

Sager, M.D., 30(b)(6), Julie A.

April 16, 2019

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

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CODY FLACK, SARA ANN MAKENZIE,

MARIE KELLY, and

COURTNEY SHERWIN,

Plaintiffs,

-vs-

Cause No.

3:18-CV-00309-WMC

WISCONSIN DEPARTMENT OF

HEALTH SERVICES and
LINDA SEEMEYER, in her official
capacity as Secretary of the
Wisconsin Department of
Health Services,

Defendants.

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30(b)(6) DEPOSITION of JULIE A. SAGER, MD, a
witness of lawful age, taken on behalf of the Plaintiffs,
wherein Cody Flack, et al., are Plaintiffs, and
Wisconsin Department of Health Services, et al., are
Defendants, pending in the United States District
Court for the Western District of Wisconsin, pursuant
to notice, before Taunia Northouse, a Registered
Diplomate Reporter and Notary Public in and for the
State of Wisconsin, at the offices of State of
Wisconsin Department of Justice, 17 West Main Street,
in the City of Madison, County of Dane, and State of
Wisconsin, on the 16th day of April 2019, commencing
at 9:15 in the forenoon.

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2 (Pages 2 to 5)

<p style="text-align: right;">2</p> <p style="text-align: center;">A P P E A R A N C E S</p> <p>1 JOSEPH J. WARDENSKI, Attorney 2 RELMAN, DANE & COLFAX 3 1225 19th Street NW, Suite 600, Washington, D.C. 4 20036, appearing on behalf of the Plaintiffs. 5 jwardenski@relmanlaw.com 202-728-1888 6</p> <p>7</p> <p>8 ROBERT THEINE PLEDL, Attorney 9 DAVIS & PLEDL, S.C. 10 1433 North Water Street, Suite 400, Milwaukee, 11 Wisconsin 53202, appearing on behalf of the 12 Plaintiffs. 13 rockpled@gmail.com 414-488-1354 14</p> <p>15 JODY J. SCHMELZER and STEVEN C. KILPATRICK, 16 Assistant Attorneys General 17 STATE OF WISCONSIN DEPARTMENT OF JUSTICE 18 17 West Main Street, P.O. Box 7857, Madison, 19 Wisconsin 53707-7857, appearing on behalf of the 20 Defendants. 21 schmelzer@doj.state.wi.us 608-266-3094 22 kilpatricksc@doj.state.wi.us 608-266-1792 23</p> <p>24 Also present: Lora Higgins, MD, and 25 Fratney Miller</p>	<p style="text-align: right;">4</p> <p>1 JULIE A. SAGER, MD, 2 called as a witness, being first duly sworn, 3 testified on oath as follows: 4</p> <p style="text-align: center;">E X A M I N A T I O N</p> <p>5</p> <p>6 By Mr. Wardenski: 7 Q Good morning, Dr. Sager. Can you state your full 8 name for the record. 9 A Julie Ann Sager. 10 Q And good morning. My name is Joseph Wardenski. 11 I'm one of the attorneys for the plaintiffs in 12 this case, Flack v. Wisconsin Department of Health 13 Services. And this is a Rule 30(b)(6) deposition 14 of DHS. Do you understand what that means? 15 A Yes. I've -- it was explained by the lawyers 16 yesterday. 17 Q So what's your understanding of what that is? 18 A My understanding is that this is an 19 informational -- actually, maybe I don't 20 understand it quite as well. 21 Q It matches your understanding. And we'll cover 22 some ground rules? 23 A Okay. 24 Q A Rule 30(b)(6) deposition is of the agency 25 itself, and you and potentially Dr. Wiggins will</p>																																											
<p style="text-align: right;">3</p> <p style="text-align: center;">I N D E X</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">WITNESS</td> <td style="width: 20%; text-align: right;">Page(s)</td> </tr> <tr> <td>JULIE A. SAGER, MD</td> <td></td> </tr> <tr> <td style="padding-left: 20px;">Examination by Mr. Wardenski</td> <td style="text-align: right;">4</td> </tr> </table> <p>6</p> <p style="text-align: center;">E X H I B I T S</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">No.</td> <td style="width: 60%;">Description</td> <td style="width: 30%; text-align: right;">Identified</td> </tr> <tr> <td>10</td> <td>Exhibit 1 Letter from Michael Heifetz 1-4-17</td> <td style="text-align: right;">32</td> </tr> <tr> <td>11</td> <td>Exhibit 2 Timeline of internal handling of</td> <td style="text-align: right;">34</td> </tr> <tr> <td>12</td> <td style="padding-left: 20px;">gender conforming surgical requests</td> <td></td> </tr> <tr> <td>13</td> <td style="padding-left: 20px;">within Wisconsin Medicaid fee for</td> <td></td> </tr> <tr> <td>14</td> <td style="padding-left: 20px;">service</td> <td></td> </tr> <tr> <td>16</td> <td>Exhibit 3 Letter from Julie Sager, MD</td> <td style="text-align: right;">48</td> </tr> <tr> <td>17</td> <td style="padding-left: 20px;">9-25-17</td> <td></td> </tr> <tr> <td>18</td> <td style="text-align: center;">=====</td> <td></td> </tr> <tr> <td>19</td> <td style="padding-left: 20px;">(Attached to the original transcript</td> <td></td> </tr> <tr> <td>20</td> <td style="padding-left: 20px;">and copies provided to all counsel)</td> <td></td> </tr> </table> <p>22</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">REQUESTS</td> <td style="width: 20%; text-align: right;">Page</td> </tr> <tr> <td>23 1 Organizational chart</td> <td style="text-align: right;">13</td> </tr> </table> <p>25 =====</p>	WITNESS	Page(s)	JULIE A. SAGER, MD		Examination by Mr. Wardenski	4	No.	Description	Identified	10	Exhibit 1 Letter from Michael Heifetz 1-4-17	32	11	Exhibit 2 Timeline of internal handling of	34	12	gender conforming surgical requests		13	within Wisconsin Medicaid fee for		14	service		16	Exhibit 3 Letter from Julie Sager, MD	48	17	9-25-17		18	=====		19	(Attached to the original transcript		20	and copies provided to all counsel)		REQUESTS	Page	23 1 Organizational chart	13	<p style="text-align: right;">5</p> <p>1 be representatives of the agency. Is that your 2 understanding? 3 A Yes. Thank you. 4 Q Okay. Have you ever been deposed before, 5 Dr. Sager? 6 A I have. 7 Q So you're familiar with the process? 8 A Actually, it was some time ago. 9 Q Okay. 10 A And it wasn't by opposing counsel. It was in 11 support. 12 Q Okay. So let me give you some basic ground rules. 13 So the purpose of a deposition is to take 14 testimony as if we were in court. And you were 15 sworn under oath that the testimony you'll give is 16 truthful; is that right? 17 A Correct. 18 Q And the format is I will ask you questions and you 19 will answer them, and I just ask that you give 20 complete answers. Does that make sense? 21 A It does. 22 Q And for the purposes of the court reporter -- and 23 you're doing well so far, give -- you know, to the 24 extent it's a yes, no question, answer yes or no 25 rather than nodding or saying uh-huh or things</p>
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6	<p>1 like that which are hard to take down; okay?</p> <p>2 A Yes.</p> <p>3 Q And if there's anything that you don't understand,</p> <p>4 if you need me to rephrase a question, that's</p> <p>5 fine. Just ask and I will do my best to ask it</p> <p>6 another way or restate it. Okay?</p> <p>7 A Okay.</p> <p>8 Q And hopefully we won't go, you know, super long</p> <p>9 today, but if you need a break at any point, just</p> <p>10 let me know. That should be fine. We can take a</p> <p>11 short break for the restroom or anything else. My</p> <p>12 only request is that if I've asked you a question,</p> <p>13 that you finish answering that question before we</p> <p>14 take a break. Does that work for you?</p> <p>15 A Yes.</p> <p>16 Q Okay. So, Dr. Sager, can you tell me your</p> <p>17 position -- you're employed by DHS; correct?</p> <p>18 A Correct.</p> <p>19 Q And what is your position at DHS?</p> <p>20 A I'm a medical director.</p> <p>21 Q And what part of DHS do you work in?</p> <p>22 A I'm -- I work for the Bureau of Benefits</p> <p>23 Management, which is in the Division of Medicaid</p> <p>24 Services.</p> <p>25 Q And can you explain to me what the Bureau does?</p>	8	<p>1 Q And there's also a provision of the state Medicaid</p> <p>2 regulations -- I believe it's 107.10(4) -- that</p> <p>3 lists -- we can talk about this more later too,</p> <p>4 but that lists gender-confirming hormones as an</p> <p>5 excluded pharmaceutical; is that correct?</p> <p>6 A I think for clarification it lists it as medically</p> <p>7 unnecessary hormone treatment.</p> <p>8 Q Okay.</p> <p>9 A But I don't have the exact language in front of</p> <p>10 me.</p> <p>11 Q So we'll talk more about that later. But you're</p> <p>12 familiar with those three provisions of the</p> <p>13 Medicaid regulations; correct?</p> <p>14 A Yes.</p> <p>15 Q And is your office, the Bureau of Benefits</p> <p>16 Management, responsible for the enforcement of</p> <p>17 those provisions?</p> <p>18 A Yes.</p> <p>19 Q And for ease of discussing them today, I'm just</p> <p>20 going to call it the challenged exclusion but</p> <p>21 refer to all three things. Does that make sense?</p> <p>22 A That's fine.</p> <p>23 Q So you are a medical director in BBM. What is</p> <p>24 your job function?</p> <p>25 A My job function is to oversee the clinical</p>
7	<p>1 A The Bureau -- the main purpose of the Bureau is</p> <p>2 to -- is for policy design and interpretation and</p> <p>3 implementation of any federal or state rules and</p> <p>4 regulations as they pertain to the Medicaid</p> <p>5 program.</p> <p>6 Q So does that include the enforcement of all</p> <p>7 federal and state Medicaid policies?</p> <p>8 A Yes. May I elaborate?</p> <p>9 Q Sure.</p> <p>10 A I think there are some policies that are enforced</p> <p>11 by other bureaus such as eligibility, contracting,</p> <p>12 fiscal matters. The Bureau of Benefit Management</p> <p>13 really enforces the benefit policy.</p> <p>14 Q So what's involved in that?</p> <p>15 A The creation of coverage guidelines that flesh out</p> <p>16 what is already in statute and administrative</p> <p>17 code.</p> <p>18 Q So are you familiar with the challenged exclusion</p> <p>19 for gender-confirming care that's at issue in this</p> <p>20 case?</p> <p>21 A Yes.</p> <p>22 Q And that is under the Wisconsin Administrative</p> <p>23 Code DHS Section 107.03(23) to (24); is that</p> <p>24 correct?</p> <p>25 A Yes.</p>	9	<p>1 appropriateness and content of the policy that's</p> <p>2 being administered by the Bureau of Benefit</p> <p>3 Management.</p> <p>4 Q So let me take a step back. So are you a medical</p> <p>5 doctor?</p> <p>6 A Yes.</p> <p>7 Q And where did you go to medical school?</p> <p>8 A The University of Auckland, New Zealand.</p> <p>9 Q And you received an MD from that university?</p> <p>10 A Correct.</p> <p>11 Q Did you have other post-graduate medical training?</p> <p>12 A I did. I trained somewhat in New Zealand in</p> <p>13 post-graduate fashion, and then I moved to the</p> <p>14 United States where I took my licensing exams and</p> <p>15 was accepted into a residency program for family</p> <p>16 medicine at Brown University, and I completed a</p> <p>17 residency in family medicine at Brown. And then I</p> <p>18 was board certified on completion of the</p> <p>19 residency, and I remain board certified until the</p> <p>20 present time.</p> <p>21 Q Did you practice as a family practitioner?</p> <p>22 A Yes.</p> <p>23 Q And how long were you a practicing doctor?</p> <p>24 A I still am a practicing physician. I was in</p> <p>25 primary care for roughly nine years from 2007 to</p>

