> Motion for Leave to File. (Roth, Colin) (Entered: 06/06/2018)
06/06/2018	<u>88</u>	Proposed Findings of Fact filed by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board re: <u>80</u> Motion for Summary Judgment. (Roth, Colin) (Entered: 06/06/2018)
06/06/2018	<u>89</u>	Expert Report of Stephanie Budge by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, (Attachments: # <u>1</u> Appendix A – Curriculum Vitae, # <u>2</u> Appendix B – Bibliography) (Roth, Colin) Modified on 6/7/2018. (lak) (Entered: 06/06/2018)
06/06/2018	<u>90</u>	Expert Report of Lawrence S. Mayer by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, (Attachments: # <u>1</u> Appendix A – Testimony in Last Four Years, # <u>2</u> Appendix B – Professional Vitae, # <u>3</u> Appendix C – Compensation, # <u>4</u> Appendix D – The New Atlantis) (Roth, Colin) Modified on 6/7/2018. (lak) (Entered: 06/06/2018)

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06/06/2018	<u>91</u>	Expert Report of David V. Williams by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, (Attachments: # <u>1</u> Exhibit A – Curriculum Vitae, # <u>2</u> Exhibit B – Medical Affairs Policy, # <u>3</u> Exhibit C – Medical Policy, # <u>4</u> Exhibit D – Dean Health Market-Based, # <u>5</u> Exhibit E – Dean Health Plan) (Roth, Colin) Modified on 6/7/2018. (lak) (Entered: 06/06/2018)	
06/07/2018	<u>92</u>	Joint Motion to Amend Briefing Schedule by Defendants Robert J. Conlin, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board. Motions referred to Magistrate Judge Stephen L. Crocker. (Roth, Colin) (Entered: 06/07/2018)	
06/07/2018	<u>93</u>	Deposition of Nancy L. Thompson taken on 5/25/18. (Fairweather, Nicholas) (Entered: 06/07/2018)	
06/08/2018	94	** TEXT ONLY ORDER ** The parties' stipulation to extend the briefing deadlines on summary judgment is accepted with these changes: the response may be filed by June 26, 2018 and the reply may be filed by July 9, 2018 to account for the federal holiday. Signed by Magistrate Judge Stephen L. Crocker on 6/8/2018. (jls) (Entered: 06/08/2018)	
06/08/2018	<u>95</u>	MOTION FOR PARTIAL SUMMARY JUDGMENT by Plaintiffs Shannon Andrews, Alina Boyden. Brief in Opposition due 6/29/2018. Brief in Reply due 7/9/2018. (Fairweather, Nicholas) (Entered: 06/08/2018)	
06/08/2018	<u>96</u>	Proposed Findings of Fact filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment. (Fairweather, Nicholas) (Entered: 06/08/2018)	
06/08/2018	<u>97</u>	Brief in Support of <u>95</u> Motion for Partial Summary Judgment by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 06/08/2018)	
06/08/2018	<u>98</u>	Declaration of Alina Boyden filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment. (Fairweather, Nicholas) (Entered: 06/08/2018)	
06/08/2018	<u>99</u>	Declaration of Shannon Andrews filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment. (Fairweather, Nicholas) (Entered: 06/08/2018)	
06/08/2018	<u>100</u>	Declaration of Wren W. Logan filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment. (Fairweather, Nicholas) (Entered: 06/08/2018)	
06/08/2018	<u>101</u>	Declaration of Stephanie Budge, Ph.D. filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment, (Attachments: # <u>1</u> Exhibit 1 – Expert Report) (Fairweather, Nicholas) (Attachment 1 replaced on 6/11/2018. Removed Appendices. See <u>89</u> for Expert Report filed as a separate entry, with attachments.) (lak) (Entered: 06/08/2018)	
06/08/2018	<u>102</u>	Declaration of Joan C. Barrett filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment, (Attachments: # <u>1</u> Exhibit 1 – Disregard. See <u>105</u> .) (Fairweather, Nicholas) Modified on 6/11/2018. (lak) (Entered: 06/08/2018)	
06/08/2018	<u>103</u>	Declaration of Michael R. Godbe filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment, (Attachments: # <u>1</u> Exhibit A – Defendants' Responses to Plaintiffs' Second Request for Admission and Interrogatory, # <u>2</u> Exhibit B – "It's Your Choice" Access Health Plan – ETF000084, # <u>3</u> Exhibit C – Excerpts From 2016 Contract & Uniform Benefits – ETF00727, # <u>4</u> Exhibit D – July 21, 2016 Pray/McNally Emails – ETF02204, # <u>5</u> Exhibit E – 2017 Benefit Year Uniform Benefits – ETF00023, # <u>6</u> Exhibit F – Alina Boyden ETF Written Complaint File – ETF00002, # <u>7</u> Exhibit G – Shannon Andrews ETF Written Complaint File – ETF00003, # <u>8</u> Exhibit H – January 31, 2017 ETF Memo to Health Plans – ETF00125,	

