

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and SHANNON ANDREWS,

Plaintiffs,

-vs-

Case No. 17-CV-264-WMC

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

Madison, Wisconsin
October 10, 2018
8:15 a.m.

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF JURY TRIAL
HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

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1 (Proceedings called to order at 8:15 a.m.)

2 THE CLERK: Case No. 17-CV-264, *Alina Boyden v. Robert*
3 *J. Conlin*, called for the second day of jury trial.

4 May we have the appearances, please.

5 MR. DUPUIS: For the plaintiffs, Laurence Dupuis,
6 Nicholas Fairweather, and John Knight.

7 MR. KILPATRICK: For the defendants, Steven Kilpatrick,
8 Jody Schmelzer, and Colin Roth.

9 THE COURT: Very good. We are here just to address any
10 remaining issues for the parties, beginning with exhibits. So
11 I'll start with the plaintiffs, if you could advise if there are
12 any more exhibits that need to be addressed.

13 MR. DUPUIS: Your Honor, we were able to address
14 Exhibit 50 -- what we are going to call 501, which is the
15 Uniform Benefits. We have excerpts of that full document that
16 we're going to be using. It will contain four pages -- I'm
17 sorry. Yeah, four pages. One is essentially a cover-type
18 page --

19 THE COURT: All right.

20 MR. DUPUIS: -- identifying it as Uniform Benefits.

21 THE COURT: And are the -- the parties are stipulating
22 to its admission, I assume.

23 MR. DUPUIS: Yes.

24 THE COURT: Is that correct for the defendants?

25 MR. KILPATRICK: Yes, Your Honor.

1 THE COURT: All right. Then I will deem that 501 is
2 admitted, and you may proceed to publish to the jury whenever is
3 appropriate.

4 Any other issues for the plaintiffs?

5 MR. FAIRWEATHER: Yes, Your Honor. There is an exhibit
6 that we had a brief exchange with opposing counsel about last
7 night, which is Exhibit 24, which was not on our list which
8 would be used solely for proper rebuttal evidence. This is a
9 denial letter. I can put it on the overhead, if you'd like.
10 You don't have it with you.

11 THE COURT: That would be convenient. That's fine.

12 MR. FAIRWEATHER: Okay. This is a document of the same
13 sort that we had -- that the Court admitted yesterday over
14 hearsay objection from the Department of Justice, but it relates
15 to the denial of Ms. Andrews' request for coverage for gender
16 confirmation surgery.

17 THE COURT: From?

18 MR. FAIRWEATHER: From -- I'm sorry -- WPS, which she
19 also testified about yesterday.

20 THE COURT: And you want to introduce it in your
21 rebuttal case through Ms. Andrews; is that right?

22 MR. FAIRWEATHER: Correct, potentially.

23 THE COURT: I understand. Let me hear the objection
24 for the defendants.

25 MR. ROTH: It's the same hearsay objection as for the

1 other similar records for Ms. Boyden, and also Ms. Andrews has
2 already testified, so unless they call her again, there's no
3 foundation.

4 THE COURT: I agree, but if they call her again, I'm
5 going to allow Exhibit 24 into evidence as long as she
6 establishes she received it.

7 Was there anything -- anything else then for the plaintiffs?

8 MR. FAIRWEATHER: No.

9 THE COURT: I want to emphasize in particular --

10 (Discussion held off the record between counsel.)

11 THE COURT: Let's wait on demonstratives. I'm worried
12 more about evidence at this point, but I'll give you an
13 opportunity to raise that at the end of this hearing if we need
14 to.

15 You had talked last night about the possibility of moving
16 the admission of some other exhibits. I just want to make sure
17 at this point you're aware that you have Exhibit 6 in evidence,
18 11, 23A through D as in dog, and potentially 24, but I'm not
19 aware of any other exhibits that are in evidence for the
20 plaintiffs; is that right?

21 MR. DUPUIS: 6, 11, 23 --

22 THE COURT: A through D.

23 MR. KNIGHT: So I have copies of 23B, C, and D.

24 THE COURT: You have A, B, C, and D.

25 MR. KNIGHT: I do. I'm sorry, Your Honor. Because --

1 I wasn't sure whether you were allowing the jury to see those --

2 THE COURT: Those were -- 23A and B were admitted. 23C
3 and D -- I think you were going to mark those, and I would admit
4 them, but I didn't formally admit them. If they're now properly
5 marked -- they were 103, 8-9, and 103, 10-11 -- I indicated I
6 would admit them.

7 MR. KNIGHT: Since Ms. Boyden has stepped down, would
8 we simply give -- ask for admission before we start or you're
9 saying they've already been admitted.

10 THE COURT: Well, I suppose maybe then what we'll do is
11 we'll treat them all as possible rebuttal, and you'll have to
12 make your decision at that time.