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10	<p>1 2015, give or take. And then I currently practice</p> <p>2 at UW in a very small appointment with the</p> <p>3 Department of Family Medicine. And that's mainly</p> <p>4 through the urgent care in a seeing patients and</p> <p>5 teaching capacity.</p> <p>6 Q Okay. And so that's a second role in addition to</p> <p>7 your role here at DHS?</p> <p>8 A I'm only employed at DHS as a limited-term</p> <p>9 employee.</p> <p>10 Q What does that mean?</p> <p>11 A That means that I'm a nonbenefited position. I</p> <p>12 have no contract. I work at will. And I work for</p> <p>13 20 hours or less per week. I can't exceed a</p> <p>14 maximum number of hours per year.</p> <p>15 Q I see. And just because she's also here today --</p> <p>16 that is Dr. Lora Wiggins -- what is her job title?</p> <p>17 A Dr. Wiggins is the chief medical officer within</p> <p>18 the BBM, the Bureau of Benefits Management, in the</p> <p>19 Division of Medicaid Services. And she is my --</p> <p>20 we have a working relationship where she is my</p> <p>21 supervisor.</p> <p>22 Q Okay. Do you have similar functions in terms of</p> <p>23 what your responsibilities are?</p> <p>24 A We overlap probably -- you know, we have a large</p> <p>25 overlap between us. She has some additional</p>	12	<p>1 policy when required.</p> <p>2 Q Okay. And with regard to the prior authorization</p> <p>3 staff, how big is that staff in the Bureau?</p> <p>4 A I don't have any line responsibility for that</p> <p>5 staff. So I'm not up-to-date with exactly how</p> <p>6 many staff we have. There is a mixture of staff.</p> <p>7 Some are state employees and some are contractors.</p> <p>8 Dr. Wiggins is a contractor. And there is section</p> <p>9 chief that is responsible directly for those</p> <p>10 clinical staff that review prior authorizations.</p> <p>11 Q And who is that person?</p> <p>12 A Tabitha Ramminger.</p> <p>13 Q And are those all doctors? Does it vary?</p> <p>14 A No. There's no other doctors in the agency apart</p> <p>15 from Dr. Wiggins and myself.</p> <p>16 Q Okay.</p> <p>17 A And recently, we were joined by a third physician.</p> <p>18 Q And who is that?</p> <p>19 A Dr. Steven Tyska.</p> <p>20 Q And what is his role?</p> <p>21 A He's also a medical director.</p> <p>22 Q So before I -- I want to talk mostly about the</p> <p>23 challenge exclusion obviously, but before I want</p> <p>24 to just ask a little bit more background</p> <p>25 information about how Medicaid works and how your</p>
11	<p>1 duties in terms of leadership within the</p> <p>2 organization.</p> <p>3 Q Okay. So how would you describe those duties, the</p> <p>4 different duties that she has as compared to you?</p> <p>5 A I think that Dr. Wiggins had -- or has more</p> <p>6 interaction with the executive management. She</p> <p>7 has more input into the direction of the agency.</p> <p>8 She is asked to provide input on larger projects</p> <p>9 that have clinical impacts.</p> <p>10 Q Okay. And so your day to day or week to week,</p> <p>11 what is typically involved in your role as medical</p> <p>12 director in the 20 hours or so a week that you</p> <p>13 spend at DHS?</p> <p>14 A I have quite a heterogeneous job in a day-to-day</p> <p>15 fashion. I oversee some -- or maybe not oversee.</p> <p>16 I provide input into some external committee and</p> <p>17 board functions that are required for Medicaid,</p> <p>18 such as the Drug Utilization Review Board and the</p> <p>19 pharmacy -- the preferred drug list.</p> <p>20 I liaise with external stakeholders when it's</p> <p>21 clinically relevant. I support the prior</p> <p>22 authorization staff when there are requests that</p> <p>23 are outside written published guidelines or that</p> <p>24 there is some clarification of a clinical nature</p> <p>25 that needs to occur. And I help create clinical</p>	13	<p>1 office fits into the structure.</p> <p>2 A Uh-huh.</p> <p>3 Q So I think at a general level where does BBM fit</p> <p>4 into the sort of overall structure of the Medicaid</p> <p>5 program?</p> <p>6 A Sure. So without an organizational chart in front</p> <p>7 of me, I'm just going to give you some broad</p> <p>8 strokes as I can best describe it and as I best</p> <p>9 understand it.</p> <p>10 Q Sure. And can I ask: Is there an organizational</p> <p>11 chart?</p> <p>12 A Yes.</p> <p>13 Q That may be something we can request afterwards,</p> <p>14 okay.</p> <p>15 A I believe it's published online, actually, in the</p> <p>16 DHS website.</p> <p>17 Q Okay.</p> <p>18 A So BBM is a Bureau, one of several, alongside the</p> <p>19 Bureau of Fiscal Management, Bureau of Contracts,</p> <p>20 Bureau of Eligibility that are underneath the</p> <p>21 program, the sort of three program managers. And</p> <p>22 then above them are two political appointees, the</p> <p>23 Medicaid director and the deputy Medicaid</p> <p>24 director. And so --</p> <p>25 Q Who -- sorry if you said this already, but who is</p>

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<p style="text-align: right;">14</p> <p>1 in charge of the Bureau of Benefits Management?</p> <p>2 A Rachel Currans-Henry was the Bureau director for</p> <p>3 many years, but she resigned in December. I think</p> <p>4 she left potentially in early January. And her</p> <p>5 position is vacant.</p> <p>6 There are two deputy directors underneath</p> <p>7 her: Pamela Appleby and Susan Seibert. And</p> <p>8 Pamela Appleby, the deputy director of the</p> <p>9 Medicaid program -- is it deputy or associate</p> <p>10 maybe -- associate director of programs may be her</p> <p>11 title, she is my boss, my nonclinical boss, my</p> <p>12 manager.</p> <p>13 Q Okay. So Dr. Wiggins is your clinical boss, so to</p> <p>14 speak?</p> <p>15 A So to speak, yeah. That's our relationship.</p> <p>16 Q And Ms. Appleby is your manager?</p> <p>17 A That's right. She has line authority over me,</p> <p>18 yes.</p> <p>19 Q Okay. So I want to talk just for a few minutes</p> <p>20 about how Wisconsin Medicaid is administered to</p> <p>21 beneficiaries. So my understanding is that</p> <p>22 there's two primary ways that someone can be</p> <p>23 enrolled in Medicaid in Wisconsin. One is through</p> <p>24 a fee for service and the other through a</p> <p>25 third-party HMO that offers a Medicaid plan. Is</p>	<p style="text-align: right;">16</p> <p>1 beneficiary that's in fee for service, how is that</p> <p>2 handled when their doctor submits a PA request to</p> <p>3 DHS?</p> <p>4 A So it comes through the staff that we referred to</p> <p>5 before, the PA reviewers. Because if they're an</p> <p>6 HMO member, it would go to their HMO, and the HMO</p> <p>7 would have that functionality in terms of</p> <p>8 reviewing the clinical appropriateness of the</p> <p>9 request. But in fee for service, it does come to</p> <p>10 DHS and is looked at by the PA reviewers.</p> <p>11 Q And what is the background of the PA reviewers?</p> <p>12 A They're all different depending on what benefit</p> <p>13 category they're assigned to. If you're just</p> <p>14 talking about the challenged exclusion?</p> <p>15 Q No. Just -- maybe taking a step back, how do they</p> <p>16 assess prior authorization requests, people on the</p> <p>17 prior authorization staff?</p> <p>18 A So the prior authorization staff typically work</p> <p>19 with the published guidelines. The guidelines</p> <p>20 that are published are a statement from the</p> <p>21 department as to what's covered by the Medicaid</p> <p>22 program. Sometimes the guidelines have a</p> <p>23 description of the type of clinical scenarios that</p> <p>24 might meet the coverage requirements, and it's the</p> <p>25 clinical PA reviewer's job to ascertain whether</p>
<p style="text-align: right;">15</p> <p>1 that accurate?</p> <p>2 A Yes.</p> <p>3 Q So let's talk about the fee-for-service approach</p> <p>4 first. Can you explain to me what that is?</p> <p>5 A Yes. Fee for service is essentially not managed.</p> <p>6 That is administered through the Department of</p> <p>7 Health Services without the aid of a third party</p> <p>8 to act as an intermediary. And the majority of</p> <p>9 our membership is within HMOs, but certainly</p> <p>10 people, depending on their eligibility category,</p> <p>11 can choose to be in fee for service.</p> <p>12 Q What percentage, roughly, of the overall Medicaid</p> <p>13 population is in the fee for service?</p> <p>14 A About 20 percent at this time.</p> <p>15 Q And the 80 percent are in --</p> <p>16 A HMOs.</p> <p>17 Q -- in the HMOs? And in reference to this</p> <p>18 particular case, it's my understanding that</p> <p>19 Cody Flack -- are you familiar with his case?</p> <p>20 A I am.</p> <p>21 Q He is through the fee-for-service program; is that</p> <p>22 right?</p> <p>23 A That's my understanding, yeah. That's my</p> <p>24 recollection.</p> <p>25 Q Now, for a prior authorization request for a</p>	<p style="text-align: right;">17</p> <p>1 the request meets the guideline.</p> <p>2 Q And these are internally developed guidelines by</p> <p>3 DHS?</p> <p>4 A Mostly. We have lots of help with guideline</p> <p>5 development. We have third-party contractors, for</p> <p>6 instance, to help us stay relevant, to make sure</p> <p>7 the evidence is incorporated. And we work within</p> <p>8 the spaces of the statute and the administrative</p> <p>9 code.</p> <p>10 Q I see. So you mentioned this a little bit</p> <p>11 earlier, but when do you become involved in the</p> <p>12 prior authorization process, you or one of the</p> <p>13 other medical directors?</p> <p>14 A When there are requests for which we don't have</p> <p>15 published guidelines.</p> <p>16 Q How often does that come up?</p> <p>17 A Not very often.</p> <p>18 Q So would transitional related health care be one</p> <p>19 of those circumstances?</p> <p>20 A Yes.</p> <p>21 Q And so you've been involved personally in</p> <p>22 reviewing requests for prior authorization for</p> <p>23 treatments for gender dysphoria?</p> <p>24 A Yes.</p> <p>25 Q Hormone treatments?</p>