		<p># <u>9</u> Exhibit I – June 22, 2016 GIB Correspondence Memo – ETF00562, # <u>10</u> Exhibit J – September 8, 2006 Kox/Bogardus Emails & Attachment ETF02026, # <u>11</u> Exhibit K – October 22, 2008 Owens/Bogardus Emails & Attachment – ETF03934, # <u>12</u> Exhibit L – April 27, 2015 Bogardus/Larson/Pray Emails & Attachment – ETF01815, # <u>13</u> Exhibit M – July 12, 2016 Open Meeting Minutes – BoydenProd6_000100, # <u>14</u> Exhibit N – June 29, 2016 Schatten/Ellinger Emails & Attachment – ETF02293, # <u>15</u> Exhibit O – January 30, 2017 Steele/Larson Emails & Attachment – ETF01893, # <u>16</u> Exhibit P – August 12, 2016 ETF Memo to GIB – ETF00091, # <u>17</u> Exhibit Q – December 13, 2016 GIB Open Meeting Minutes – GIB00711, # <u>18</u> Exhibit R – December 29, 2016 Bogardus/Alexander/Tischer/Olson Emails – ETF02184, # <u>19</u> Exhibit S – December 30, 2016 GIB Open Meeting Minutes – ETF00141, # <u>20</u> Exhibit T – February 6, 2017 Pray/Ellinger Emails – BoydenProd7_000174, # <u>21</u> Exhibit U – February 8, 2017 GIB Open Meeting Minutes – BoydenProd6_000050, # <u>22</u> Exhibit V – May 24, 2017 GIB Open Meeting Minutes – ETF00156, # <u>23</u> Exhibit W – Defendants' Responses to Plaintiffs' First Set of Discovery Requests, # <u>24</u> Exhibit X – May 2, 2018 Stipulation) (Fairweather, Nicholas) Modified on 6/11/2018. (lak) (Entered: 06/08/2018)</p>
06/08/2018	<u>104</u>	Disregard. See <u>106</u> . Modified on 6/11/2018. (lak) (Entered: 06/08/2018)
06/11/2018	<u>105</u>	Expert Report of Joan C. Barrett and Elaine T. Corrough by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> Barrett CV, # <u>2</u> Barrett Biography, # <u>3</u> Corrough CV, # <u>4</u> Corrough Biography, # <u>5</u> Corrough Billing Rates) (lak) (Entered: 06/11/2018)
06/11/2018	<u>106</u>	Expert Report of Loren S. Schechter, M.D., by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> Exhibit A – CV, # <u>2</u> Exhibit B – Department of Health and Human Services, Departmental Appeals Board, Decision, # <u>3</u> Exhibit C – Decision Memo for Gender Dysphoria and Gender Reassignment Surgery) (lak) (Entered: 06/11/2018)
06/14/2018	<u>107</u>	Brief in Reply by Plaintiffs Shannon Andrews, Alina Boyden in Support of <u>74</u> Motion for Leave to File. (Fairweather, Nicholas) (Entered: 06/14/2018)
06/14/2018	<u>108</u>	Declaration of Nicholas E. Fairweather filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>74</u> Motion for Leave to File, (Attachments: # <u>1</u> Exhibit A – Second Amended Complaint) (Fairweather, Nicholas) (Entered: 06/14/2018)
06/25/2018	<u>109</u>	ORDER granting in part and denying in part <u>74</u> Motion for Leave to File Second Amended Complaint. Adding GIB members Michael S. Farrell, Stacey Rolston, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, J.P. Wieske and Bob Ziegelbauer as defendants in their individual and official capacities, and adding GIB members Jennifer Stegall, Francis Sullivan, Herschel Day and Nancy Thompson as defendants in their official capacities. Accepting plaintiffs' proposed second amended complaint (dkt. # <u>108</u> –1) as the operative pleading. Striking as parties plaintiff Wren Logan and defendants University of Wisconsin Hospitals and Clinics Authority and Alan S. Kaplan. No additional, answer, motion or response is required by any defendant, except as they may choose to assert it. Signed by District Judge William M. Conley on 6/25/2018. (jls) (Entered: 06/25/2018)
06/25/2018	<u>110</u>	Supplemental Deposition of Herschel E. Day taken on 6/11/2018. (Fairweather, Nicholas) (Entered: 06/25/2018)
06/25/2018	<u>111</u>	Deposition of David V. Williams taken on 6/15/18. (Fairweather, Nicholas) (Entered: 06/25/2018)

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06/25/2018	<u>112</u>	Deposition of Lawrence S. Mayer taken on 6/15/18. (Fairweather, Nicholas) (Entered: 06/25/2018)
06/26/2018	<u>113</u>	Response to Proposed Findings of Fact filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>80</u> Motion for Summary Judgment. (Fairweather, Nicholas) (Entered: 06/26/2018)
06/26/2018	<u>114</u>	Supplemental Proposed Findings of Fact filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>80</u> Motion for Summary Judgment. (Fairweather, Nicholas) (Entered: 06/26/2018)
06/26/2018	<u>115</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>80</u> Motion for Summary Judgment, filed by State of Wisconsin Department of Employee Trust Funds, Robert J. Conlin, State of Wisconsin Group Insurance Board. (Fairweather, Nicholas) (Entered: 06/26/2018)
06/26/2018	<u>116</u>	Supplemental Expert Report of Loren S. Schechter, M.D. by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 06/26/2018)
06/26/2018	<u>117</u>	Disregard. Modified on 6/27/2018. (lak) (Entered: 06/26/2018)
06/26/2018	<u>118</u>	Declaration of Caitlin M. Madden filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>80</u> Motion for Summary Judgment, (Attachments: # <u>1</u> Exhibit A – Ellinger February 12, 2015 Notes – ETF000618) (Fairweather, Nicholas) (Entered: 06/26/2018)
06/27/2018	<u>119</u>	Supplemental Expert Report of Stephanie Budge, Ph.D by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> References) (lak) (Entered: 06/27/2018)
06/29/2018	<u>120</u>	Brief in Opposition by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>95</u> Motion for Partial Summary Judgment filed by Alina Boyden, Shannon Andrews. (Kilpatrick, Steven) (Entered: 06/29/2018)
06/29/2018	<u>121</u>	Additional Proposed Findings of Fact filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>95</u> Motion for Partial Summary Judgment. (Kilpatrick, Steven) Modified on 7/1/2018. (lak) (Entered: 06/29/2018)
06/29/2018	<u>122</u>	Response to Proposed Findings of Fact filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>95</u> Motion for Partial Summary Judgment. (Kilpatrick, Steven) (Entered: 06/29/2018)
06/29/2018	<u>123</u>	Supplemental Declaration of Colin T. Roth filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>95</u> Motion for Partial Summary Judgment, (Attachments: # <u>1</u> Exhibit S – WPATH Standars of Care, # <u>2</u> Exhibit T – Pray Deposition Exhibit 7 – E-mail dated December 8, 2014 with Attachments, # <u>3</u> Exhibit U – USDOJ Letter, # <u>4</u> Exhibit V – ACLU Webpage, # <u>5</u> Exhibit W – Transgender Law Center Webpage, # <u>6</u> Exhibit X – Wikipedia Transgender Rights, # <u>7</u> Exhibit Y – Transgender Law Center Webpage, # <u>8</u> Exhibit Z – National Center for Transgender Equality Webpage, # <u>9</u> Exhibit AA – ACLU Webpage, # <u>10</u> Exhibit BB – Lambda Legal Webpage,