13 MR. KNIGHT: Okay.

14 THE COURT: And I won't deem them admitted at this
15 point since there was an objection.

16 MR. DUPUIS: Your Honor, A and B are in now, correct?

17 THE COURT: Pardon me? A and B are in.

18 MR. DUPUIS: So C and D are the only questionable.

19 THE COURT: That's right. All right. Were there any
20 other exhibits that you're going to want to move admission in
21 your case-in-chief, because this would be the time to do so.
22 Hearing none, I'm going to -- I'll give you one last
23 opportunity, but I don't want to -- since we're going to be
24 moving right to the defendants' case, I don't want there to
25 suddenly be a sidebar because you want to move other exhibits,

1 so I'll come back to you on that.

2 Now, as to defendants, I'll hear if there were any other
3 exhibits that need to be addressed now that we have a 518A and
4 B, 517, 514, and now a 501 by stipulation.

5 MS. SCHMELZER: That's correct, Your Honor. We don't
6 have any others.

7 THE COURT: All right. I'll hear if there's anything
8 more for the plaintiffs then.

9 MR. DUPUIS: On exhibits, no, Your Honor, other than
10 the demonstrative.

11 THE COURT: And the demonstrative issue is something
12 that you haven't had a chance to talk through yet?

13 MR. ROTH: You just updated it with the numbers from
14 the testimony; is that right?

15 MR. DUPUIS: Yes, that's correct.

16 THE COURT: Here's what we're going to do: At the
17 break just make sure you're all on the same page. Otherwise
18 I'll come out a couple minutes early. Just tell Mr. Wiseman.
19 If I need to come out early, I'll do that. Otherwise, we'll
20 reconvene at 8:30 with -- whenever our jury is ready to proceed
21 with trial, and is it -- your first witness will be a new
22 witness, correct?

23 MR. DUPUIS: Will be Dr. Budge, correct.

24 THE COURT: All right. So she hasn't been on the stand
25 yet; is that correct?

1 MR. DUPUIS: No.

2 THE COURT: So we'll do that. You can just call her
3 name when we start, and then we'll have her come forward, and
4 I'll read her bio.

5 Anything more for the plaintiffs?

6 MR. DUPUIS: No, although we did just confirm they're
7 okay with the demonstrative.

8 THE COURT: All right. Then I'll come out as soon as
9 our jury is ready. Anything more for the defendants?

10 MS. SCHMELZER: No, Your Honor.

11 THE COURT: All right. I will see you at 8:30 or
12 thereabouts. We are off the record. Thank you.

13 THE CLERK: This Honorable Court stands in recess.

14 (Recess at 8:23 a.m. until 8:32 a.m.)

15 THE COURT: We'll bring out our jury.

16 (Jury enters the courtroom at 8:33 a.m.)

17 THE CLERK: This Honorable Court is again in session.
18 Please be seated and come to order.

19 Case No. 17-CV-264, *Alina Boyden v. Robert J. Conlin*, called
20 for the second day of jury trial.

21 THE COURT: Members of the jury, welcome back. We are
22 going to complete plaintiffs' case-in-chief, and plaintiffs may
23 call their last witness.

24 MR. DUPUIS: Plaintiffs call Dr. Stephanie Budge.

25 THE COURT: Dr. Budge, if you would come forward, and

1 you can come all the way forward to the front of the room to be
2 sworn.

3 **STEPHANIE BUDGE, PLAINTIFFS' WITNESS, SWORN**

4 THE COURT: And while Dr. Budge is getting settled, I'm
5 going to read an approved narrative statement of her background
6 because she is a designated expert in this case.

7 Dr. Budge is a licensed psychologist and professor of
8 Counseling Psychology who has specialized in gender identity and
9 gender transition for more than ten years. Dr. Budge graduated
10 from the University of Utah with a degree in Psychology in 2003.
11 She then received her Master of Science in Educational
12 Psychology from the University of Texas at Austin in 2006 and
13 completed her Ph.D. for Counseling Psychology with an emphasis
14 on transgender individuals at the University of
15 Wisconsin-Madison in 2011. Dr. Budge is currently an associate
16 professor in Counseling Psychology at the University of
17 Wisconsin-Madison where she teaches courses for masters and
18 doctoral students focused on counseling skills, psychological
19 assessment, and research design.

20 As a psychologist with expertise in gender identity issues,
21 Dr. Budge primarily provides clinical care to transgender
22 individuals. She has evaluated and provided mental health
23 treatment and care to over 100 transgender individuals through
24 individual and group therapy, psychological evaluations, and
25 supervision of the clinical work of students. Most of the

1 transgender individuals Dr. Budge works with have gender
2 dysphoria.

3 Through her faculty appointment at the University of
4 Wisconsin-Madison, Dr. Budge has engaged in clinical work
5 providing therapy to transgender individuals. She also directs
6 the Trans Research Lab where she designs research projects that
7 focuses on transgender individuals' mental health. She recently
8 designed a project concerning the efficacy of psychotherapy for
9 transgender individuals and trained therapists in assessing
10 gender dysphoria. In addition, Dr. Budge is a part-time
11 clinical health psychologist for the University of Wisconsin
12 Hospitals and Clinics Authority. At UWHCA Dr. Budge evaluates
13 transgender adolescents and helps determine what treatments are
14 appropriate for them.