<p style="text-align: right;">18</p> <p>1 A No.</p> <p>2 Q So surgical treatments only?</p> <p>3 A Yes.</p> <p>4 Q Okay. And just to close the loop on the fee for</p> <p>5 service versus HMOs, so it's my understanding</p> <p>6 there's 15, currently, third-party HMOs that offer</p> <p>7 Medicaid plans; is that right?</p> <p>8 A Yes.</p> <p>9 Q And explain to me how the prior authorization</p> <p>10 process works for them.</p> <p>11 A Well, the reason we involve HMOs is that they can</p> <p>12 oversee and manage and administer the Medicaid</p> <p>13 benefit to their Medicaid eligible population. So</p> <p>14 when a prior authorization comes in, it's reviewed</p> <p>15 by their reviewers so that it meets the published</p> <p>16 guidelines. Typically, or within the contract</p> <p>17 between the state Medicaid agency and the HMOs, we</p> <p>18 set the minimum standard. The HMOs are at liberty</p> <p>19 to provide more than fee for service does, but</p> <p>20 they may not provide less.</p> <p>21 So the requests come to the HMOs; they're</p> <p>22 reviewed by their clinical staff; and they're</p> <p>23 approved or denied.</p> <p>24 Q At that level? At the HMOs?</p> <p>25 A That's right.</p>	<p style="text-align: right;">20</p> <p>1 A That's my position.</p> <p>2 Q So moving on now to the heart of the matter, the</p> <p>3 challenged exclusion, can you explain to me in</p> <p>4 your own words what you understand the exclusion</p> <p>5 to mean and what services that it excludes from</p> <p>6 coverage?</p> <p>7 A Well, the challenged exclusion uses outdated</p> <p>8 language. The exclusion stipulates that</p> <p>9 transsexual surgeries are excluded, but</p> <p>10 "transsexual" is an outdated term that's no longer</p> <p>11 really used in medical language. And I take</p> <p>12 transsexual surgery to mean any surgical</p> <p>13 alteration that changes by logic gender to align</p> <p>14 with gender identity.</p> <p>15 Q Can that include chest surgeries or what's known</p> <p>16 as top surgeries for transgender men and</p> <p>17 transgender women?</p> <p>18 A That's what I would interpret the spirit of that</p> <p>19 language when it was developed in the nineties to</p> <p>20 mean, yes.</p> <p>21 Q And does it include what sometimes is informally</p> <p>22 referred to as bottom surgeries or genital</p> <p>23 reconstruction surgeries on transgender men and</p> <p>24 transgender women?</p> <p>25 A Yep.</p>
<p style="text-align: right;">19</p> <p>1 Q Does your office -- does BBM ever get involved in</p> <p>2 denials or prior authorization requests that are</p> <p>3 handled by an HMO?</p> <p>4 A Yes. When a request is denied by an HMO, the</p> <p>5 Medicaid eligible individual has options as to</p> <p>6 their next steps. One of those options is to</p> <p>7 submit their request to the State to see whether</p> <p>8 their request would have been covered by fee for</p> <p>9 service; in which case contractually the HMO is</p> <p>10 obliged to give them the service.</p> <p>11 Q So one example I saw in some of the documents that</p> <p>12 were produced to us from DHS was that some HMOs</p> <p>13 had denied some forms of hormone treatments, for</p> <p>14 example, and then either the HMO itself or</p> <p>15 potentially through this process a patient</p> <p>16 challenged that or an HMO checked into the policy.</p> <p>17 In that circumstance, does DHS then instruct the</p> <p>18 HMO to cover something like that?</p> <p>19 A So when it's found to be medically necessary and</p> <p>20 it would have been covered in fee for service,</p> <p>21 yes, we compel the HMO to cover it.</p> <p>22 Q And for hormone specifically, for</p> <p>23 gender-confirming hormone treatments, there are</p> <p>24 circumstances where it's medically necessary; is</p> <p>25 that correct?</p>	<p style="text-align: right;">21</p> <p>1 Q Does it include other surgical procedures that may</p> <p>2 treat gender dysphoria?</p> <p>3 A Yes.</p> <p>4 Q So any surgery that may be a treatment for gender</p> <p>5 dysphoria is excluded by this exclusion from</p> <p>6 coverage; is that correct?</p> <p>7 A That's my understanding.</p> <p>8 Q Now, you mentioned that the term "transsexual</p> <p>9 surgery" is outdated. What is the, I guess, the</p> <p>10 correct terminology in your view these days?</p> <p>11 A I think gender-conforming surgery is more</p> <p>12 appropriate.</p> <p>13 Q And why do you say that? What's your basis for</p> <p>14 that?</p> <p>15 A Because the surgery makes alterations to align</p> <p>16 with the gender that the individual identifies</p> <p>17 with.</p> <p>18 Q So the exclusion on its own terms covers both</p> <p>19 surgeries and at least some hormone treatments; is</p> <p>20 that correct?</p> <p>21 A This is my understanding. The language as it</p> <p>22 relates to hormones does say medically</p> <p>23 unnecessary. So my interpretation of that is that</p> <p>24 when hormones are used to treat gender dysphoria,</p> <p>25 they're not medically unnecessary.</p>

Sager, M.D., 30(b)(6), Julie A.

April 16, 2019

7 (Pages 22 to 25)

22	<p>1 Q And so, therefore, the exclusion doesn't apply?</p> <p>2 A Therefore, that DHS wasn't trying to screen out</p> <p>3 hormones from use and misuse.</p> <p>4 Q And that's -- is that both for fee-for-service</p> <p>5 beneficiaries or for everyone?</p> <p>6 A I think that the fee for service, the coverage of</p> <p>7 drugs in the Medicaid program is carved out of the</p> <p>8 HMOs, so all drugs are covered through the</p> <p>9 fee-for-service program except if they're given in</p> <p>10 a hospital.</p> <p>11 Q Okay.</p> <p>12 A And then they're carved into the HMO payments.</p> <p>13 Q So all beneficiaries, regardless of whether</p> <p>14 they're fee for service or on an HMO, their --</p> <p>15 A Drug benefit is administered by the State in a</p> <p>16 fee-for-service manner.</p> <p>17 Q Okay. So the policy for those should be</p> <p>18 consistently applied, generally speaking, across</p> <p>19 all beneficiaries?</p> <p>20 A Correct.</p> <p>21 Q Okay. Do you have something to add to that?</p> <p>22 A I do. The -- the Medicaid population is</p> <p>23 1.2 million, and there are no diagnoses on</p> <p>24 prescriptions. It's not practicable to put in</p> <p>25 place any barriers to screen out hormone use for</p>	24	<p>1 know, I understand may cause some problems for,</p> <p>2 you know, transgender people, transgender men</p> <p>3 seeking hysterectomy, for example, or with respect</p> <p>4 to hormone treatments. Is that right?</p> <p>5 A Yes. So there are -- there are coding edits in</p> <p>6 place in our system. So the majority of our</p> <p>7 claims are handled in an automated fashion.</p> <p>8 They're not touched by a human. And so there are</p> <p>9 codes -- code edits that are put into the system</p> <p>10 to ensure that the correct codes are used.</p> <p>11 They're not there to enforce the challenged</p> <p>12 exclusion. They're there for all sorts of reasons</p> <p>13 to ensure that the correct coding is being</p> <p>14 submitted to this big Medicaid automated payment</p> <p>15 system. And some of them, I believe, were gender</p> <p>16 edits. But that's -- they weren't put in on</p> <p>17 purpose for the purpose of operationalizing the</p> <p>18 exclusion.</p> <p>19 Q They might have had the same effect sometimes?</p> <p>20 A I agree, yes.</p> <p>21 Q Now, has that been eliminated within the</p> <p>22 fee-for-service system?</p> <p>23 A I believe so. I think when it was brought to our</p> <p>24 attention, for example, that potentially a</p> <p>25 transgender man couldn't get a cervical Pap smear,</p>
23	<p>1 any sort of medically unnecessary reasons. It's</p> <p>2 just not a feasible, logistical practice. And</p> <p>3 that's most likely why it doesn't happen.</p> <p>4 Q Okay. Now, I understand that there's been some</p> <p>5 discussion within DHS for the past couple years</p> <p>6 about gender coding in both DHS's own system, I</p> <p>7 guess, and also in HMOs' systems for particular</p> <p>8 drugs and, you know, other treatments.</p> <p>9 Can you explain to me what that issue is?</p> <p>10 A Yes. There are lots of procedure codes that are</p> <p>11 used to describe these surgeries. Some of the</p> <p>12 procedures that are in use don't have a specific</p> <p>13 procedure code, which makes -- making implementing</p> <p>14 policy very difficult. So we wanted to make sure</p> <p>15 that we weren't unnecessarily burdening providers.</p> <p>16 And we didn't want to cast the net so wide on</p> <p>17 these procedures that it unduly burdened providers</p> <p>18 and patients, but we did try and administer the</p> <p>19 administrative code and the exclusion as it is</p> <p>20 stated. So we needed to understand what codes</p> <p>21 were exclusively used for gender confirmation.</p> <p>22 Q Okay. And there was also an issue, at least</p> <p>23 historically or maybe even until somewhat</p> <p>24 recently, some treatments were sort of coded for</p> <p>25 men only or males only or females only, which, you</p>	25	<p>1 that clearly is something that is medically</p> <p>2 necessary and isn't part of the exclusion that we</p> <p>3 needed, you know -- I mean, I'm using that as an</p> <p>4 example.</p> <p>5 Q Sure.</p> <p>6 A I don't know if that was one of the -- so we tried</p> <p>7 to get rid of all those edits. And I believe</p> <p>8 there were some issues with gender that's on the</p> <p>9 drugs also that we tried to get rid of.</p> <p>10 Remember, we didn't put these in as an</p> <p>11 agency. This is whoever developed our computer</p> <p>12 systems. And so it was a third party. So I think</p> <p>13 that was a challenge to try and work through all</p> <p>14 of those. But I wasn't involved.</p> <p>15 Q Okay. Do you know whether or not at the HMO level</p> <p>16 they have also removed those gender edits, or is</p> <p>17 that an HMO-specific thing to do?</p> <p>18 A I don't know. They have their own computer</p> <p>19 systems.</p> <p>20 Q Okay. So some of them may still have gender edits</p> <p>21 in their own systems?</p> <p>22 A I really don't know.</p> <p>23 Q Okay. So we were talking about gender-confirming</p> <p>24 surgeries, what the exclusion refers to as</p> <p>25 transsexual surgery. It's correct to say that</p>

26	<p>1 this covers a pretty wide range of surgical</p> <p>2 procedures and not just one particular thing; is</p> <p>3 that right?</p> <p>4 A Yes.</p> <p>5 Q All right. And many of those same procedures and</p> <p>6 surgeries are covered for other conditions besides</p> <p>7 gender dysphoria; is that correct?</p> <p>8 A Yes.</p> <p>9 Q And I'll get more specific a little bit later on</p> <p>10 that.</p> <p>11 Explain to me what your understanding of the</p> <p>12 diagnosis of gender dysphoria is and where that</p> <p>13 diagnosis comes from.</p> <p>14 A I think my interpretation of gender dysphoria is</p> <p>15 that there is a significant distress regarding</p> <p>16 gender incongruence, so that means between</p> <p>17 somebody's identity and their biological gender</p> <p>18 such that it causes dysfunction in their lives,</p> <p>19 social, employment.</p> <p>20 Q Psychological?</p> <p>21 A Psychological, yeah. Dysphoria meaning distress</p> <p>22 to the point of disruption of function.</p> <p>23 Q And treatment for gender dysphoria can reduce</p> <p>24 those adverse symptoms or outcomes; is that right?</p> <p>25 A That's my understanding, yes.</p>	28	<p>1 Persons."</p> <p>2 Q And you're looking at your -- DHS's response to</p> <p>3 Interrogatory No. 10?</p> <p>4 A That's correct. Sorry.</p> <p>5 Q No, that's okay. And so tell me what you know</p> <p>6 about the WPATH standards of care.</p> <p>7 A Well, to summarize the 144 pages, my understanding</p> <p>8 is that cosmetic procedures that may be considered</p> <p>9 cosmetic in the absence of gender dysphoria then</p> <p>10 become medically necessary when they're used to</p> <p>11 treat gender dysphoria.</p> <p>12 Q And that includes hormones and surgeries?</p> <p>13 A Correct.</p> <p>14 Q Do you have an opinion about whether those WPATH</p> <p>15 standards of care are generally accepted in the</p> <p>16 medical community?</p> <p>17 A I guess I just want to ask a little bit of</p> <p>18 clarification because I feel like the 30(b)(6)</p> <p>19 deposition, I'm supposed to represent the</p> <p>20 Department rather than representing my own</p> <p>21 opinions. I feel like that question is more to my</p> <p>22 opinion.</p> <p>23 Q Well, I'd like to ask both. But if --</p> <p>24 MS. SCHMELZER: And I'll object to</p> <p>25 Dr. Sager's personal medical opinion on that</p>
27	<p>1 Q Can that include -- or that does include hormone</p> <p>2 treatments; right?</p> <p>3 A Yes.</p> <p>4 Q Can that include surgical treatments as well?</p> <p>5 A Yes.</p> <p>6 Q Are you aware, or do you consider any particular</p> <p>7 medical guidelines or standards of care to be the</p> <p>8 appropriate standards for assessing medical</p> <p>9 necessity for any particular gender-confirming</p> <p>10 treatments?</p> <p>11 A There's two guidelines that I'm aware of. And I</p> <p>12 think I listed them in the admissions, or maybe</p> <p>13 the interrogatories. So if you don't mind, I'll</p> <p>14 just refer to them so that I don't mispronounce</p> <p>15 them.</p> <p>16 Q And I have a copy. So you can just give me the</p> <p>17 number.</p> <p>18 A One of them's 144 pages long. It's the -- here we</p> <p>19 go -- the "World Professional Association For</p> <p>20 Transgender Health Standards of Care For the</p> <p>21 Health of Transsexual, Transgender, and</p> <p>22 Gender-Nonconforming People."</p> <p>23 The other one is the "Endocrine Society,</p> <p>24 Clinical Practice Guideline, The Endocrine</p> <p>25 Treatment of Gender-Dysphoric, Gender-Incongruent</p>	29	<p>1 outside of the Department's position on that</p> <p>2 question.</p> <p>3 MR. WARDENSKI: Okay. I had asked</p> <p>4 to depose Dr. Sager individually. So if we</p> <p>5 can come back and do that this afternoon, I</p> <p>6 would like to do that briefly, if there's</p> <p>7 questions she's not going to answer in her</p> <p>8 clinical opinion as an employee of DHS.</p> <p>9 A I'm fine to give an opinion. I just understood</p> <p>10 that that wasn't within the scope of this</p> <p>11 discussion.</p> <p>12 MR. KILPATRICK: Can you give us a</p> <p>13 second?</p> <p>14 MR. WARDENSKI: Sure. Let's go off</p> <p>15 the record.</p> <p>16 (Discussion off the record)</p> <p>17 By Mr. Wardenski:</p> <p>18 Q Okay. Dr. Sager, the question just before the</p> <p>19 break was whether if your personal medical opinion</p> <p>20 differed from the position of DHS, how to address</p> <p>21 that since this is a 30(b)(6) deposition. And</p> <p>22 we've agreed with the State's attorneys that you</p> <p>23 can provide your personal opinion if it's</p> <p>24 different, but to make that distinction on the</p> <p>25 record. And I told you I will try to ask</p>