		# <u>11</u> Exhibit CC – Movement Advancement Project Webpage, # <u>12</u> Exhibit DD – NY Times Editorial, # <u>13</u> Exhibit EE – Washington Post Editorial, # <u>14</u> Exhibit FF – LA Times Editorial, # <u>15</u> Exhibit GG – Pages 1–2 of the Federal Register, Vol. 81, No. 96, May 18, 2016, Part IV, Dept. of Health and Human Services, Office of the Secretary) (Kilpatrick, Steven) Modified on 7/1/2018. (lak) (Entered: 06/29/2018)
07/09/2018	<u>124</u>	Motion to Strike <i>Plaintiffs' Supplemental Expert Reports</i> by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer. Brief in Opposition due 7/23/2018. Brief in Reply due 7/30/2018. (Kilpatrick, Steven) (Entered: 07/09/2018)
07/09/2018	<u>125</u>	Declaration of Colin T. Roth filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>124</u> Motion to Strike, (Attachments: # <u>1</u> Exhibit A – Email Chain Regarding Deposition Scheduling, # <u>2</u> Exhibit B – Rough Draft of Mayer Report) (Kilpatrick, Steven) Modified on 7/10/2018. (lak) (Entered: 07/09/2018)
07/09/2018	<u>126</u>	Brief in Reply by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer in Support of <u>80</u> Motion for Summary Judgment. (Kilpatrick, Steven) (Entered: 07/09/2018)
07/09/2018	<u>127</u>	Response to Supplemental Proposed Findings of Fact filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>80</u> Motion for Summary Judgment. (Kilpatrick, Steven) (Entered: 07/09/2018)
07/09/2018	<u>128</u>	Reply in Support of Proposed Findings of Fact filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>80</u> Motion for Summary Judgment. (Kilpatrick, Steven) (Entered: 07/09/2018)
07/09/2018	<u>129</u>	Declaration of Lawrence Mayer filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>80</u> Motion for Summary Judgment, (Attachments: # <u>1</u> Exhibit A – Hayes Directory Reports) (Kilpatrick, Steven) (Entered: 07/09/2018)
07/09/2018	<u>130</u>	Brief in Reply by Plaintiffs Shannon Andrews, Alina Boyden in Support of <u>95</u> Motion for Partial Summary Judgment. (Dupuis, Laurence) (Entered: 07/09/2018)
07/09/2018	<u>131</u>	Declaration of Caitlin Madden filed by Plaintiffs Shannon Andrews, Alina Boyden re: <i>Plaintiffs' Summary Judgment Reply</i> re: <u>95</u> Motion for Partial Summary Judgment, (Attachments: # <u>1</u> Exhibit A – Webster Letter, # <u>2</u> Exhibit B – Stipulation re: Covered Procedures, # <u>3</u> Exhibit C – DOJ/DOE Dear Colleague Letter, # <u>4</u> Exhibit D – Actuarial Standard of Practice No. 1) (Dupuis, Laurence) Modified on 7/10/2018. (lak) (Entered: 07/09/2018)
07/09/2018	<u>132</u>	Response to Additional Proposed Findings of Fact filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment. (Dupuis, Laurence) Modified on 7/10/2018. (lak) (Entered: 07/09/2018)

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07/09/2018	<u>133</u>	Reply in Support of Proposed Findings of Fact filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>95</u> Motion for Partial Summary Judgment. (Dupuis, Laurence) (Entered: 07/09/2018)
07/09/2018	<u>134</u>	Disregard. See <u>136</u> . Modified on 7/10/2018. (lak) (Entered: 07/09/2018)
07/09/2018	<u>135</u>	Disregard. See <u>137</u> . Modified on 7/10/2018. (lak) (Entered: 07/09/2018)
07/10/2018	<u>136</u>	Second Supplemental Expert Report of Stephanie Budge, Ph.D., by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> References) (lak) (Entered: 07/10/2018)
07/10/2018	<u>137</u>	Second Supplemental Expert Report of Loren S. Schechter, M.D., by Plaintiffs Shannon Andrews, Alina Boyden. (lak) (Entered: 07/10/2018)
07/10/2018	<u>138</u>	Motion to Strike <i>Plaintiffs' Second Supplemental Expert Witness Reports</i> by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer. Brief in Opposition due 7/24/2018. Brief in Reply due 7/31/2018. (Roth, Colin) (Entered: 07/10/2018)
07/23/2018	<u>139</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>138</u> Motion to Strike, filed by Nancy Thompson, J.P. Wieske, Stacey Rolston, Michael S. Farrell, Herschel Day, State of Wisconsin Department of Employee Trust Funds, Theodore Neitzke, Bob Ziegelbauer, Robert J. Conlin, Charles Grapentine, State of Wisconsin Group Insurance Board, Waylon Hurburt, Francis Sullivan, Jennifer Stegall, <u>124</u> Motion to Strike, filed by Nancy Thompson, J.P. Wieske, Stacey Rolston, Michael S. Farrell, Herschel Day, Theodore Neitzke, State of Wisconsin Department of Employee Trust Funds, Bob Ziegelbauer, Charles Grapentine, Robert J. Conlin, State of Wisconsin Group Insurance Board, Waylon Hurburt, Francis Sullivan, Jennifer Stegall. (Knight, John) (Entered: 07/23/2018)
07/30/2018	<u>140</u>	Brief in Reply by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer in Support of Support of <u>124</u> Motion to Strike, <u>138</u> Motion to Strike. (Roth, Colin) Modified on 7/30/2018. (lak) (Entered: 07/30/2018)
08/01/2018	<u>141</u>	Supplemental MOTION FOR SUMMARY JUDGMENT by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer. Brief in Opposition due 8/22/2018. Brief in Reply due 9/4/2018. (Roth, Colin) (Entered: 08/01/2018)
08/01/2018	<u>142</u>	Brief in Support of <u>141</u> Supplemental Motion for Summary Judgment, by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer. (Roth, Colin) (Entered: 08/01/2018)
08/01/2018	<u>143</u>	Additional Proposed Findings of Fact filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer re: <u>141</u> Supplemental Motion for Summary Judgment. (Roth, Colin) Modified on 8/2/2018. (lak) (Entered: 08/01/2018)
08/01/2018	<u>144</u>	Notice of Appearance filed by Amanda Michelle Kuklinski for Plaintiffs Shannon Andrews, Alina Boyden. (Kuklinski, Amanda) (Entered: 08/01/2018)
08/10/2018	<u>145</u>	Notice by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Francis Sullivan, Nancy Thompson, J.P. Wieske, Bob Ziegelbauer of