15 Dr. Budge has published 62 invited and peer-reviewed journal
16 articles and book chapters. The majority of those publications
17 focus on transgender individuals and treatment for gender
18 dysphoria, including counseling, hormone therapy, and surgery.
19 Her publications have also described clinical decision-making
20 for transgender mental health care and effective
21 psychotherapeutic treatment for transgender individuals. She
22 sits on the editorial board for two peer-reviewed academic
23 journals, both related to the psychological issues affecting
24 transgender people, and has received numerous awards for her
25 research and clinical practice involving transgender

1 individuals. She is also a member of several professional
2 organizations, including the American Psychological Association,
3 which is the leading professional and scientific organization
4 for psychologists in the United States, and the World
5 Professional Association for Transgender Health, which publishes
6 the standards of care for treatment of gender dysphoria.

7 Those are -- those are Dr. Budge's qualifications, and you
8 may proceed now with her testimony.

9 MR. DUPUIS: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. DUPUIS:

12 Q Good morning, Dr. Budge.

13 A Good morning.

14 Q What is the definition of gender identity in the field of
15 psychology?

16 A In the field of psychology, gender identity means someone's
17 internal sense of their gender identity, so if they're male,
18 female, or somewhere in between.

19 Q Does everyone have a gender identity?

20 A Yes.

21 Q What does transgender mean in your field?

22 A Transgender means that somebody identifies their gender as
23 differently than the gender that was assigned to them when they
24 were born.

25 Q And when you say "assigned to them when they were born,"

1 what do you mean by that?

2 A So when an infant is born, most of the time some person,
3 usually a physician, says, based on the genitals, that they're a
4 boy or a girl, so they're usually assigned a gender at birth.

5 Q Is having a transgender identity a choice?

6 A No.

7 Q On what basis do you say that?

8 A For several reasons. So in my field in psychology, it's
9 considered unethical to change somebody's gender identity, and
10 that's because in the past there's been some research that's
11 been conducted on people where they've -- where some either
12 psychologists or some mental health professionals have tried to
13 change somebody's gender identity, and that hasn't been possible
14 or it's been extremely upsetting.

15 Q So you've used -- you've been described as an expert in
16 gender dysphoria. What is gender dysphoria?

17 A So gender dysphoria is a diagnosis that's included in the
18 manual that we use as psychologists. It's called the *Diagnostic*
19 *and Statistical Manual*, or the DSM-5, so I'll be referring to it
20 as the DSM-5. It includes a couple of different pieces that
21 are -- of how we would define gender dysphoria.

22 So there are a couple of pieces that are included in that.
23 There are two criteria. One of the criteria is that somebody
24 has to have a disconnect, or what we call incongruence, with
25 their gender identity and the gender that they were assigned

1 when they were born, and then there are six different symptoms
2 that are included within that, and those range from things like
3 I, you know, feel like I want to be rid of some of the primary
4 or secondary sex characteristics, so those are characteristics
5 that are, like, reproductive organs or different types of
6 your -- parts of your body that would be developed by sex
7 hormones, or there could be other components that are included
8 in that like I need to be treated as the gender identity that I
9 am or that I have these kind of typical feelings and reactions
10 to the gender identity that I have. There's another criteria
11 that includes the distress that's related to those feelings that
12 I just mentioned above.

13 Q And you may refer to those as -- the first set as criteria
14 A; is that correct?

15 A That's correct.

16 Q And then the distress part or impairment as criteria B?

17 A That's correct.

18 Q So I think you mentioned that -- a number of these
19 symptoms, and what are the sources of those symptoms or the
20 focuses of those symptoms?

21 A So those symptoms can come from different places. Like I
22 mentioned, in that criterion A that I had just talked about,
23 there are different areas that can cause gender dysphoria, so,
24 for example, for some people it may be related to their genitals
25 or to their breasts or to their chest or to different parts of

1 their body, so that might be one example. Another example might
2 be the way that they are treated. So if they're misgendered,
3 for example, that might also cause gender dysphoria.

4 Q So are fears about how others view the person part of the
5 distress of gender dysphoria?

6 A Yes.

7 Q And would that be one of the symptoms that would be looked
8 at under criterion A?

9 A Yes.

10 Q How do you evaluate a patient for gender dysphoria?

11 A Yeah, so there's a standard protocol that I use when I'm
12 evaluating somebody for gender dysphoria. Usually it's a two-
13 to three-hour meeting that I have with somebody that includes
14 something that we call a clinical interview, and that is a wide
15 range of questions that I ask somebody about their background,
16 their history, and may include some things related to their
17 psychological history, their medical history, those kinds of
18 things.

19 I always do a diagnostic interview. That includes going
20 through the DSM-5 and the primary diagnoses that people may
21 experience, and then I go through some of the other maybe more,
22 you know, some of the symptoms that people may have mentioned.
23 I also will ask for medical records sometimes or sometimes I'll
24 also talk to a person's treating physician or psychologist,
25 depending on what comes up in those clinical interviews or the

1 evaluation.