30	<p>1 questions in that way, but if I don't, you're</p> <p>2 happy to make that distinction to the extent there</p> <p>3 is one in your answers. Does that -- do you</p> <p>4 understand that?</p> <p>5 A Yes.</p> <p>6 MR. WARDENSKI: Okay. What was the</p> <p>7 last question before a break that I had</p> <p>8 asked? If the court reporter can read it</p> <p>9 back, please.</p> <p>10 (Last question read)</p> <p>11 A I do. And I think they are, yes.</p> <p>12 Q And that's your personal opinion?</p> <p>13 A And that's my personal opinion.</p> <p>14 Q Based on your --</p> <p>15 A Medical practice.</p> <p>16 Q Now, do you know what DHS's current opinion is</p> <p>17 about the WPATH standards of care?</p> <p>18 A I do not. Dr. Wiggins and I have tried to elicit</p> <p>19 an opinion from the political appointees and</p> <p>20 executive management, and those requests for</p> <p>21 clarification were not addressed.</p> <p>22 Q Do you have an understanding of what the former</p> <p>23 DHS administration meaning before December 31st,</p> <p>24 2017 was about the WPATH standards of care?</p> <p>25 A I do.</p>	32	<p>1 stamped I will just refer to them rather than</p> <p>2 entering them as exhibits just to keep the</p> <p>3 record down. But this is not marked. So if</p> <p>4 we can mark this as Exhibit 1.</p> <p>5 (Exhibit 1 marked for</p> <p>6 identification)</p> <p>7 Q Is this the letter that you were just referring</p> <p>8 to?</p> <p>9 A Yes.</p> <p>10 Q So you describe this letter as the only, I guess,</p> <p>11 guidance that went out to the third-party HMOs as</p> <p>12 to DHS's position on gender-confirming therapy; is</p> <p>13 that correct?</p> <p>14 A That is correct. And internally, there were no</p> <p>15 written clarification from the political</p> <p>16 appointees or executive management either.</p> <p>17 Q And Mr. Heifetz was a political appointee?</p> <p>18 A Correct.</p> <p>19 Q Was the Bureau of Benefits Management consulted</p> <p>20 before this letter went out?</p> <p>21 A No. In fact, I didn't know that it had gone out.</p> <p>22 We didn't -- I'm not even sure how I even came</p> <p>23 across it to be honest. It wasn't given to me.</p> <p>24 It wasn't given to the internal staff.</p> <p>25 Q Until after it had gone out? Or you didn't see it</p>
31	<p>1 Q And what was that?</p> <p>2 A Well, I'm not sure that I can speak to what they</p> <p>3 thought about that specific guideline, the</p> <p>4 World --</p> <p>5 Q The WPATH?</p> <p>6 A The WPATH. But I believe that they wanted to</p> <p>7 uphold the exclusion for all transexual surgeries</p> <p>8 and medically unnecessary hormone use, which I'm</p> <p>9 assuming was felt by them to be for transgender</p> <p>10 care.</p> <p>11 Q Okay.</p> <p>12 A And I base my understanding of their position on a</p> <p>13 letter that Michael Heifetz wrote to the contract</p> <p>14 administrators in January of 2017. And that was</p> <p>15 the only clarification on the position of DHS.</p> <p>16 Q I am going to pull a copy of that letter out. I</p> <p>17 think I know the one that you're referring to.</p> <p>18 So I'm handing you a copy of a letter dated</p> <p>19 January 4th, 2017, signed by Michael Heifetz, the</p> <p>20 Medicaid director for the State of Wisconsin</p> <p>21 Department of Health Services.</p> <p>22 MS. SCHMELZER: Do you want to mark</p> <p>23 it?</p> <p>24 MR. WARDENSKI: Yes. As a general</p> <p>25 practice today, for things that are Bates</p>	33	<p>1 until after it had gone out?</p> <p>2 A Yes.</p> <p>3 Q And is your understanding from DHS's perspective</p> <p>4 that this is a letter based on the law or based on</p> <p>5 clinical practice?</p> <p>6 A It's not based on clinical practice. It's based</p> <p>7 on the law.</p> <p>8 Q So we were talking about the WPATH standards of</p> <p>9 care. Let me ask about the Endocrine Society</p> <p>10 guidelines. What do you know about those?</p> <p>11 A Well, I know that there are certain guidelines in</p> <p>12 terms of duration of hormone treatment before</p> <p>13 generally surgical transition is considered. And</p> <p>14 it differs for different genders and maybe I think</p> <p>15 even different ages, if I can recollect. And then</p> <p>16 there's, I think, some guidance about what</p> <p>17 hormones and how much of it and in what form, what</p> <p>18 route to give.</p> <p>19 Q Is it your -- well, does DHS have an opinion about</p> <p>20 whether the -- a current opinion about whether the</p> <p>21 Endocrine Society guidelines are generally</p> <p>22 accepted in the medical community?</p> <p>23 A I feel like DHS's position hasn't been clarified.</p> <p>24 Q Okay. Would you -- in your personal professional</p> <p>25 medical opinion, do you consider those</p>

<p style="text-align: right;">34</p> <p>1 Endocrine Society guidelines to be generally</p> <p>2 accepted by the medical community?</p> <p>3 A Yes.</p> <p>4 Q How are you doing? Are you ready to keep going?</p> <p>5 A Yeah, I'm good. I'm good.</p> <p>6 MR. WARDENSKI: So there was a</p> <p>7 document that was produced to us last night</p> <p>8 that I'm going to ask to be marked as Exhibit</p> <p>9 No. 2.</p> <p>10 (Exhibit 2 marked for</p> <p>11 identification)</p> <p>12 Q And I'm handing you Exhibit No. 2. This document</p> <p>13 is -- has the title "Timeline of Internal Handling</p> <p>14 of Gender Conforming Surgical Requests within</p> <p>15 Wisconsin Medicaid Fee For Service." Is that</p> <p>16 right?</p> <p>17 A Correct.</p> <p>18 Q And your name and the date July 3rd, 2018, is on</p> <p>19 the bottom of that document; is that right?</p> <p>20 A Correct.</p> <p>21 Q Can you tell me what this document is?</p> <p>22 A It's a contemporaneous memo that I wrote to --</p> <p>23 just outlining the logic in terms of the change of</p> <p>24 administration, the Medicaid administration, the</p> <p>25 governor was the same. I guess outlining a little</p>	<p style="text-align: right;">36</p> <p>1 out loud. It's in the record. But it refers to</p> <p>2 that up until that point, top surgeries for gender</p> <p>3 dysphoria were sporadically covered by DHS. Is</p> <p>4 that an accurate statement?</p> <p>5 A Yes.</p> <p>6 Q And that's before you joined the agency; is that</p> <p>7 right?</p> <p>8 A Yes.</p> <p>9 Q And do you know what the basis of those, I guess,</p> <p>10 approvals was for those surgeries?</p> <p>11 A Yes.</p> <p>12 Q From DHS's -- do you know, speaking for DHS, what</p> <p>13 the basis for those approvals was?</p> <p>14 MS. SCHMELZER: And I'm just going</p> <p>15 to object to the extent that it calls for any</p> <p>16 attorney-client communications and instruct</p> <p>17 the witness that it's okay to talk about the</p> <p>18 policy that resulted but not the,</p> <p>19 specifically, legal advice given from legal</p> <p>20 counsel regarding that.</p> <p>21 A There was no written policy, but there is dueling</p> <p>22 administrative code, 107.06 (2)(C), "which does</p> <p>23 allow for surgical or other medical procedures for</p> <p>24 questionable medical necessity but deemed</p> <p>25 advisable in order to correct conditions that may</p>
<p style="text-align: right;">35</p> <p>1 bit the frustrations we -- I as a medical person</p> <p>2 within the agency had in bringing this for</p> <p>3 discussion.</p> <p>4 Q Okay. If you don't mind, can we just walk through</p> <p>5 it sort of step-by-step? So the timeline</p> <p>6 starts -- before I get there, was this prepared</p> <p>7 for your own internal notes or for some other</p> <p>8 reason?</p> <p>9 A It was for my own internal notes and in the</p> <p>10 projected anticipation that this would end up in a</p> <p>11 court of law.</p> <p>12 Q And you prepared this in July of 2018; is that</p> <p>13 right?</p> <p>14 A Correct.</p> <p>15 Q So in the section marked "September 2016," it says</p> <p>16 that you joined -- it says joined "BBM from OIG."</p> <p>17 I assume that's when you started at the Bureau?</p> <p>18 A Yes. And the OIG is the Office of the Inspector</p> <p>19 General. So I had a brief stint up there.</p> <p>20 Q What was your role there?</p> <p>21 A I was the chief medical officer in the Office of</p> <p>22 the Inspector General.</p> <p>23 Q So you started in this office in fall of 2016?</p> <p>24 A Correct.</p> <p>25 Q Now, this document -- I'm not going to read it all</p>	<p style="text-align: right;">37</p> <p>1 reasonably be assumed to significantly interfere</p> <p>2 with the recipient's personal or social adjustment</p> <p>3 or employability, an example of which is cosmetic</p> <p>4 surgery."</p> <p>5 So my understanding is that sometimes that</p> <p>6 code was used as the basis for approvals.</p> <p>7 Q For chest surgeries?</p> <p>8 A Correct.</p> <p>9 Q For the treatment of gender dysphoria?</p> <p>10 A Correct.</p> <p>11 Q That may otherwise have been considered cosmetic,</p> <p>12 but were -- is it right to say not considered</p> <p>13 cosmetic for that purpose?</p> <p>14 A Yes.</p> <p>15 Q Would it be accurate to say because they were</p> <p>16 deemed medically necessary for -- to treat gender</p> <p>17 dysphoria? Or let me -- either treat gender</p> <p>18 dysphoria or to treat the related symptoms of</p> <p>19 personal or social adjustment?</p> <p>20 A I guess I can't speak to somebody else's opinion</p> <p>21 about whether it was medically necessary or not</p> <p>22 per se. But that language was the basis by which</p> <p>23 we found -- by we I mean the Department found on</p> <p>24 occasion these procedures to be allowable.</p> <p>25 Q About a month after you started, Mr. Heifetz</p>