		<i>Substitution of Party.</i> (Kilpatrick, Steven) Modified on 8/13/2018. (lak) (Entered: 08/10/2018)
08/13/2018	<u>146</u>	Motion to Amend/Correct <u>37</u> Pretrial Conference Order, by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. Response due 8/20/2018. (Kilpatrick, Steven) (Entered: 08/13/2018)
08/14/2018	147	** TEXT ONLY ORDER ** State defendants' motion to amend the preliminary pretrial scheduling order (dkt. # <u>146</u>) is GRANTED to the extent that plaintiffs seek compensatory damages at trial. The court will issue a revised scheduling order for a jury trial next week. Signed by District Judge William M. Conley on 8/14/2018. (jls) (Entered: 08/14/2018)
08/22/2018	<u>148</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>141</u> Supplemental Motion for Summary Judgment, filed by Nancy Thompson, J.P. Wieske, Stacey Rolston, Michael S. Farrell, Robert Wimmer, Herschel Day, State of Wisconsin Department of Employee Trust Funds, Theodore Neitzke, Bob Ziegelbauer, Robert J. Conlin, Charles Grapentine, State of Wisconsin Group Insurance Board, Waylon Hurburt, Jennifer Stegall. (Fairweather, Nicholas) (Entered: 08/22/2018)
08/22/2018	<u>149</u>	Response to Additional Proposed Findings of Fact filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>141</u> Supplemental Motion for Summary Judgment. (Fairweather, Nicholas) (Entered: 08/22/2018)
08/23/2018	<u>150</u>	AMENDED Scheduling Order: Rule 26(a)(3) disclosures and Motions in Limine due 9/5/2018. Response to Motion due 9/14/2018. Final Pretrial Conference set for 9/25/2018 at 02:00 PM. Jury Selection and Trial set for 10/9/2018 at 09:00 AM. Signed by District Judge William M. Conley on 8/23/18. (jat) (Entered: 08/23/2018)
08/27/2018	<u>151</u>	Unopposed Motion to Amend Briefing Schedule by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. Motions referred to Magistrate Judge Stephen L. Crocker. (Kilpatrick, Steven) (Entered: 08/27/2018)
08/28/2018	152	** TEXT ONLY ORDER ** ORDER granting <u>151</u> Unopposed Motion to Amend the Pre-Trial Scheduling Order. Signed by Magistrate Judge Stephen L. Crocker on 8/28/18. (jat) (Entered: 08/28/2018)
09/04/2018	<u>153</u>	Notice of Appearance filed by Carolyn M. Wald for Plaintiffs Shannon Andrews, Alina Boyden. (Wald, Carolyn) (Entered: 09/04/2018)
09/04/2018	<u>154</u>	Disregard. To be refiled. Modified on 9/4/2018. (lak) (Entered: 09/04/2018)
09/04/2018	<u>155</u>	Reply in Support of Additional Proposed Findings of Fact filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer re: <u>141</u> Motion for Summary Judgment. (Roth, Colin) Modified on 9/4/2018. (lak) (Entered: 09/04/2018)
09/04/2018	<u>156</u>	Brief in Reply by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer in Support of <u>141</u> Supplemental Motion for Summary Judgment. (Roth, Colin) Modified on 9/5/2018. (lak) (Entered: 09/04/2018)
09/05/2018	<u>157</u>	Motion for Leave to File <i>Supplemental Motion for Summary Judgment</i> by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> Exhibit A – Plaintiffs' Brief in Support of Supplemental Motion for Summary Judgment, # <u>2</u> Exhibit B – Plaintiffs' Proposed Findings of Fact in Support of Supplemental

		Motion for Summary Judgment, # <u>3</u> Exhibit C – Stipulation Regarding GIB Members) (Fairweather, Nicholas) (Entered: 09/05/2018)
09/07/2018	<u>158</u>	Deposition of Stephanie L. Budge taken on 8–22–18. (Kilpatrick, Steven) (Entered: 09/07/2018)
09/07/2018	<u>159</u>	Deposition of Loren Schechter taken on 8–23–18. (Kilpatrick, Steven) (Entered: 09/07/2018)
09/07/2018	<u>160</u>	Rule 26(a)(3) Pretrial Disclosures by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> See <u>185</u> .) (Fairweather, Nicholas) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>161</u>	Proposed Jury Instructions – Liability and Damages by Plaintiffs Shannon Andrews, Alina Boyden, (Attachments: # <u>1</u> See <u>186</u> .) (Fairweather, Nicholas) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>162</u>	Proposed Special Verdict – Liability by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>163</u>	Proposed Special Verdict – Damages by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>164</u>	Notice by Plaintiffs Shannon Andrews, Alina Boyden of <i>Proposed Expert Witness Narrative Statement – Stephanie Budge, Ph.D.</i> (Fairweather, Nicholas) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>165</u>	Notice by Plaintiffs Shannon Andrews, Alina Boyden of <i>Proposed Expert Witness Narrative Statement – Loren S. Schechter, M.D.</i> (Fairweather, Nicholas) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>166</u>	Notice by Plaintiffs Shannon Andrews, Alina Boyden of <i>Proposed Expert Witness Narrative Statement – Joan C. Barrett.</i> (Fairweather, Nicholas) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>167</u>	Motion for Attorney Conducted Voir Dire <i>and Brief in Support</i> by Plaintiffs Shannon Andrews, Alina Boyden. Response due 9/14/2018. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>168</u>	Proposed Voir Dire by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>169</u>	Motion in Limine to <i>Exclude Evidence or Testimony from Dr. Lawrence S. Mayer</i> by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>170</u>	Brief in Support of <u>169</u> Motion in Limine to <i>Exclude Evidence or Testimony from Dr. Lawrence S. Mayer</i> by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>171</u>	Declaration of Carolyn M. Wald filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>169</u> Motion in Limine, (Attachments: # <u>1</u> Exhibit A – About EPPC, Ethics & Public Policy Center, # <u>2</u> Exhibit B – Letter From Researchers and Experts on New Atlantis Report, # <u>3</u> Exhibit C – Advocate Article: New 'Scientific' Study on Sexuality, Gender is Neither New nor Scientific, # <u>4</u> Exhibit D – Faculty Biography of Paul W. Hruz, M.D., Ph.D., # <u>5</u> Exhibit E – Amicus Brief – Gloucester County School Board v. G.G., # <u>6</u> Exhibit F – Southern Poverty Law Center Article: Meet the Anti-LGBT Hate Group that Filed an Amicus Brief, # <u>7</u> Exhibit G – Memorandum from the American College of Pediatricians: A Medical Response to DOE and DOJ Guidance for Schools, # <u>8</u> Exhibit H – Proto Magazine Article: Crossing Over, # <u>9</u> Exhibit I – City Pages Article: University of Minnesota Professor's Research Hijacked,