2 Q Do all transgender people have gender dysphoria?

3 A No.

4 Q For those who have gender dysphoria, how is it treated?

5 A So it may depend on the specific person. So I mentioned
6 that there are a lot of different symptoms that are included in
7 criterion A specifically. So depending on what the gender
8 dysphoria is that that person experiences, that would define
9 what treatment is medically necessary for that person. So, for
10 example, if the primary symptoms that are included in the gender
11 dysphoria are related to parts of their body, then a medical
12 intervention would be considered necessary in those instances.

13 Q Are there aspects of treatment for gender dysphoria that
14 are not medical interventions?

15 A There are. So, for example, it may be possible --
16 depending on what the dysphoria might be, so, for example, if
17 it's related to how someone might be dressing or those kinds of
18 things, then it's possible that having a mental health provider
19 who can help you kind of move through that or figure out ways of
20 doing that, that would be something that would be indicated in
21 that instance. So if -- depending on what it is, what the
22 actual gender dysphoria -- where it's located, then there might
23 be some different interventions that would be included there.

24 Q And you talked about medical interventions. What are those
25 medical interventions?

1 A So there are a couple of medical interventions that would
2 be deemed medically necessary for individuals who have gender
3 dysphoria. So, for example, it may be that cross-sex hormones
4 or hormone replacement therapy would be deemed medically
5 necessary for somebody, so, for example, if -- depending on the
6 different type of hormone therapy, that they will have different
7 symptoms to them. So if somebody takes testosterone, for
8 example, that might lower their voice or cause facial hair, so
9 that would be something that would happen there, or other things
10 might happen from estrogen or spironolactone.

11 And then a couple of other medical interventions that might
12 be considered medically necessary would be things like gender
13 confirmation surgery, which can include a wide range of things,
14 so that can include -- in psychology and the way that we talk
15 about it, it's actually a pretty broad definition, so things
16 like having chest surgery, so that would be either having breast
17 surgery so either breast reduction or chest masculinization or
18 having breasts implanted, and then also there could be some
19 genital surgeries. Also facial feminization surgery could be
20 included in that definition.

21 Q So you talked -- you mentioned before primary and secondary
22 sex characteristics. Can you tell us what surgeries deal with
23 primary sex characteristics and which ones deal with secondary
24 sex characteristics?

25 A Yes. So the surgeries that deal with primary sex

1 characteristics are the ones that focus on genital surgeries or
2 things like having a hysterectomy, for example. And then for
3 the secondary sex characteristics, those would be surgeries that
4 would be related to the chest or breasts and then -- or to the
5 face.

6 Q And are the secondary sex characteristics those that are
7 the result of having hormones that are inconsistent with your
8 gender identity?

9 A Yes.

10 Q So a -- it would be having masculine hormones even though
11 you are a female -- transgender female, having those masculine
12 hormones would masculinize your face, for example?

13 A That's correct.

14 Q Are you able to recommend treatments for gender dysphoria?

15 A Yes.

16 Q How do you determine what treatments are medically
17 necessary for a particular patient?

18 A So when I'm working with a patient, there will be -- like I
19 mentioned that I do these evaluations, and so throughout that
20 evaluation it will become clear exactly where the dysphoria may
21 be for that particular person, and based on the dysphoria, then
22 I can make recommendations. So, for example, if somebody is
23 indicating to me that they have severe distress that's related
24 to their genitals, then I would -- and it seems like they meet
25 criteria for gender dysphoria, for example, then I would make a

1 recommendation that it would be medically necessary for them to
2 have surgery.

3 Q You're not a physician, a medical doctor, correct?

4 A No.

5 Q So you don't actually prescribe the hormones or perform the
6 surgeries, right?

7 A That's correct.

8 Q What role do you play?

9 A Because gender dysphoria is considered a psychological
10 disorder, my role is to talk with the person about their
11 understanding of what gender dysphoria is, how it feels to them
12 and their body, and what seems like it would be necessary for
13 them. And because I have an expertise in this area, then I can
14 deem whether or not it seems like they do indeed have gender
15 dysphoria, and if they do have that, then that would be -- then
16 I can indicate whether or not that would be medically necessary
17 for them. But I don't have conversations with them about the
18 actual medical component of that because that's not within my
19 area of expertise.

20 Q Do you assess other psychological issues that might need
21 treatment or interfere with competence to consent?

22 A I do.

23 Q And that's part of the clinical interview?

24 A Yes.

25 Q What role does the doctor play in this process?

1 A Okay. So the medical doctor would have several roles.
2 After I would recommend that it may be medically necessary for
3 somebody to have a treatment, then that person would meet with
4 the medical doctor, and the medical doctor would talk with them
5 about the actual medical procedure. So the medical doctor would
6 talk with them about the side effects or talk with them about
7 possible pros and cons of the surgery and also about what would
8 actually -- what it will look like.