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<p style="text-align: right;">38</p> <p>1 started as the Medicaid director; correct?</p> <p>2 A That's right.</p> <p>3 Q Now, were you aware when you started of the</p> <p>4 regulations that have been promulgated by the</p> <p>5 U.S. Department of Health & Human Services to</p> <p>6 implement Section 1557 of the Affordable Care Act?</p> <p>7 A Can you ask the question again, please?</p> <p>8 Q Sure. So were you aware at that point in the fall</p> <p>9 of 2016 of regulations that had been promulgated</p> <p>10 by the Department of Health & Human Services, the</p> <p>11 federal department of HHS to implement</p> <p>12 Section 1557 of the Affordable Care Act?</p> <p>13 A Yes.</p> <p>14 Q Okay. And were you aware at that point that those</p> <p>15 regulations expressly defined sex discrimination</p> <p>16 prohibited under that law to include</p> <p>17 discrimination based on gender identity?</p> <p>18 A Yes. May I refer to a document?</p> <p>19 Q Sure.</p> <p>20 A I have an email in November 14 that was sent to</p> <p>21 management that talks about that in the first</p> <p>22 paragraph.</p> <p>23 Q Of 2017?</p> <p>24 A Would you like me to give that to you?</p> <p>25 Q Sure. Yes. Thank you.</p>	<p style="text-align: right;">40</p> <p>1 reasonably assumed to interfere with functioning.</p> <p>2 I asked the administration whether we could</p> <p>3 continue to do that essentially and just assume</p> <p>4 that if a request came in for gender dysphoria</p> <p>5 that -- to not allow the requested surgical or</p> <p>6 medical procedures as long as they were within the</p> <p>7 standard of care, whether we could just allow that</p> <p>8 because we would assume that significant</p> <p>9 interference of functioning would exist and</p> <p>10 continue if the requested procedures weren't</p> <p>11 allowed.</p> <p>12 Q So that with this 107.06(2)(C), whether that could</p> <p>13 be interpreted in a way to allow these surgeries</p> <p>14 and other procedures to be covered; is that</p> <p>15 correct?</p> <p>16 A Yes.</p> <p>17 Q Did you -- so this email is from you to</p> <p>18 Rachel Currans-Henry, Pamela Appleby, and</p> <p>19 Lora Wiggins. Dr. Wiggins, obviously, is your</p> <p>20 clinical supervisor. Pamela Appleby is the</p> <p>21 manager -- your manager. And can you remind me</p> <p>22 who Rachel Currans-Henry is?</p> <p>23 A She is Pamela Appleby's supervisor. So she was</p> <p>24 the Bureau section --</p> <p>25 MS. MILLER: She was Bureau</p>
<p style="text-align: right;">39</p> <p>1 MS. SCHMELZER: And just off the</p> <p>2 record.</p> <p>3 (Discussion off the record)</p> <p>4 (Recess)</p> <p>5 By Mr. Wardenski:</p> <p>6 Q So, Dr. Sager, just before we took a break, you</p> <p>7 referenced a letter from November 14th of 2016.</p> <p>8 I'm going to give you a Bates stamped copy of</p> <p>9 that, and for the record it's Bates No. DHS 001008</p> <p>10 to 1009. Is that the document you have in your</p> <p>11 hand?</p> <p>12 A Yes.</p> <p>13 Q So tell me what this email is.</p> <p>14 A Well, that was an email really letting the</p> <p>15 administration know that my opinion was that the</p> <p>16 exclusion for transsexual surgery appeared to be</p> <p>17 noncompliant with the nondiscrimination principles</p> <p>18 and standards of Section 1557 of the</p> <p>19 Affordable Care Act. And it also is a document</p> <p>20 that talks about how previous transsexual</p> <p>21 surgeries were being allowed sporadically under</p> <p>22 DHS Admin Code 107.06(2)(C) that does allow for</p> <p>23 the surgical or medical profession procedures of</p> <p>24 questionable medical necessity that might be</p> <p>25 advisable to correct conditions that may be</p>	<p style="text-align: right;">41</p> <p>1 director.</p> <p>2 A Bureau director, sorry.</p> <p>3 Q Of BBM?</p> <p>4 A She was the director of BBM.</p> <p>5 Q And was that a political appointment?</p> <p>6 A No.</p> <p>7 Q Did you get any response to this email?</p> <p>8 A No, not in writing.</p> <p>9 Q Did you get a response verbally?</p> <p>10 A Yes.</p> <p>11 Q And do you remember what that was and from whom?</p> <p>12 A That response was from mid management, so -- and</p> <p>13 it was from the political appointees, that we were</p> <p>14 not to approve the surgeries, and we were</p> <p>15 specifically told to remain mute and neither</p> <p>16 approve nor deny, just leave them.</p> <p>17 Q Was there any explanation given about why?</p> <p>18 A No.</p> <p>19 Q So I'm looking back at Exhibit 2, your timeline.</p> <p>20 A Yes.</p> <p>21 Q And in November 2016, it refers to "internal</p> <p>22 requests (via email) for direction and</p> <p>23 assistance."</p> <p>24 I assume that's the email that we just talked</p> <p>25 about?</p>

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42	<p>1 A Yes.</p> <p>2 Q And the verbal direction came from mid-level</p> <p>3 management that upper management directed you to</p> <p>4 not approve surgeries; correct?</p> <p>5 A Yes. And I can't name names because I don't</p> <p>6 really remember who that message was delivered by,</p> <p>7 and I don't think I was ever made aware, except</p> <p>8 that it was the political appointees that directed</p> <p>9 the message to be given, but I don't know which</p> <p>10 one.</p> <p>11 Q That's fine. But upper management refers to</p> <p>12 political appointees?</p> <p>13 A Correct.</p> <p>14 Q And you have a parenthetical there that says</p> <p>15 specifically upper management said to "let them</p> <p>16 sit and 'age out.'" What is your understanding of</p> <p>17 what that meant?</p> <p>18 A To not respond, to not either approve or deny. So</p> <p>19 the PA requests come in to the reviewers', sort</p> <p>20 of, queues in an automated fashion. And I believe</p> <p>21 we have a certain number of days by which to</p> <p>22 render an action. And this refers to purposely</p> <p>23 not complying with that, to adjudicate them one</p> <p>24 way or the other.</p> <p>25 Q So to take no action?</p>	44	<p>1 administrators; correct?</p> <p>2 A Yes.</p> <p>3 Q And that's what we previously discussed; right?</p> <p>4 A Yes.</p> <p>5 Q Marked as Exhibit 1?</p> <p>6 A Yes.</p> <p>7 Q So next I'm going to hand you a copy of an email</p> <p>8 from you dated January 4th, 2017. It's Bates</p> <p>9 Nos. DHS 001099 through 1101.</p> <p>10 A Yes.</p> <p>11 Q Are you familiar with this email? And you can</p> <p>12 take a second to review it.</p> <p>13 A Yes.</p> <p>14 Q And the attachment to the email which is numbered</p> <p>15 1101 on the bottom appears to be a draft of the</p> <p>16 letter that was marked as Exhibit 1; is that</p> <p>17 right?</p> <p>18 A Yes.</p> <p>19 Q And this is the letter from Mr. Heifetz to</p> <p>20 contract administrators?</p> <p>21 A Yes.</p> <p>22 Q Explain to me what this email -- who it was to and</p> <p>23 why you sent it.</p> <p>24 A So this email was to Dr. Wiggins. And I sent</p> <p>25 this -- I guess the draft must have come out to us</p>
43	<p>1 A Correct.</p> <p>2 Q And then what's the effect of that? There's just</p> <p>3 no decision?</p> <p>4 A Yes. I don't really understand from a procedural</p> <p>5 perspective what that does to people's appeal</p> <p>6 rights or otherwise. I don't -- that's outside of</p> <p>7 my knowledge.</p> <p>8 Q And have you ever gotten that direction for any</p> <p>9 other kind of coverage determinations?</p> <p>10 A No.</p> <p>11 Q The next item in the timeline is December 2016.</p> <p>12 It refers to a federal judge in Texas issuing a</p> <p>13 preliminary injunction against enforcement of the</p> <p>14 rules prohibition -- or prohibition of</p> <p>15 discrimination on the basis of gender identity and</p> <p>16 termination of pregnancy.</p> <p>17 The rule referring there is -- that you're</p> <p>18 referring to there is Section 1557; correct?</p> <p>19 A Correct.</p> <p>20 Q And what information did you receive or learn at</p> <p>21 your level, at the BBM level, about that decision?</p> <p>22 A None. This is all just read about in the</p> <p>23 mainstream media.</p> <p>24 Q And then shortly thereafter, in January 2017,</p> <p>25 Mr. Heifetz sent a letter to the HMO contract</p>	45	<p>1 or -- so when I saw the direction to the HMOs, we</p> <p>2 had been asking -- as we had previously</p> <p>3 discussed -- we had been asking internally for</p> <p>4 direction and didn't receive any. And then when</p> <p>5 we saw this black-and-white kind of in writing</p> <p>6 direction to the HMOs, I felt that we were quite</p> <p>7 vulnerable to continue the compassionate allowing</p> <p>8 of transgender surgeries. They were sporadic at</p> <p>9 that point, almost exclusively the top procedures</p> <p>10 in the way that we allowed them before given the</p> <p>11 Department really coming to a position that they</p> <p>12 pushed out to the HMOs.</p> <p>13 Q And so your opinion here was that all requests for</p> <p>14 these treatments should be denied moving forward;</p> <p>15 is that right?</p> <p>16 A Yes.</p> <p>17 Q And that was based on the -- was that based on a</p> <p>18 clinical determination?</p> <p>19 A No.</p> <p>20 Q And if you can read the third paragraph of that</p> <p>21 email. I guess it's one sentence. If you can</p> <p>22 read that third paragraph.</p> <p>23 A I've written here, "In my opinion, I think it is a</p> <p>24 more transparent and reasonable option to deny all</p> <p>25 these requests for gender-confirming treatment</p>

46	<p>1 hormones and surgery, not that I believe this to</p> <p>2 be ethically or morally right but in order to</p> <p>3 catalyze a better solution through the appropriate</p> <p>4 legislative or legal channels rather than attempt</p> <p>5 a nonstandard, nonpublishable, and therefore not</p> <p>6 indefensible ad hoc solution."</p> <p>7 Q So --</p> <p>8 A Sorry, my laughter is nervous at this present</p> <p>9 time.</p> <p>10 Q Understood. And so is it safe to say --</p> <p>11 A This is my position. This is my opinion.</p> <p>12 Q This is your personal position?</p> <p>13 A Correct. This is not a Department position.</p> <p>14 Q Sure. And, in fact, the Department's position was</p> <p>15 legal or policy based. And is it safe to say your</p> <p>16 clinical -- your personal clinical view was</p> <p>17 different than that?</p> <p>18 A Yes.</p> <p>19 Q And does this email generally accurately reflect</p> <p>20 your feelings at the time?</p> <p>21 A Yes.</p> <p>22 Q And I'm asking you this in your personal capacity.</p> <p>23 When you're referring to it not being ethically or</p> <p>24 morally right, was it your opinion about whether</p> <p>25 it was medically correct?</p>	48	<p>1 mark as Exhibit 3.</p> <p>2 (Exhibit 3 marked for</p> <p>3 identification)</p> <p>4 MS. SCHMELZER: Just to remind</p> <p>5 Dr. Sager that it is okay to talk about</p> <p>6 Cody Flack because we do have an</p> <p>7 authorization for that disclosure.</p> <p>8 MR. WARDENSKI: Thank you. And we</p> <p>9 may in the official record want to redact</p> <p>10 some of the identifying information, but we</p> <p>11 can do that later.</p> <p>12 Q Okay. Dr. Sager, this is a letter from you as</p> <p>13 medical director of the Bureau of Benefits</p> <p>14 Management to the Division of Hearings and Appeals</p> <p>15 and to Cody Flack dated September 25th of 2017; is</p> <p>16 that correct?</p> <p>17 A Correct.</p> <p>18 Q And this letter was submitted in connection with</p> <p>19 Mr. Flack's administrative appeal of his denial of</p> <p>20 prior authorization; is that right?</p> <p>21 A Yes.</p> <p>22 Q The letter describes the surgeries that -- the</p> <p>23 surgery that he was seeking and his diagnosis of</p> <p>24 gender dysphoria; correct?</p> <p>25 A Correct.</p>
47	<p>1 A Yes. I didn't need to state that because Lora and</p> <p>2 I had discussed that, and we were in agreement</p> <p>3 that it was medically reasonable and should be</p> <p>4 allowable.</p> <p>5 Q Both hormones and surgeries?</p> <p>6 A Yes. Per the current standard medical guidelines.</p> <p>7 Q Including WPATH and Endocrine Society?</p> <p>8 A Correct.</p> <p>9 Q Okay. I want to change gears for a few minutes</p> <p>10 and talk specifically about Cody Flack.</p> <p>11 A Yes.</p> <p>12 Q So my understanding is that you were personally</p> <p>13 involved in the original denial of his</p> <p>14 authorization for surgery and later in approving</p> <p>15 that surgery after the injunction issued in this</p> <p>16 case; is that correct?</p> <p>17 A Correct.</p> <p>18 Q So Cody in, I guess, the summer of 2017 had sought</p> <p>19 prior authorization for top surgery, is that</p> <p>20 correct, a double mastectomy and chest</p> <p>21 reconstruction?</p> <p>22 A Yes. I don't really recall offhand, you know, but</p> <p>23 I believe you.</p> <p>24 Q Okay. I will represent to you that that's what he</p> <p>25 was seeking. And there is a letter I'd like to</p>	49	<p>1 Q And indicates that DMS -- is that the Division of</p> <p>2 Medicaid Services?</p> <p>3 A Yes.</p> <p>4 Q -- denied the surgery under the challenge</p> <p>5 exclusion; is that right?</p> <p>6 A Yes.</p> <p>7 Q Can you read the next paragraph, the</p> <p>8 second-to-last paragraph on that first page.</p> <p>9 A "The medical necessity of the services requested</p> <p>10 was not taken into account as reimbursement by</p> <p>11 Medicaid for this type of surgery is currently</p> <p>12 excluded by DHS regulations."</p> <p>13 Q So consistent with the decision that you had made</p> <p>14 to apply the directives from upper management</p> <p>15 earlier that year, medical necessity was not</p> <p>16 considered in any way in making -- in issuing his</p> <p>17 denial; is that right?</p> <p>18 A Correct.</p> <p>19 Q Now, you signed this letter, but I understand it</p> <p>20 was -- from other documents that it was primarily</p> <p>21 written by OLC. Is that Office of Legal Counsel?</p> <p>22 A That is correct.</p> <p>23 Q And that they asked you to sign this; correct?</p> <p>24 A And I actually initially --</p> <p>25 MS. SCHMELZER: I'm going to object</p>