		# <u>10</u> Exhibit J – Medicare Decision Memo for Gender Dysphoria and Gender Reassignment Surgery) (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>172</u>	Declaration of Stephanie Budge, Ph.D. filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>169</u> Motion in Limine. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>173</u>	Motion in Limine <i>to Exclude Evidence or Testimony from David V. Williams and Brief in Support of Motion</i> by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/07/2018)
09/07/2018	<u>174</u>	Disregard. See <u>190</u> . Modified on 9/11/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>175</u>	Disregard. See <u>187</u> . (<u>Sealed Document</u>) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>176</u>	Disregard. See <u>191</u> . Modified on 9/11/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>177</u>	Disregard. See <u>189</u> . (<u>Sealed Document</u>) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>178</u>	Motions in Limine (<i>Nos. 4–5</i>) <i>to Exclude Certain Testimony of Drs. Budge and Schechter</i> by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/07/2018	<u>179</u>	Witness List by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer (Kilpatrick, Steven) Modified on 9/25/2018: See <u>210</u> for Amended Witness List. (lak) (Entered: 09/07/2018)
09/07/2018	<u>180</u>	Exhibit List by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) Modified on 9/10/2018: Unnumbered. (lak) Modified on 9/25/2018: See <u>209</u> for Amended Exhibit List. (lak) (Entered: 09/07/2018)
09/07/2018	<u>181</u>	Proposed Jury Instructions – Liability by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) (Entered: 09/07/2018)
09/07/2018	<u>182</u>	Proposed Special Verdict – Liability and Damages by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer (Kilpatrick, Steven) (Entered: 09/07/2018)
09/07/2018	<u>183</u>	Proposed Voir Dire by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer (Kilpatrick, Steven) (Entered: 09/07/2018)
09/07/2018	<u>184</u>	Notice by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer <i>of Proposed Expert Witnesses Narrative Statements</i> . (Kilpatrick, Steven) Modified on 9/10/2018. (lak) (Entered: 09/07/2018)
09/10/2018	<u>185</u>	Exhibit List by Plaintiffs Shannon Andrews, Alina Boyden. (lak) Modified on 9/25/2018: See <u>212</u> for Amended Exhibit List. (lak) (Entered: 09/10/2018)

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09/10/2018	<u>186</u>	Memorandum in Support of <u>161</u> Proposed Jury Instructions, by Plaintiffs Shannon Andrews, Alina Boyden. (lak) (Entered: 09/10/2018)
09/10/2018	<u>187</u>	Motions in Limine (<i>Nos. 1-4</i>) to Exclude Evidence of Various Damages (<u>Sealed Document</u>) by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) Modified on 9/10/2018. (lak) (Entered: 09/10/2018)
09/10/2018	<u>188</u>	Disregard. See <u>190</u> . Modified on 9/11/2018. (lak) (Entered: 09/10/2018)
09/10/2018	<u>189</u>	Declaration of Colin T. Roth filed by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer re: <u>187</u> Motions in Limine, (<u>Sealed Document</u>) (Attachments: # <u>1</u> Exhibit A – Plaintiff's Response to Defendant's Second Set of Interrogatories, # <u>2</u> Exhibit B – Plaintiff's Disc. PL000340)) (Kilpatrick, Steven) Modified on 9/10/2018. (lak) (Entered: 09/10/2018)
09/10/2018	<u>190</u>	Redaction to <u>187</u> Motions in Limine to Exclude Evidence of Various Damages (<u>Sealed Document</u>) by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) (Entered: 09/10/2018)
09/10/2018	<u>191</u>	Redaction to <u>189</u> Declaration of <i>Colin T. Roth</i> by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer, (Attachments: # <u>1</u> Exhibit A – Plaintiff's Response to Defendant's Second Set of Interrogatories, # <u>2</u> Exhibit B – Plaintiff's disc. PL000340) (Kilpatrick, Steven) (Entered: 09/10/2018)
09/14/2018	<u>192</u>	Response to Proposed Liability and Damages Jury Instructions by Plaintiffs Shannon Andrews, Alina Boyden (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>193</u>	Response to Proposed Special Verdict by Plaintiffs Shannon Andrews, Alina Boyden (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>194</u>	Response to Proposed Voir Dire by Plaintiffs Shannon Andrews, Alina Boyden (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>195</u>	Plaintiffs' Response to Defendants' Narrative Statement of Expert Witness Qualifications. (Fairweather, Nicholas) Modified on 9/17/2018 (jls). (Entered: 09/14/2018)
09/14/2018	<u>196</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>178</u> Motion in Limine, filed by Nancy Thompson, J.P. Wieske, Stacey Rolston, Michael S. Farrell, Robert Wimmer, Herschel Day, State of Wisconsin Department of Employee Trust Funds, Theodore Neitzke, Bob Ziegelbauer, Robert J. Conlin, Charles Grapentine, State of Wisconsin Group Insurance Board, Waylon Hurburt, Jennifer Stegall (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>197</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>178</u> Motion in Limine, filed by Nancy Thompson, J.P. Wieske, Stacey Rolston, Michael S. Farrell, Robert Wimmer, Herschel Day, State of Wisconsin Department of Employee Trust Funds, Theodore Neitzke, Bob Ziegelbauer, Robert J. Conlin, Charles Grapentine, State of Wisconsin Group Insurance Board, Waylon Hurburt, Jennifer Stegall (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>198</u>	Brief in Opposition by Plaintiffs Shannon Andrews, Alina Boyden re: <u>187</u> Motion in Limine, filed by Nancy Thompson, J.P. Wieske, Stacey Rolston, Michael S. Farrell, Robert Wimmer, Herschel Day, State of Wisconsin Department of Employee Trust Funds, Theodore Neitzke, Bob Ziegelbauer, Robert J. Conlin, Charles Grapentine,