9 Q Do they also review medical contraindications?

10 A My understanding is that they would.

11 Q And what does that mean?

12 A That means that if there's some other medical diagnosis
13 that somebody might have that would interfere with the surgery
14 or hormones being effective, then they would review if that
15 would -- if it's possible or medically indicated for the person
16 to have hormones or surgery.

17 Q Do all people who need -- with gender dysphoria who need
18 hormones also need surgery?

19 A No.

20 Q How do you determine who needs surgery?

21 A So I mentioned that during the evaluation I'll have a
22 conversation with somebody about their dysphoria and what it
23 feels like to them, how it actually manifests for them, and
24 through that conversation we'll talk about the different kinds
25 of things that would reduce their gender dysphoria. Hormones

1 can only go so far with changing certain parts of your body, and
2 so if it seems like somebody's dysphoria primarily comes from
3 their genitals, for example, hormones for the most part may not
4 change somebody's genitals to the extent that would actually
5 have the genitals match the gender identity that that person
6 has.

7 Q Do you evaluate the effectiveness of surgical treatments
8 for patients with gender dysphoria?

9 A I do.

10 Q How do you do that?

11 A So in addition to my clinical role as a clinical -- as a
12 counseling psychologist with a clinical role, I'm also a
13 researcher, so my primary position at the university is as a
14 researcher, and, therefore, I have been able to evaluate the
15 research that -- the abundance of research that has been done
16 about the efficacy of hormones and surgery.

17 Q And have you also observed the effectiveness of surgical
18 treatments for your own patients with gender dysphoria?

19 A I have.

20 Q Do you have an opinion on the effectiveness of surgical
21 treatments in reducing or eliminating gender dysphoria?

22 A I do.

23 Q And what is that opinion?

24 A So my opinion is that in terms of the research, there has
25 been over 30 years of research that has shown the effectiveness

1 of hormones and surgery for individuals with gender dysphoria.
2 Especially in the last five years, the research has become
3 extremely robust and has indicated that it's effective -- that
4 it's effective in reducing gender dysphoria, and so that's what
5 the research says.

6 In terms of my own clinical work, I'm working with clients.
7 I have seen enormous reductions in distress after people --

8 MS. SCHMELZER: Your Honor, I'm going to object as
9 being outside the scope of her report.

10 THE COURT: Do you want to cite me to a page or line?

11 MR. DUPUIS: Yeah. I believe this is on page --

12 THE COURT: We're still in 89?

13 MR. DUPUIS: Yes. 15 to 17 and 18, paragraphs -- and
14 page 21 beginning with "In the above section."

15 THE COURT: Just give me a moment.

16 I'll overrule it. You can pose your next question.

17 MR. DUPUIS: Overrule it, so she can answer the
18 question?

19 THE COURT: Yes. She did answer the question.

20 MR. DUPUIS: Oh, I'm sorry. You're right.

21 THE COURT: You should ask the next question.

22 BY MR. DUPUIS:

23 Q Will all people with gender dysphoria have the same
24 response to particular medical treatments?

25 A Not necessarily.

1 Q So will one medical treatment always be sufficient to
2 eliminate gender dysphoria, for example?

3 A Not necessarily.

4 Q Can you -- do you have knowledge of what happens when -- if
5 prescribed surgery is not provided?

6 A Yes. So when prescribed surgery is not provided, in my
7 clinical experience it has caused extreme distress for the
8 clients who I worked with, for example, either, you know,
9 experiencing depression, anxiety, suicidal ideation. I've had
10 some clients who have been hospitalized after -- if they are not
11 able to have surgeries or hormones, for example.

12 Q And when you've had patients who have had surgeries, has
13 that surgery -- one surgery always corrected the gender
14 dysphoria?

15 A It depends on the patient. So for some patients, if they
16 only have dysphoria in one part of their body and then that
17 surgery was on that one part of their body, it's likely that
18 that was effective for them. But if the patient experiences
19 dysphoria in different ways, then they might have a reduction in
20 dysphoria based on that particular treatment, but then they
21 would still experience dysphoria for the other areas of their
22 body or the other parts that cause dysphoria for them.

23 Q Did you evaluate Alina Boyden and Shannon Andrews for
24 gender dysphoria?

25 A I did.

1 Q When did you do that?

2 A In January of 2018.

3 Q And how did you do that?

4 A I conducted an evaluation separately with each one of them
5 in the same way that I described earlier on how I conduct
6 evaluations.

7 Q Did you reach any diagnoses for Alina Boyden?

8 A I did.

9 Q And what did you diagnose for her?

10 A I diagnosed her with gender dysphoria and other specified
11 anxiety disorder.

12 Q How did you determine that she had gender dysphoria?

13 A I went through the DSM-5 criteria asking specific questions
14 related to that criterion A and then the six different symptoms
15 in criterion B, and Alina met all six of the symptoms for
16 criterion A and met criterion B.

17 Q So can you describe the symptoms of her gender dysphoria?

18 A Uh-huh. So Alina's primary dysphoria when I met with her
19 was coming from her genitals.

20 Q And can you describe what the symptoms were related to her
21 genitals?

22 A She had indicated to me that she experienced extreme
23 distress and shame related to her genitals, that they definitely
24 didn't feel like they fit for her, that she tried to avoid
25 thinking about them, and that when she was confronted with

1 thinking about them, that that caused great levels of distress
2 for her.