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14 (Pages 50 to 53)

<p style="text-align: right;">50</p> <p>1 to any communications with legal counsel and</p> <p>2 instruct the witness not to answer.</p> <p>3 MR. WARDENSKI: Okay. We can get</p> <p>4 there.</p> <p>5 Q Is it correct to say that this does not reflect a</p> <p>6 clinical determination?</p> <p>7 A Yes.</p> <p>8 Q But rather, a legal determination; is that right?</p> <p>9 A Yes.</p> <p>10 Q And I'm now handing you a series of emails Bates</p> <p>11 stamped DHS 003006 to 3007. And this was an email</p> <p>12 exchange about whose signature would be on that</p> <p>13 letter; is that right?</p> <p>14 A Yes. I refused to sign it.</p> <p>15 Q And you were instructed to sign it; is that right?</p> <p>16 A I wanted the political appointees to sign it</p> <p>17 because it was a -- felt to me like it was a</p> <p>18 nonclinical adjudication, and I felt disingenuous</p> <p>19 signing something that was outside of my clinical</p> <p>20 jurisdiction.</p> <p>21 Q And again, based on this view, this was not a</p> <p>22 clinical denial?</p> <p>23 A Yes.</p> <p>24 Q Okay. So now fast forwarding to late July, the</p> <p>25 court in this case issued a preliminary injunction</p>	<p style="text-align: right;">52</p> <p>1 code does give us the definition of medical</p> <p>2 necessity. And I'm not sure I can give you a code</p> <p>3 reference off the top of my head.</p> <p>4 Q That's okay.</p> <p>5 A But it really goes through, you know, a</p> <p>6 preponderance of evidence in line with other</p> <p>7 payers' standards, you know, consistent with</p> <p>8 standards in the medical community. There's sort</p> <p>9 of just a list -- cost effectiveness I believe is</p> <p>10 on there. And I felt that based on those</p> <p>11 considerations that -- and in using the WPATH and</p> <p>12 the Endocrine Society guidelines as what is</p> <p>13 consistent in standard of care, or accepted in the</p> <p>14 medical community, that those requests met the</p> <p>15 medical necessity definition.</p> <p>16 Q And was that review of his prior authorization</p> <p>17 request after the injunction the same as you would</p> <p>18 apply to others that -- other people's prior</p> <p>19 authorization denials that landed on your desk?</p> <p>20 A Yes.</p> <p>21 Q And I'm going to hand you another email from that</p> <p>22 point dated July 30th, 2018, and Bates stamped</p> <p>23 DHS 002903. This email appears to be some</p> <p>24 questions that you had about the injunction</p> <p>25 directed to your supervisor, Pamela Appleby; is</p>
<p style="text-align: right;">51</p> <p>1 barring enforcement of the exclusion on behalf of</p> <p>2 Cody Flack and Sara Makenzie on July 25th of 2018;</p> <p>3 right?</p> <p>4 A Right.</p> <p>5 Q And thereafter, you personally reviewed --</p> <p>6 re-reviewed Mr. Flack's prior authorization</p> <p>7 request; is that right?</p> <p>8 A No. I've never reviewed them. I didn't review</p> <p>9 them for medical necessity.</p> <p>10 Q At any point?</p> <p>11 A Until there was the injunction, and then I</p> <p>12 reviewed them for the first time.</p> <p>13 Q Oh, okay. So after the injunction issued, you</p> <p>14 reviewed his prior authorization request for</p> <p>15 medical necessity?</p> <p>16 A Yes.</p> <p>17 Q And you determined in your role as medical</p> <p>18 director that the surgical procedures he was</p> <p>19 seeking were medically necessary; is that right?</p> <p>20 A Yes. For the treatment of gender dysphoria, yes.</p> <p>21 Q And was that -- in the absence of published DHS</p> <p>22 guidelines, how did you reach that determination</p> <p>23 that those procedures were medically necessary for</p> <p>24 gender dysphoria?</p> <p>25 A So DHS does give us the definition. The admin</p>	<p style="text-align: right;">53</p> <p>1 that right?</p> <p>2 A Yes.</p> <p>3 Q And in the email you note that you reviewed the CD</p> <p>4 with Mr. Flack's full medical record; is that</p> <p>5 right?</p> <p>6 A Yes. Actually, I don't -- I don't have a read --</p> <p>7 I mean. Someone must have printed it off and</p> <p>8 handed it to me. I don't remember having the</p> <p>9 actual CD.</p> <p>10 Q But you did review his full file?</p> <p>11 A His medical record, yes.</p> <p>12 Q And based on that review, you reached your</p> <p>13 determination?</p> <p>14 A Yes.</p> <p>15 Q And then the second paragraph refers to the other</p> <p>16 member. I'm assuming that means Ms. Makenzie; is</p> <p>17 that right?</p> <p>18 A Yes.</p> <p>19 Q And because she is enrolled in an HMO, that</p> <p>20 determination needed to be made by her HMO in the</p> <p>21 first instance; is that right?</p> <p>22 A Yes.</p> <p>23 Q And is that what happened from your recollection?</p> <p>24 A Yes, yes.</p> <p>25 Q Were there communications between her HMO and your</p>

<p style="text-align: right;">54</p> <p>1 office?</p> <p>2 A Yes.</p> <p>3 Q And was that to -- what were the nature of those</p> <p>4 communications?</p> <p>5 A We wanted to make sure that they were just going</p> <p>6 to comply promptly and that they didn't have any</p> <p>7 questions. We also wanted to ensure that whoever</p> <p>8 was reviewing it at the HMO had no problems with</p> <p>9 the medical necessity of the requests. There was</p> <p>10 also an issue of reimbursement to the HMOs because</p> <p>11 some of the codes, you know, they were switched</p> <p>12 off in our kind of Medicaid system. So we</p> <p>13 couldn't -- they wouldn't get credit for allowing</p> <p>14 some of the procedures because we didn't -- our</p> <p>15 systems didn't recognize them.</p> <p>16 Q Because of the exclusion?</p> <p>17 A Because of the exclusion. So there had to be some</p> <p>18 nonstandard way to financially reimburse the HMO</p> <p>19 for the provision of the services. And that was</p> <p>20 also discussed. And that again is beyond me.</p> <p>21 Q Do you know, one way or the other -- obviously</p> <p>22 they made the approval. Did they consider those</p> <p>23 procedures medically necessary?</p> <p>24 A Yes. We made it our business to ensure that there</p> <p>25 was no problems with those -- with that approval.</p>	<p style="text-align: right;">56</p> <p>1 right?</p> <p>2 A That's right.</p> <p>3 Q Including the challenge exclusion here?</p> <p>4 A Correct.</p> <p>5 Q So is it -- it's DHS's position, correct, that the</p> <p>6 challenged exclusion does not apply to recipients</p> <p>7 under the age of 21?</p> <p>8 A I think that's an overstatement.</p> <p>9 Q How would you put it?</p> <p>10 A I think that operationally we can't not adjudicate</p> <p>11 for medical necessity for a request for</p> <p>12 transgender services to a member under the age of</p> <p>13 21. It needed to actually be adjudicated for</p> <p>14 medical necessity.</p> <p>15 So I guess your statement -- I guess</p> <p>16 following on, I guess that's a logical conclusion</p> <p>17 that the challenged exclusion isn't applicable for</p> <p>18 minors because they had to be medically --</p> <p>19 adjudicated for medical necessity and couldn't be</p> <p>20 blanket excluded.</p> <p>21 So I guess I've talked myself around. The</p> <p>22 answer to your question is yes.</p> <p>23 Q And minors, for purposes of this provision, are</p> <p>24 under 21?</p> <p>25 A Right.</p>
<p style="text-align: right;">55</p> <p>1 Q And did you review Ms. Makenzie's records at all?</p> <p>2 A I don't believe I ever had them.</p> <p>3 Q All right. So I want to turn and ask you a bit</p> <p>4 about what happens for beneficiaries under the age</p> <p>5 of 21. I understand there's some distinction</p> <p>6 between -- for purposes of gender-confirming</p> <p>7 treatments for gender dysphoria for people under</p> <p>8 21 and those over 21. Can you explain to me,</p> <p>9 generally speaking, what that distinction is and</p> <p>10 then I'll drill down a little bit.</p> <p>11 A Sure. EPSDT is the Early Periodic Screening</p> <p>12 Diagnosis and Treatment provision in the -- I</p> <p>13 believe it's in the Social Security Act. It's a</p> <p>14 federal regulation that ensures that requests to a</p> <p>15 Medicaid program for children are individually</p> <p>16 case reviewed for medical necessity regardless of</p> <p>17 whether they fall into a recognizable Medicaid --</p> <p>18 covered Medicaid benefit. So really what that</p> <p>19 means is that we can't have blanket exclusions for</p> <p>20 Medicaid-eligible members under the age of 21</p> <p>21 because they all have to be adjudicated to see</p> <p>22 whether it's medically necessary for that minor at</p> <p>23 that particular time and for that particular</p> <p>24 circumstance.</p> <p>25 Q So that would be blanket exclusions of any kind;</p>	<p style="text-align: right;">57</p> <p>1 Q Up to the 21st birthday; is that right?</p> <p>2 A Yes.</p> <p>3 Q And so as a matter of general practice, if there</p> <p>4 was a 20-year-old seeking a surgical treatment for</p> <p>5 gender dysphoria, that person's prior</p> <p>6 authorization request would be reviewed under the</p> <p>7 EPSDT protocol?</p> <p>8 A Considerations, that's right.</p> <p>9 Q And do you know how long DHS has regarded the</p> <p>10 challenged exclusion as not applying to</p> <p>11 beneficiaries under 21?</p> <p>12 A So incorporating that federal EPSDT -- did I say</p> <p>13 it right?</p> <p>14 Q Yes.</p> <p>15 A -- consideration into every operational function</p> <p>16 of the Medicaid program is quite difficult or is</p> <p>17 quite challenging. The mandate -- that federal</p> <p>18 mandate has been in existence for a long time. I</p> <p>19 think that there's been more and more of a</p> <p>20 recognition within the Department that there are</p> <p>21 some holes in terms of compliance and</p> <p>22 implementation of those considerations in a</p> <p>23 process -- in processes across the department and</p> <p>24 within HMOs. And there has been over the last few</p> <p>25 years management push to try and make sure those</p>