		State of Wisconsin Group Insurance Board, Waylon Hurburt, Jennifer Stegall (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>199</u>	Declaration of Nicholas E. Fairweather filed by Plaintiffs Shannon Andrews, Alina Boyden re: <u>187</u> Motion in Limine, (Attachments: # <u>1</u> Exhibit A – Defendants' Responses and Objections to Plaintiffs' Second Set of Requests for Production of Documents and Things, # <u>2</u> Exhibit B – EFT Website) (Fairweather, Nicholas) (Entered: 09/14/2018)
09/14/2018	<u>200</u>	Brief in Opposition by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer re: <u>173</u> Motion in Limine filed by Alina Boyden, Shannon Andrews (Kilpatrick, Steven) (Entered: 09/14/2018)
09/14/2018	<u>201</u>	Brief in Opposition by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer re: <u>169</u> Motion in Limine filed by Alina Boyden, Shannon Andrews (Kilpatrick, Steven) (Entered: 09/14/2018)
09/14/2018	<u>202</u>	Response to Proposed Liability and Damages Jury Instructions <i>and Special Verdict Form</i> by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer (Kilpatrick, Steven) (Entered: 09/14/2018)
09/14/2018	<u>203</u>	Response to Proposed Voir Dire by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer (Kilpatrick, Steven) (Entered: 09/14/2018)
09/14/2018	<u>204</u>	Objection to Rule 26(a)(3) Designations by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer (Kilpatrick, Steven) (Entered: 09/14/2018)
09/14/2018	<u>205</u>	Defendants' Objections to plaintiffs' expert witness narrative statements. (Kilpatrick, Steven) Modified on 9/17/2018 (jls). (Entered: 09/14/2018)
09/17/2018	<u>206</u>	Brief in Opposition by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer re: <u>157</u> Motion for Leave to File, filed by Alina Boyden, Shannon Andrews. (Kilpatrick, Steven) (Entered: 09/17/2018)
09/18/2018	<u>207</u>	ORDER granting in part and denying in part defendants' <u>80</u> Motion for Summary Judgment and <u>141</u> Supplemental Motion for Summary Judgment. The motions are granted as to defendants' argument that the individual defendants are entitled to qualified immunity against plaintiffs' Equal Protection claim asserted against those defendants in their individual capacity. The motions are denied in all other respects; granting plaintiffs' <u>95</u> Motion for Partial Summary Judgment; denying defendants' <u>124</u> Motion to Strike Plaintiffs' Supplemental Expert Reports; denying defendants' <u>138</u> Motion to Strike Plaintiffs' Second Supplemental Expert Witness Reports; and denying as moot plaintiffs' <u>157</u> Motion for Leave to File Supplemental Motion for Summary Judgment. Signed by District Judge William M. Conley on 9/18/2018. (jls) (Entered: 09/18/2018)
09/20/2018	<u>208</u>	** TEXT ONLY ORDER ** At the end of its opinion and order on the parties' respective motions for summary judgment, the court alluded to the availability of punitive damages under Title VII. In

		doing so, the court failed to note, as it had previously, that plaintiffs withdrew a claim to punitive damages under Title VII in response to an earlier motion to dismiss. (See Pls.' Br. (dkt. # <u>39</u>) 23 n.11 ("Plaintiffs also agree that the punitive damages claims under Title VII against the State Defendants (Defs.' Br. at 22) may be dismissed."); 5/11/18 Op. & Order (dkt. # <u>67</u>) 4 (acknowledging plaintiffs' withdrawal of claim).) Accordingly, no question of punitive damages will be submitted to the jury. The court thought it might be helpful to clarify this in advance of the final pretrial conference next Tuesday. Signed by District Judge William M. Conley on 9/20/2018. (jls) (Entered: 09/20/2018)
09/24/2018	<u>209</u>	Amended Exhibit List by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) (Entered: 09/24/2018)
09/24/2018	<u>210</u>	Amended Witness List by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) (Entered: 09/24/2018)
09/24/2018	<u>211</u>	Amended Witness List by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/24/2018)
09/24/2018	<u>212</u>	Amended Exhibit List by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/24/2018)
09/24/2018	<u>213</u>	ORDER denying <u>167</u> Motion for Attorney Conducted Voir Dire; denying as moot plaintiffs' <u>169</u> Motion in Limine to Exclude Evidence or Testimony from Dr. Lawrence S. Mayer; denying as moot plaintiffs' <u>173</u> Motion in Limine to Exclude Evidence or Testimony from David V. Williams; granting in part and denying in part defendants' <u>187</u> Motion in Limine (Nos. 1-4) to Exclude Evidence of Various Damages; and denying as moot defendants' <u>178</u> Motion in Limine (Nos. 4-5) to Exclude Certain Testimony of Drs. Budge and Schechter. Signed by District Judge William M. Conley on 9/24/2018. (jls) (Entered: 09/24/2018)
09/25/2018	<u>214</u>	Minute Entry for proceedings held before District Judge William M. Conley: Final Pretrial Conference held on 9/25/2018. 14 jurors will be called forward. 8 jurors will be empaneled. [1:03] Attention: In the event of a settlement of this matter over the weekend, counsel are advised to contact the Clerk of Court at (608) 287-4875 or the Chief Deputy Clerk at (608) 354-8004. (Court Reporter JD.) (voc) (Entered: 09/25/2018)
09/25/2018	<u>215</u>	Final Pretrial Conference Order. Signed by District Judge William M. Conley on 9/25/2018. (voc) (Entered: 09/25/2018)
09/25/2018		Set/Reset Hearings: Telephone Conference set for 10/4/2018 at 10:00 AM before Judge William M. Conley. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5087. (voc) (Entered: 09/25/2018)
09/27/2018	<u>216</u>	Proposed Special Verdict – Damages (<i>Amended</i>) by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) (Entered: 09/27/2018)
09/27/2018	<u>217</u>	Proposed Jury Instructions – Damages (<i>Additional Language to Introductory Instructions</i>) by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) Modified on 9/28/2018. (lak) (Entered: 09/27/2018)
09/27/2018	<u>218</u>	Proposed Jury Instructions – Damages (<i>Proposed Amendments</i>) by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/27/2018)