3 Q Are those symptoms consistent with the symptoms of other
4 patients with gender dysphoria you've seen?

5 A Yes.

6 Q Can you describe the severity of her symptoms, which I take
7 it is part of what criterion B is getting at; is that correct?

8 A Yes. So criterion B we do assess the level of severity,
9 and I had put Alina's level of severity related to that specific
10 dysphoria at severe.

11 Q So what sorts of limitations did her gender dysphoria
12 impose on her?

13 A So in terms of Alina's gender dysphoria, because it was
14 primarily isolated to her genitals, she was functioning very
15 highly in school and other areas of her life. There's some
16 social aspects of her functioning, specifically related to
17 romantic relationships, that were included, but also just an
18 internal level of anxiety and distress and shame that was
19 related to her genitals that I had put at a severe level.

20 Q So you also diagnosed an anxiety disorder, and I think you
21 said not specified or not otherwise specified or something --

22 A Other specified anxiety disorder.

23 Q And what is that?

24 A So there isn't an anxiety disorder in the DSM that's
25 related to experiences of discrimination, for example, so she

1 had indicated to me that she had experienced anxiety related to
2 the denials from the -- from ETF and from the other pieces that
3 were related to the case.

4 Q So was there any of that anxiety disorder that was separate
5 from her -- either her reaction to the exclusion or the gender
6 dysphoria?

7 A No. She has experienced some, like, usual stress from
8 school, but none of that was related to that anxiety disorder.

9 Q Did you make any diagnoses for Shannon Andrews?

10 A I did.

11 Q And what were those diagnoses?

12 A Shannon Andrews had a diagnosis of gender dysphoria and of
13 social anxiety disorder.

14 Q And, again, how did you determine that Shannon had gender
15 dysphoria?

16 A I used the same evaluation method as I did with Alina, so I
17 went through the criteria for the DSM-5.

18 Q Can you describe the symptoms of Shannon's gender
19 dysphoria?

20 A Uh-huh. So Shannon's gender dysphoria was primarily
21 related to her face and to the masculinization of her face. She
22 had described to me experiencing extreme levels of distress and
23 dysphoria when she thought about how other people were going to
24 perceive her or how people were going to interact with her
25 because of her masculine features. She had indicated to me that

1 she avoided social situations and basically didn't have a
2 fulfilling social life because she was concerned about what was
3 going to be happening in social situations.

4 Q Is that type of symptom specifically in the DSM?

5 A Is the -- can you repeat that?

6 Q Yeah. Is the sort of social interaction or fear of how
7 others will perceive you part of the DSM --

8 A Yes. So there is a symptom under that criterion A that
9 indicates that -- that's related to how you are treated as a
10 person, yes.

11 Q So Shannon had already had some surgical treatments for her
12 gender dysphoria when you met with her, correct?

13 A Yes.

14 Q What surgeries had she had?

15 A She had had gender confirmation surgery on her genitals.

16 Q Do you have an understanding of whether Shannon's insurance
17 had covered that surgery?

18 A She had told me that it had not been covered.

19 Q And do you have an understanding of why it was not covered?

20 A My understanding was that it was not covered because there
21 was an exclusion in the health insurance banning or barring
22 transgender individuals from having surgery related to their
23 gender identity.

24 Q Have you seen the exclusion at issue in this case?

25 A I have.

1 THE COURT: And for the record, 501 is an excerpt from
2 the health -- I should have had this available.

3 MR. DUPUIS: It's the Uniform Benefits plan.

4 THE COURT: Thank you -- from the Uniform Benefits plan
5 that's applicable to the two plaintiffs, and the parties have
6 agreed that this excerpt is accurate, and so it is admitted as
7 Exhibit 501.

8 And you may proceed, Counsel.

9 BY MR. DUPUIS:

10 Q Have you seen this document before?

11 A I have.

12 Q And what do you understand it to be?

13 A I understand it to be the ETF's Uniform Benefits, the state
14 health insurance plan.

15 Q And I'd like to draw your attention to a particular page of
16 this document, the fourth page --

17 UNIDENTIFIED JUROR: Zero in a little.

18 THE COURT: Yeah, they'll have to do that from --
19 unfortunately, there are certain controls not given to the
20 judge, but it's not legible. When you're ready, you can zoom
21 in.

22 UNIDENTIFIED JUROR: Yeah.

23 THE COURT: You may proceed, Counsel.

24 MR. DUPUIS: Your Honor, sometimes counsel is not
25 technologically sophisticated on these things, but I will

1 attempt to do some good zooming. Yeah, I know where it is, but
2 whether I can do it effectively is another question.