<p style="text-align: right;">58</p> <p>1 considerations are hard baked into the current 2 processes.</p> <p>3 Q So to make sure that the EPSDT requirements are 4 being applied?</p> <p>5 A That's right. I think there was recognition that 6 probably there were holes, just because it's 7 nuanced and difficult to --</p> <p>8 Q Sure. And do you know, one way or the other, 9 whether the challenged exclusion ever was applied 10 to beneficiaries under 21; in other words, that 11 EPSDT requirements were not followed because of 12 the challenged exclusion?</p> <p>13 MS. SCHMELZER: And I'm just going 14 to object to the extent that it calls for 15 personal identifiable healthcare information. 16 But you can talk generally and respond to 17 that question.</p> <p>18 A There was -- I'm not -- there was one instance 19 that came to my attention for a member in this age 20 range that requested transgender services through 21 their HMO and was denied. It came to the State 22 for adjudication under fee for service. And 23 because the member was under 21, I did look at it 24 in terms of medical necessity -- the medical 25 necessity considerations in the admin code and</p>	<p style="text-align: right;">60</p> <p>1 document that was found through this process. And 2 it was July of 2018.</p> <p>3 Q July of 2018?</p> <p>4 A Correct.</p> <p>5 Q Are you aware of any -- whether by DHS or any of 6 the Medicaid HMOs, that any gender-confirming 7 surgery for a beneficiary under 21 has ever been 8 approved?</p> <p>9 A I'm not aware that anything has been approved. 10 It's quite unusual for these sorts of services -- 11 for permanent anatomical change to be requested in 12 adolescence. It's not to say that it doesn't 13 happen, but the majority of requests for these 14 sorts of services are in adults.</p> <p>15 Q And from a lay perspective, that could include 16 people over the age of 18?</p> <p>17 A Yes. Absolutely, yeah.</p> <p>18 Q Other than this particular instance from last 19 July, are you aware of any other EPSDT reviews?</p> <p>20 A No.</p> <p>21 Q So the state administration, and I imagine the DHS 22 administration as well, changed in January after 23 the election; is that right?</p> <p>24 A That's right.</p> <p>25 Q So there's an email that I found interesting. And</p>
<p style="text-align: right;">59</p> <p>1 also the additional federal language for 2 consideration, which is to correct or ameliorate 3 any physical or mental health condition. And I 4 found the requested services to be medically 5 necessary. And I wrote a letter to that effect 6 and suggested that the HMO denial be overturned 7 and the HMO be compelled to pay for the service 8 under EPSDT considerations, and that letter was 9 handled in the usual fashion, and it was given to 10 Tabitha Ramminger, who is the section chief for 11 the PA department. Because the other PA people 12 dealt with HMO denials for their sorts of things 13 as well, but because this was a surgical service, 14 it came to me as the doctor. And that was my 15 determination, and I gave that letter to Tabitha.</p> <p>16 Q Do you know what happened with that?</p> <p>17 A I don't know.</p> <p>18 Q So you don't know whether the surgery was approved 19 ultimately or not?</p> <p>20 A The surgery was not performed, and that's come to 21 my attention in the last 24 hours.</p> <p>22 Q And just for context, can you just give me the 23 year that this all happened? Was this recently? 24 A long time ago?</p> <p>25 A My memory was refreshed by the furnishing of the</p>	<p style="text-align: right;">61</p> <p>1 I'm not sure whether you've seen this or not. If 2 you haven't, you can say so. But I'm going to 3 give you a copy of it. And this is -- it's 4 actually two documents. It's the email and the 5 attachment, but the Bates range is DHS 000546 6 through 554. And this has the subject line 7 "Forward weekly update for leadership team." 8 Why don't you take a second to look at it and 9 then let me know when you're ready to talk about 10 it.</p> <p>11 A Sorry. I don't -- oh. Okay. I see why you're 12 asking me.</p> <p>13 Q So I guess my first question is: Have you ever 14 seen this before?</p> <p>15 A No.</p> <p>16 Q Okay.</p> <p>17 A This was just an example -- this was above my 18 position in the agency.</p> <p>19 Q So it looks like this is something that 20 happened -- that was created by the transition 21 team for the new administration; is that right?</p> <p>22 A Yes.</p> <p>23 Q Okay. And the thing I'm calling your attention 24 to -- there's actually two places. The first is 25 on page 552, the second-to-last bullet under</p>

<p style="text-align: right;">62</p> <p>1 benefits and rates reads "Use budget to implement 2 state statutory changes to allow coverage of 3 transgender surgery. Follow federal law 4 Section 1557. Get DOJ to stop lawsuit. We should 5 follow federal law and cover transgender surgeries 6 when medically appropriate." 7 And on the last page, 554, there's a heading 8 "Pressing issues to address in the first 100 9 days." 10 And then the second item under that reads 11 "Transgender case. Get DOJ to drop and cover?" 12 So these, again, seem to be ideas that were 13 above your pay grade at the political level; is 14 that right? 15 A Yes. 16 Q Did the transition team interact in any way before 17 the new administration with BBM or DMS staff in 18 setting its priorities? 19 A I feel like it's hard for me to answer that 20 because I can only answer from my role, and they 21 didn't interact with me or ask for my opinion at 22 all. I'm not sure whether they asked for others 23 in BBM's opinion. 24 Q Do you know whether it's the current DMS agency 25 position that the exclusion should be ended in</p>	<p style="text-align: right;">64</p> <p>1 Q And do you know whether now that the 2 administration is in place there's also a new DHS 3 secretary, at least an acting secretary; is that 4 right? 5 A Yes. 6 Q Has she been confirmed yet? 7 A No. 8 MS. SCHMELZER: No. 9 Q Are there now discussions about changing this 10 exclusion or ending this exclusion as an agency? 11 And let me ask that to be perfectly clear. 12 Separate from this litigation, from a policy 13 perspective, are there conversations about 14 changing this policy from a policy perspective? 15 A No official conversations have taken place, but 16 there has been water cooler talk that this will 17 occur. 18 Q In your personal opinion, is that a good thing? 19 A Yes. 20 Q And why is that? 21 A Because I feel like it's medically accepted 22 standard of care. 23 Q The last thing I'm going to hand you, and then we 24 can finish up, is an email from just last month 25 with a fairly lengthy attachment. It's an email</p>
<p style="text-align: right;">63</p> <p>1 some way and that the surgeries should be covered? 2 A Well, I think my answer here is that I don't know. 3 I could assume. 4 Q And what would your assumption be? 5 A My assumption would be that they would, that the 6 governor has signaled his -- the importance of 7 nondiscrimination principles in Wisconsin really 8 early in his elected office, and I would assume 9 that that would extend to transgender medical 10 services and surgeries. 11 Q Now, from your clinical perspective, would a 12 change like that be consistent with current 13 medical practice? 14 A Yes. Could I make one observation about this? 15 Q Sure. 16 A This looks like it was communicated in December. 17 No. When was this? December 1? 18 Q The email is dated December 10th. 19 A So that was before inauguration and before the 20 appointment of a new Medicaid director. 21 Q So it really was a transition position statement? 22 A Right. 23 Q Building on that, though, there is now a new 24 Medicaid director? 25 A Yes.</p>	<p style="text-align: right;">65</p> <p>1 from Kathleen Plunkett to you and Dr. Wiggins 2 copying Steve Tyska. That's the other medical 3 director? 4 A Uh-huh, yes. 5 Q And the Bates range for the email is DHS 000393. 6 That's it. And then the attachment doesn't have a 7 Bates range, but I believe the Bates number for 8 the attachment because it's a spreadsheet was 9 DHS 000394. 10 So are you familiar with this email? 11 A Yes. 12 Q And what is it and what is the attachment? 13 A So this -- I believe this was prompted because 14 the -- at my request for a formal discussion with 15 the executive management about this issue, I was 16 asked to prepare like a one-page briefing document 17 to talk about what I think generally should be 18 covered, what should be medically necessary in 19 broad strokes, right, what a policy would look 20 like. And as you can see, because there's nine 21 pages of code in fairly small print, these are all 22 the procedure codes that might be touched by said 23 policy. And when we create policy for a large 24 range of procedure codes, we need to make sure 25 that where we have other types of procedures</p>

<p style="text-align: right;">66</p> <p>1 talking about other uses of these codes, that 2 there's congruence in policy. So it was sort of 3 part of the initial research to put together a 4 transgender coverage policy to prepare that for 5 discussion with executive management. That 6 discussion was delayed.</p> <p>7 Q So it has not happened yet?</p> <p>8 A No.</p> <p>9 Q Who put together this spreadsheet? Was it you or 10 someone else?</p> <p>11 A No. So this is our medical -- Kahleen Plunkett is 12 our coder, and so -- are you familiar with what a 13 coder is?</p> <p>14 Q Why don't you explain it.</p> <p>15 A So a medical coder -- so the way that healthcare 16 services are operationalized in terms of financial 17 reimbursement is that the codes are all designated 18 and then priced. So it's sort of like currency. 19 And she -- and there are tens of thousands -- 20 hundreds of thousands of codes, not just for 21 surgical procedures but for drugs, for devices, 22 for any sort of health care -- sort of very 23 transactional -- you know, makes it a 24 transactional system. And she's the specialist 25 that helps us figure out what procedures go with</p>	<p style="text-align: right;">68</p> <p>1 Q Sure.</p> <p>2 A But yes, it's a current coverage.</p> <p>3 Q So this has a "Y" or an "N" for yes or no?</p> <p>4 A Right.</p> <p>5 Q And so where it says "yes," that means --</p> <p>6 A We cover it.</p> <p>7 Q -- Forward Health or Medicaid covers it for other 8 things besides gender dysphoria; is that right?</p> <p>9 A Well, do you want to -- so I guess I just want to 10 make the clarification that where it says 11 Forward Health covers it and then PA requires -- 12 required and it says "no," if that procedure was 13 performed as part of a transgender care, 14 Forward Health would pay for it because we would 15 not have a mechanism by which to deny it.</p> <p>16 Q Okay. HMOs might have a different way of doing 17 things; correct?</p> <p>18 A That's correct.</p> <p>19 Q So even though DHS itself might not deny something 20 for these reasons for FFS patients, an HMO might 21 deny it with a different procedure?</p> <p>22 A Correct.</p> <p>23 Q Okay. So for items where Forward Health covers it 24 and prior authorization is required, what happens 25 there if it's a treatment for gender dysphoria?</p>
<p style="text-align: right;">67</p> <p>1 what codes.</p> <p>2 Q Understood.</p> <p>3 A Because it's a kind of expertise in itself.</p> <p>4 Q So as you mentioned, there are nine or ten pages 5 of many procedures that may fall under the broad 6 umbrella of a gender-confirming surgical 7 treatment; right?</p> <p>8 A Right.</p> <p>9 Q And just going across the columns on the 10 spreadsheet starting on page 1 where all the 11 diagnoses are listed -- I guess this is maybe the 12 third page of the attachment -- it has a CPT code, 13 which is the standard medical code; is that --</p> <p>14 A Yeah. It's short for current procedural 15 terminology, which is a procedure code.</p> <p>16 Q Okay. And then underneath that it has a 17 description of the various procedures; right?</p> <p>18 A Yeah.</p> <p>19 Q What does FH coverage mean? That's the next 20 column. If you know.</p> <p>21 A I think it's Forward Health.</p> <p>22 Q And Forward Health is another name for --</p> <p>23 A Medicaid. Sorry. It's not an abbreviation that I 24 see. I think she just used it to fit it into the 25 column.</p>	<p style="text-align: right;">69</p> <p>1 A Then it's denied outright without review for 2 medical necessity in members 21 and older, and in 3 members less than 21 it is reviewed for medical 4 necessity.</p> <p>5 Q And that's based on the challenge exclusion and 6 EPSDT; correct?</p> <p>7 A Yes.</p> <p>8 Q The next column says "Definitive gender 9 reassignment procedure." What do you think -- 10 what does that mean? The third column over -- so 11 there's FH coverage, PA required, and definitive 12 gender reassignment procedure?</p> <p>13 A I think what she's referring to there is that, you 14 know, does this code have other medical 15 applications other than transgender care. Because 16 as we talked about, transgender surgery is a suite 17 of different procedures and not all individuals 18 choose or want all of them. And then within that 19 suite of services, there are lots of procedures 20 that are used for indications that are not gender 21 dysphoria. And so I think when she says 22 definitive gender reassignment procedures, she's 23 really meaning exclusive. Is the code really only 24 exclusive to gender-confirming surgery, or does it 25 have other wider medical application?</p>