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09/27/2018	<u>219</u>	Memorandum in Support of Proposed Jury Instructions by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 09/27/2018)
09/28/2018	<u>220</u>	Brief in Support of Proposed Voir Dire by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Kilpatrick, Steven) Modified on 10/1/2018. (lak) (Entered: 09/28/2018)
09/28/2018	<u>221</u>	Amended Proposed Voir Dire by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) Modified on 10/1/2018. (lak) (Entered: 09/28/2018)
10/01/2018	<u>222</u>	Joint Proposed Jury Instructions – Damages by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 10/01/2018)
10/01/2018	<u>223</u>	Objections to Trial Exhibits by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 10/01/2018)
10/01/2018	<u>224</u>	Response to Proposed Special Verdict by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 10/01/2018)
10/01/2018	<u>225</u>	Objections to <u>217</u> Proposed Jury Instructions, by Plaintiffs Shannon Andrews, Alina Boyden. (Fairweather, Nicholas) (Entered: 10/01/2018)
10/01/2018	<u>226</u>	Response to Proposed Damages Jury Instructions by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Roth, Colin) (Entered: 10/01/2018)
10/01/2018	<u>227</u>	Objections to Trial Exhibits by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer. (Roth, Colin) (Entered: 10/01/2018)
10/03/2018	<u>228</u>	Joint Notice by Plaintiffs Shannon Andrews, Alina Boyden of <i>Stipulations Regarding Exhibits</i> . (Fairweather, Nicholas) Modified on 10/4/2018. (lak) (Entered: 10/03/2018)
10/04/2018		Minute Entry for proceedings held before District Judge William M. Conley: Telephone Status Conference held on 10/4/2018 [1:10] (Court Reporter JD.) (skv) (Entered: 10/04/2018)
10/04/2018	<u>229</u>	** TEXT ONLY ORDER ** The court held a telephonic conference today at which the parties appeared by counsel. As discussed on the record, the court will hold an in-person conference on Tuesday, October 9, 2018, at 8:30 a.m., before the start of jury selection at 9:00 a.m. By 4:30 p.m., tomorrow, Friday, October 5, 2018, the parties may file briefs on whether defendants should be able to argue that a third-party provider might not have approved gender-confirming surgery. Signed by District Judge William M. Conley on 10/4/2018. (jls) (Entered: 10/04/2018)
10/05/2018	<u>230</u>	Brief by Plaintiffs Shannon Andrews, Alina Boyden <i>in Support of Precluding Defendants from Arguing that a Third-Party Health Plan Might Not Have Covered Gender Confirming Surgery Even in the Absence of the Exclusion</i> . (Fairweather, Nicholas) (Entered: 10/05/2018)
10/05/2018	<u>231</u>	Brief by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer <i>Regarding Plaintiffs' Burden to Prove Causation in Order to Obtain Damages</i> . (Roth, Colin) Modified on 10/8/2018: Last page is blank. (lak) (Entered: 10/05/2018)
10/08/2018	<u>232</u>	ORDER on Supplemental Briefing on Causation. Signed by District Judge William M. Conley on 10/8/2018. (Attachments: # <u>1</u> Exhibit Closing Instructions, # <u>2</u> Exhibit Damages Verdict Form) (bgw) (Entered: 10/08/2018)