3 So I'd like you to take a look at the top of this.

4 THE COURT: And the jury will have this in the jury
5 room.

6 MR. DUPUIS: Can the jury see that okay now?

7 THE COURT: And the key is don't move it now because
8 it's an auto focus, so it will blur every time you move it.

9 BY MR. DUPUIS:

10 Q Is this the exclusion under 1(a) that you understand to be
11 the exclusion, where I'm pointing here --

12 A Yes.

13 Q -- that prevented Shannon and Alina from obtaining coverage
14 for their hormone -- or for their surgical treatments?

15 A Yes.

16 Q I'm going to take that away.

17 Were you able to assess the effectiveness of the surgeries
18 that Ms. Andrews had already had on her gender dysphoria?

19 A Yes.

20 Q And can you describe the effect that that surgery had had
21 on her?

22 A Yes. And they had what I would consider a great effect on
23 her mental health and well-being. She had indicated to me that
24 if she hadn't been able to have surgery, that she would not be
25 here today, that she would have killed herself.

1 Q So can you describe the severity of her symptoms before she
2 had had that genital surgery?

3 A So I had mentioned that she had indicated that she would
4 have killed herself if she would not have been able to have that
5 surgery, and I would indicate that that would be in the severe
6 range.

7 Q Did you do anything to confirm your sense of the severity
8 prior to the surgery, the severity of her symptoms prior to the
9 surgery?

10 A Can you restate that?

11 THE COURT: Is there anything in her background that
12 you reviewed that would have suggested that her self-report was
13 accurate?

14 THE WITNESS: Yes. So I had asked her about her
15 history related to her mental health, and there were a lot of
16 things that indicated to me that that was something that was
17 likely to have happened. For example, she had suicide attempts
18 in her past and also, for example, had been struggling at
19 certain employment positions and had struggled at times in
20 school and that while she was able to really get through those
21 times, because of the suicide attempts previously, that was
22 indicative to me that that's something that would have likely --
23 would have occurred.

24 BY MR. DUPUIS:

25 Q Did you talk to any of her treatment providers from that

1 time?

2 A I did. I talked to Nyle Biondi about her treatment from
3 the time that she had worked with him. He had indicated to me
4 that she was actually the client who he was most worried about
5 when he was working with her because of her suicidal ideation.

6 Q Would you say that the gender confirmation surgery or
7 genital surgery that she had was medically necessary?

8 A Yes.

9 Q Did the surgery completely eliminate her gender dysphoria?

10 A No.

11 Q What sorts of symptoms remained?

12 A So her dysphoria related to her genitals had -- was pretty
13 much eliminated after the surgery, but that allowed then for the
14 dysphoria that she had related to the masculinization of her
15 face to then creep up, and this is pretty typical for people who
16 have had one type of treatment but have dysphoria in other areas
17 of their life. So for Shannon she had indicated to me that it
18 was becoming more clear that, you know, that she wasn't passing
19 as well as she felt like she needed to to be safe in the world
20 and also to be treated the way that she needed to be treated
21 from other people.

22 Q You also diagnosed a social anxiety disorder for --

23 THE COURT: Counsel, you may want to either turn off
24 the mic or pass notes, but one or the other.

25 You may proceed, Counsel.

1 BY MR. DUPUIS:

2 Q You also diagnosed an anxiety disorder for Ms. Andrews?

3 A I did.

4 Q What are the symptoms of that?

5 A So a social anxiety disorder is focused on individuals who
6 are fearful of social situations, and some of the symptoms that
7 are included in that include things like fear of rejection or
8 fear of being humiliated in public and that basically almost all
9 social interactions that aren't one-on-one are tolerated with
10 great anxiety, and so for Shannon that was the case.

11 Q And so what was the source of that social anxiety for her?

12 A The source of the social anxiety for her was her fear of
13 how people would treat her because of the masculinization of her
14 face.

15 Q And is that symptom consistent with symptoms you've seen in
16 other patients with gender dysphoria?

17 A Yes.

18 Q And the surgical interventions, are those designed just to
19 make people happier with their appearance?

20 A They're designed to reduce gender dysphoria, so it wouldn't
21 be -- I mean, some people may have happiness as a result of
22 having the surgery, but the primary purpose of the surgery is to
23 reduce gender dysphoria.

24 Q And is it targeted toward primary or secondary sex
25 characteristics?

1 A Depending on the surgery, it would be -- if this is facial
2 feminization surgery, that it would be targeted toward the
3 secondary sex characteristics.

4 Q And, again, secondary sex characteristics are those -- can
5 you define secondary sex characteristics again?

6 A Yes. So they're characteristics that evolve as a result of
7 the sex hormones, so, for example, for a transgender woman who
8 has gone through puberty, that there are certain features in
9 one's face that may be more masculinized, so, for example, a
10 more prominent jaw line or brow ridge, an Adam's apple. Those
11 are things that are a result of testosterone.

12 Q Was any of Shannon's anxiety, social anxiety, related to
13 anything other than the masculine features of her face at the
14 time you did your evaluation?

15 A No.

16 Q Did you arrive at a conclusion about what kinds of
17 treatments Alina Boyden and Shannon Andrews needed at the time
18 of your interviews with them?