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<p>1 Q Right. And so many of these procedures have "no"</p> <p>2 because they do have multiple applications; is</p> <p>3 that right?</p> <p>4 A Yes.</p> <p>5 Q The next column -- and I'll just walk through</p> <p>6 these just so we are on the same page as to what</p> <p>7 they are -- is the ICD 10 code and description.</p> <p>8 Just for the record, what is the ICD 10?</p> <p>9 A So the CPT codes -- they're the definition of an</p> <p>10 actual procedure. They're sort of a verb. And</p> <p>11 ICD 10 is the noun. It's the diagnosis. So</p> <p>12 you'll often see them together.</p> <p>13 Q So -- so how would that work?</p> <p>14 A So just say -- so what she's doing is she's</p> <p>15 linking. So, you know, there's -- the CPT code</p> <p>16 here is amputation of the penis partial, and then</p> <p>17 she's linked all the conceivable ICD 10 diagnosis</p> <p>18 codes that could go along with that procedural</p> <p>19 code.</p> <p>20 Q Okay.</p> <p>21 A She hasn't -- I guess she hasn't put transgender</p> <p>22 stuff there because the whole thing is -- could</p> <p>23 involve the ICD 10 diagnosis of gender dysphoria</p> <p>24 or transsexualism, whatever the ICD 10 diagnosis</p> <p>25 is.</p>	<p>1 Dr. Wiggins?</p> <p>2 MR. WARDENSKI: I don't. You're</p> <p>3 off the hook.</p> <p>4</p> <p>5 (Adjourning at 11:16 a.m.)</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 Q Understood. So this really was a survey how these</p> <p>2 treatments and services are applied to other</p> <p>3 things?</p> <p>4 A As well as if they're applicable, and they're all</p> <p>5 applicable to transgender care. This really</p> <p>6 demonstrates the complexity of operationalizing</p> <p>7 kind of these sorts of details in the Medicaid</p> <p>8 system because we don't want to inconvenience or</p> <p>9 have unintended harms with policy that touches and</p> <p>10 reaches other things that we didn't anticipate.</p> <p>11 Q So my last question is: If there were no</p> <p>12 exclusion and you reviewed prior authorization</p> <p>13 requests and denials the same way you would for</p> <p>14 any other diagnosis or condition, would you review</p> <p>15 them in the same way that you reviewed Mr. Flack's</p> <p>16 prior authorization requests last July and August?</p> <p>17 A Yes.</p> <p>18 MR. WARDENSKI: Okay. Thank you</p> <p>19 very much.</p> <p>20 THE WITNESS: Thank you.</p> <p>21 MR. WARDENSKI: That's all I have</p> <p>22 for now. I want to reserve the right to</p> <p>23 continue the 30(b)(6) at some point later if</p> <p>24 needed. But this is all we need for today.</p> <p>25 MR. KILPATRICK: So you don't need</p>	<p>1 STATE OF WISCONSIN)</p> <p>2) ss.</p> <p>3 COUNTY OF DANE)</p> <p>4 I, Tania Northouse, a Registered Diplomate Reporter</p> <p>5 and Notary Public duly commissioned and qualified in and</p> <p>6 for the State of Wisconsin, do hereby certify that</p> <p>7 pursuant to notice, there came before me on the 16th day</p> <p>8 of April 2019, at 9:15 in the forenoon, at the offices</p> <p>9 of State of Wisconsin Department of Justice,</p> <p>10 17 West Main Street, the City of Madison, County of</p> <p>11 Dane, and State of Wisconsin, the following named</p> <p>12 person, to wit: JULIE A. SAGER, MD, who was by me duly</p> <p>13 sworn to testify to the truth and nothing but the truth</p> <p>14 of her knowledge touching and concerning the matters in</p> <p>15 controversy in this cause; that she was thereupon</p> <p>16 carefully examined upon her oath and her examination</p> <p>17 reduced to typewriting with computer-aided</p> <p>18 transcription; that the deposition is a true record of</p> <p>19 the testimony given by the witness; and that reading and</p> <p>20 signing was waived.</p> <p>21 I further certify that I am neither attorney</p> <p>22 or counsel for, nor related to or employed by any of the</p> <p>23 parties to the action in which this deposition is taken</p> <p>24 and further that I am not a relative or employee of any</p> <p>25 attorney or counsel employed by the parties hereto or</p>

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1 financially interested in the action.

2 In witness whereof I have hereunto set my
3 hand and affixed my notarial seal this 16th day of April
4 2019.

5

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7 Registered Diplomat Reporter
8 Notary Public, State of Wisconsin

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10 My commission expires

11 May 17, 2019

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Sager, M.D., 30(b)(6), Julie A.

April 16, 2019

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January 4, 2017

Dear Contract Administrators:

We have received a number of questions regarding the Department of Health and Human Services (HHS) final rule implementing Section 1557 of the Affordable Care Act of 2010, the non-discrimination provision, found at 45 Code of Federal Regulations Part 92. Among other provisions, the Section 1557 rule prohibits discrimination on the basis of sex, including based on termination of pregnancy, gender identity, and sex stereotyping.

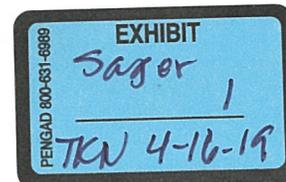
The portion of the rule prohibiting discrimination on the basis of gender identity and termination of pregnancy is being challenged in a lawsuit by the State of Wisconsin (among other plaintiffs), which is captioned *Franciscan Alliance, Inc., et al., v. Burwell*, N.D. Texas Case No. 7:16-cv-00108-O, as an invalid regulation. On December 31, 2016, the federal judge presiding over that lawsuit issued a preliminary injunction enjoining the enforcement of the rule's prohibition of discrimination on the basis of gender identity and termination of pregnancy. This injunction is effective immediately and, thus, the State of Wisconsin will not enforce the Section 1557 rule prohibiting discrimination on the basis of gender identity or termination of pregnancy.

The Department will continue to abide by its own regulations related to covered services under Medical Assistance/Medicaid ("MA"). Specifically, under the Department's MA regulations, transsexual surgery and medically unnecessary hormone therapy are not covered services. (See Wis. Admin. Code §§ DHS 107.03(23), (24); 107.10(4)(p)). Furthermore, under MA regulations, abortion services that do not comply with state statutes are not covered services. (See Wis. Admin. Code §§ DHS 107.06(4)(i), (5)(b)). The Department will continue to make coverage decisions under its regulations, and will not reimburse entities for procedures that fall outside of the Department's regulations.

Finally, under the injunction, only the portion of the Section 1557 rule prohibiting discrimination on the basis of gender identity and termination of pregnancy has been enjoined. Therefore, the Department will continue to work toward implementing other portions of the Section 1557 rule. In particular, the Department is working to provide the required nondiscrimination notifications and grievance procedures and to ensure access to services for individuals with limited English proficiency and communications disabilities.

Sincerely,

Michael Heifetz
Medicaid Director



Timeline of internal handling of Gender Conforming Surgical Requests within Wisconsin Medicaid Fee for service

September 2016 Joined BBM from OIG. Up until this point, within the department, sporadic 'top' procedures requested for gender dysphoria in the context of a gender identity disorder and supported by psychological assessment, were, at the advice of prior legal counsel, felt not to be included in the definition of "transsexual surgeries", which are excluded from coverage by code. Therefore, an opportunity existed for coverage of requests for gender conforming procedures, excluding genital surgeries, using Wis. Admin Code DHS 107.06(2)(c) which does allow for "surgical or other medical procedures of questionable medical necessity but deemed advisable in order to correct conditions that may reasonably be assumed to significantly interfere with a recipient's personal or social adjustment or employability, an example of which is cosmetic surgery".

From the start of my tenure with BBM, I was skeptical of the legal argument that breast procedures may not be considered to be 'transsexual surgery'. Transsexualism is an outdated term; however it has been used in medical literature for decades as an umbrella term to describe those who are unsatisfied with their designated gender. Gender dysphoria and gender incongruence are more modern replacement terms. Transsexual surgery, therefore, to my thinking would be any surgical alteration in persons with gender dysphoria or gender incongruence to conform to gender identity.

October 2016 New Medicaid Director- Michael Heifetz

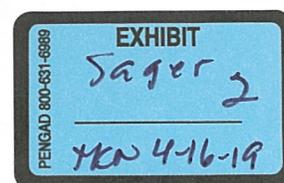
? Fall 2016 (unclear date) State of WI (among other plaintiffs; captioned Franciscan Alliance, Inc et al., v. Burwell) challenges the federal government regarding a portion of the rule implementing Section 1557 of the ACA of 2010, the non-discrimination provision; prohibiting on the basis of sex, including based on termination of pregnancy, gender identity and sex stereotyping

November 2016 Internal requests (via email) for direction and assistance in navigating increased requests for gender conforming surgery sent to management. Verbal direction via mid-level management from upper management were to not approve surgeries (specifically let them sit and 'age out'). (See attached email which was unanswered).

December 2016 federal judge in Texas presiding over the aforementioned lawsuit issued a preliminary injunction enjoining the enforcement of the rule's prohibition of discrimination on the basis of gender identity and termination of pregnancy.

January 2017 Letter to contract administrators at managed care organizations from the MA Director stating that the state of WI will not enforce Section 1557 prohibiting discrimination on the basis of gender ID and the department will continue to abide by its own regulations, specifically, that transsexual surgery (and medically unnecessary hormone therapy) are not covered services. (Wis. Admin Code DHS 107.03(23),(24); 107.10(4)(p))

January 2017 to present Given the increased number of requests for gender conforming surgeries since Medicare lifted its moratorium on the same in 2014, the increased political spotlight on the issue, the



lack of clear direction or guidance from upper Medicaid management and the seemingly clear stance of the state of WI not to cover such surgeries, the Medicaid clinical staff consisting of Dr. Wiggins and myself decided to no longer scrutinize such requests for medical necessity, nor the opportunity to exception via Wis. Admin Code DHS 107.06(2)(c), and viewed all gender conforming surgical requests (i.e. breast surgery, genital surgery, facial feminization etc) as transsexual surgeries which were denied per Wis Admin Code as non-covered services.

Julie Sager MD

July 3rd 2018

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Suzuki

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Secretary

September 25, 2017

ID# 5442392456

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And

MPA-05/183168

Cody Flack
400 N Monroe Ave #605
Green Bay, Wisconsin 54301

Dear Hearing Examiner and Mr. Flack:

The Division of Hearings and Appeals (DHA) has requested that the Department of Medicaid Services (DMS), submit a summarized statement outlining the facts and basis for denial of Prior Authorization (PA) #5171990032 for bilateral complete simple mastectomy (service code 19303) and breast reconstruction (nipple graft- service code 19350).

Mr. Flack is a 29 year old transgender man who is seeking the aforementioned services as part of gender confirmation surgery. The primary diagnosis listed with the prior authorization request is transsexualism (F64.0). Mr. Flack also carries a diagnosis of gender dysphoria which is an accepted medical indication for the surgical treatment requested.

This request was denied by DMS as Wis. Admin. Code DHS 107.03(24) specifically lists 'transsexual surgery' as a non-covered service under medical assistance.

The medical necessity of the services requested was not taken into account as reimbursement by Medicaid for this type of surgery is currently excluded by DHS regulations.

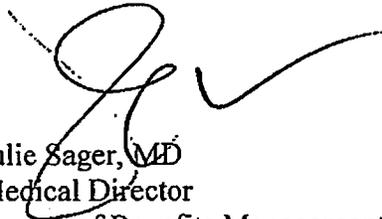
Furthermore, please take notice of the attached federal court decision staying enforcement of Section 1557 of the Affordable Care Act regulations related to gender identity.



Division of Hearings and Appeals
Cody Flack, MPA-05/183168
September 25 2017
Page 2 of 2

It is anticipated that the Division of Medicaid Services will not be participating in the fair hearing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Julie Sager', with a long horizontal flourish extending to the right.

Julie Sager, MD
Medical Director
Bureau of Benefits Management
Division of Medicaid services
Wisconsin Department of Health Services

Encl.