Case: 18-3408 Document: 1-1 Filed: 11/09/2018 Pages: 116		
10/09/2018		Set/Reset Trial Date: 2nd Day Jury Trial set for 10/10/2018 at 08:30 AM. (voc) (Entered: 10/09/2018)
10/09/2018	<u>233</u>	Minute Entry for proceedings held before District Judge William M. Conley: Jury Selection and First Day of Trial held on 10/9/2018. Trial continues. [7:19] (Court Reporter CS/JD.) (voc) (Entered: 10/09/2018)
10/10/2018	<u>234</u>	Minute Entry for proceedings held before District Judge William M. Conley: 2nd Day Jury Trial held on 10/10/2018. Damages verdict returned in favor of plaintiff Alina Boyden in the amount of \$301,000.00 and plaintiff Shannon Andrews in the amount of \$479,500.00[3:39] (Court Reporter JD/CS.) (aw/voc) (Entered: 10/11/2018)
10/11/2018	<u>235</u>	Introductory Jury Instructions. (voc) (Entered: 10/11/2018)
10/11/2018	<u>236</u>	Closing Jury Instructions. (voc) (Entered: 10/11/2018)
10/11/2018	<u>237</u>	Deliberation Jury Instructions. (voc) (Entered: 10/11/2018)
10/11/2018	<u>238</u>	Jury Verdict – Damages: Verdict returned in favor of Plaintiff Alina Boyden in the amount of \$301,000.00 and plaintiff Shannon Andrews in the amount of \$479,500.00. (voc) (Entered: 10/11/2018)
10/11/2018	<u>239</u>	Orientation Remarks and Voir Dire. (voc) (Entered: 10/11/2018)
10/11/2018	<u>240</u>	JUDGMENT in favor of Alina Boyden in the amount of \$301,000; in favor of Shannon Andrews in the amount of \$479,500.00; enjoining defendants from enforcing the State of Wisconsin's exclusion of coverage for "[p]rocedures, services and supplies related to surgery and sex hormones associated with gender reassignment" from health insurance coverage provided to state employees; and dismissing claims against defendants Board of Regents of the University of Wisconsin System, Raymond W. Cross, Rebecca M. Blank, University of Wisconsin School of Medicine and Public Health, Robert N. Golden, and Dean Health Plan. (WMC /PAO) (Entered: 10/11/2018)
10/16/2018	<u>241</u>	Notice by Plaintiffs Shannon Andrews, Alina Boyden <i>Counsel for Plaintiffs' Request for Leave to Contact Jurors</i> . (Fairweather, Nicholas) Modified on 10/17/2018 (jls). (Entered: 10/16/2018)
10/17/2018	<u>242</u>	Letter from the court regarding counsel for plaintiffs' request for leave to contact jurors. (jls) (Entered: 10/17/2018)
10/19/2018	<u>243</u>	Joint Motion for Extension of Time to <i>File Motion for Attorney Fees Bill of Costs</i> by Plaintiffs Shannon Andrews, Alina Boyden. Motions referred to Magistrate Judge Stephen L. Crocker. (Dupuis, Laurence) (Entered: 10/19/2018)
10/19/2018	<u>244</u>	Stipulation to Extend Time to File Motion for Attorney Fees Bill of Costs by Plaintiffs Shannon Andrews, Alina Boyden. (Dupuis, Laurence) (Entered: 10/19/2018)
10/22/2018	245	** TEXT ONLY ORDER ** The parties' joint motion to extend the deadline for filing a motion for attorneys' fees and costs and a bill of costs, as set forth in the parties' stipulation, (dkt. ## <u>243</u> , <u>244</u>), is GRANTED. Signed by Magistrate Judge Stephen L. Crocker on 10/22/2018. (jls) (Entered: 10/22/2018)
11/09/2018	<u>246</u>	NOTICE OF APPEAL by Defendants Robert J. Conlin, Herschel Day, Michael S. Farrell, Charles Grapentine, Waylon Hurburt, Theodore Neitzke, Stacey Rolston, State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Jennifer Stegall, Nancy Thompson, J.P. Wieske, Robert Wimmer, Bob Ziegelbauer as to <u>240</u> Judgment. Filing fee of \$ 505, receipt number 0758-2356288, paid. Docketing Statement filed. (Attachments: # <u>1</u> Exhibit – Final Judgment, # <u>2</u> Docketing Statement) (Kilpatrick, Steven) Modified on 11/9/2018. (lak) (Entered: 11/09/2018)
11/09/2018	<u>247</u>	Appeal Information Packet. (lak) (Entered: 11/09/2018)
11/09/2018	<u>248</u>	Transmission of Notice of Appeal, Docketing Statement, Judgment and Docket Sheet to Seventh Circuit Court of Appeals re: <u>246</u> Notice of Appeal, (Attachments: # <u>1</u> Docketing Statement, # <u>2</u> Judgment,

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF CASE OPENING

November 9, 2018

No. 18-3408	<p>ALINA BOYDEN, et al., Plaintiffs - Appellees</p> <p>v.</p> <p>ROBERT J. CONLIN, in his individual and official capacity as Secretary of the Department of Employee Trust Funds, et al., Defendants - Appellants</p>
Originating Case Information:	
<p>District Court No. 3:17-cv-00264-wmc Western District of Wisconsin Clerk/Agency Rep Peter Oppeneer District Judge William M. Conley Court Reporter Jennifer L. Dobbratz</p> <p>Case filed: 11/09/2018 Case type: cv/pri Fee status: Paid Date of Judgment: 10/11/2018 Date NOA filed: 11/09/2018</p>	

The above-captioned appeal has been docketed in the United States Court of Appeals for the Seventh Circuit.

Deadlines:

<u>Appeal No.</u>	<u>Filer</u>	<u>Document</u>	<u>Due Date</u>
18-3408	Robert J. Conlin	Transcript information sheet	11/23/2018
18-3408	Michael S. Farrell	Transcript information sheet	11/23/2018

18-3408	Stacey Rolston	Transcript information sheet	11/23/2018
18-3408	Wisconsin Department of Employee Trust Funds	Transcript information sheet	11/23/2018
18-3408	Wisconsin Group Insurance Board	Transcript information sheet	11/23/2018
18-3408	Robert J. Conlin	Appellant's brief	12/19/2018
18-3408	Michael S. Farrell	Appellant's brief	12/19/2018
18-3408	Stacey Rolston	Appellant's brief	12/19/2018
18-3408	Wisconsin Department of Employee Trust Funds	Appellant's brief	12/19/2018
18-3408	Wisconsin Group Insurance Board	Appellant's brief	12/19/2018

NOTE: This notice is issued to counsel of record, in furtherance of the revised *Circuit Rule 3(d)*, to provide necessary information regarding this appeal. Please verify this notice for accuracy. Counsel are encouraged to provide a fax and/or e-mail address to the court. If any corrections are necessary, please indicate those corrections on this notice and return it to the Clerk's Office within ten (10) days.

THIS NOTICE SHALL NOT ACT AS A SUBSTITUTE FOR MOTIONS FOR NON-INVOLVEMENT / SUBSTITUTION OF COUNSEL. COUNSEL ARE STILL REQUIRED TO FILE THE APPROPRIATE MOTIONS.

Important Scheduling Notice!

Hearing notices are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals are scheduled after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your appeal might be scheduled, please write the clerk advising him of the time period and the reason for your unavailability. The court's calendar is located at <http://www.ca7.uscourts.gov/cal/argcalendar.pdf>. Once an appeal has been scheduled for oral argument, it is very difficult to have the date changed. See Cir.R. 34(e).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Phone: (312) 435-5850
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NOTICE OF DOCKETING - Short Form

November 9, 2018

To: Peter Oppeneer
Clerk of Court

The below captioned appeal has been docketed in the United States Court of Appeals for the Seventh Circuit:

Appellate Case No: 18-3408

Caption:
ALINA BOYDEN, et al.,
Plaintiffs - Appellees

v.

ROBERT J. CONLIN, in his individual and official capacity as
Secretary of the Department of Employee Trust Funds, et al.,
Defendants - Appellants

District Court No: 3:17-cv-00264-wmc
Clerk/Agency Rep Peter Oppeneer
District Judge William M. Conley
Court Reporter Jennifer L. Dobbratz

Date NOA filed in District Court: 11/09/2018

If you have any questions regarding this appeal, please call this office.

form name: **c7_Docket_Notice_short_form**(form ID: 188)