19 A I did.

20 Q What treatments did you conclude would be medically
21 necessary for Alina Boyden?

22 A I concluded that gender confirmation surgery, specifically
23 genital surgery, would be medically necessary for Alina Boyden.

24 Q And on what basis did you arrive at that conclusion?

25 A And that was because of the severity of her gender

1 dysphoria.

2 Q Were there any psychological reasons that would have been
3 inappropriate for Alina to have that surgery?

4 A No.

5 Q Did you reach a conclusion about the likely effect of
6 genital surgery on Alina's gender dysphoria?

7 A I did.

8 Q And what was that conclusion?

9 A I would anticipate that her gender dysphoria would either
10 be greatly reduced or completely eliminated because her gender
11 dysphoria was only focused on her genitals.

12 Q Were you able to assess the effect of her not receiving
13 gender confirmation surgery on her gender dysphoria?

14 A I was.

15 Q And what was the effect of not receiving gender
16 confirmation surgery?

17 A I was concerned about what might happen if Alina was not
18 able to receive surgery. She had indicated to me that she would
19 potentially engage in self-surgery if she was not able to have
20 surgery that was covered.

21 Q At the time you evaluated Shannon Andrews, were you able to
22 determine whether any other treatments besides the gender
23 confirmation surgery that she had had before you saw her would
24 be medically necessary to treat her gender dysphoria?

25 A Yes.

1 Q What treatments did you conclude would be necessary?

2 A I concluded that facial feminization surgery would be
3 medically necessary for Shannon.

4 Q And on what basis did you reach that conclusion?

5 A That was due to the severity of her gender dysphoria.

6 Q Were there any psychological reasons that it would be
7 inappropriate for Ms. Andrews to have had facial feminization
8 surgery?

9 A No.

10 Q Did you reach a conclusion about the likely effect of
11 facial feminization surgery on Shannon's gender dysphoria?

12 A I did.

13 Q And what was that conclusion?

14 A I also concluded that either her gender dysphoria would be
15 greatly reduced or eliminated.

16 Q And, again, why do you say that?

17 A So when I had talked with Shannon about her -- the previous
18 responses that she had had to treatment, she had had great
19 responses. So when she had had hormone surgery -- or when she
20 had hormone therapy and when she'd had the gender confirmation
21 surgery with her genitals, she'd had a really positive response,
22 and so we can only conclude that she would also have a positive
23 response to the facial feminization surgery, and also that was
24 the primary component of what she had described related to her
25 dysphoria when we met.

1 Q Were you able to assess the effect of not receiving facial
2 feminization surgery at the time that you interviewed her on her
3 gender dysphoria?

4 A I was.

5 Q And what was the likely effect of not -- had she not been
6 able to receive facial feminization surgery?

7 A I was concerned about Shannon's mental health. She had
8 indicated to me that she'd had suicidal ideation in the past if
9 not being able to receive surgeries, and so that was something
10 for me that I would have been concerned about if she hadn't been
11 able to have that surgery, and at the very least I would
12 anticipate that she would only have an increase in depression
13 and more anxiety as well.

14 Q Can you define suicidal ideation?

15 A Yeah. So suicidal ideation includes somebody who may have
16 suicidal thoughts that come up, so ideation just means thoughts
17 that happen related to suicide.

18 Q So for both Shannon and Alina, would it be -- well,
19 actually let me withdraw that question. Would it be unusual for
20 a person with gender dysphoria to experience relief after
21 receiving surgery and then have dysphoria increase at some later
22 point?

23 A No. That would be pretty usual. So in the clinical work
24 that I've done, a lot of my clients may have dysphoria in
25 several different realms but will say, you know, I have this

1 primary dysphoria related to this particular piece, and if they
2 receive hormones and then they have this initial sense of relief
3 or initial sense of reduction in dysphoria, that's pretty
4 common. And what will often happen is that because that
5 dysphoria has been decreased related to that particular part of
6 their body or that particular piece of dysphoria that they
7 experience, then they actually have more mental space to focus
8 on other dysphoria that they may have. That's why they may
9 experience some initial relief but may also then have an
10 increase in dysphoria related to other aspects of their body.

11 Q So beyond the continued gender dysphoria from the inability
12 to get treatment, were you able to determine if the exclusion
13 caused any other distress to Ms. Andrews and Ms. Boyden?

14 A I was.

15 Q How did you do that?

16 A I specifically asked them separately what their reactions
17 were when they had received -- you know, when they had learned
18 about the exclusion and then also what had happened when they
19 had received denials, and so I'd asked them questions
20 specifically about those aspects.

21 Q Can you describe the distress that Shannon Andrews -- I'm
22 sorry, that Alina Boyden experienced as a result of the
23 exclusion?

24 A Alina told me that she was extremely upset. It's
25 interesting because she indicates that she usually suppresses

1 her emotions, and so for her sometimes that means either feeling
2 extremely angry or feeling extremely distressed, but she also
3 had indicated that she had experienced panic attacks, so
4 definitely an increase in anxiety.

5 Q And for Shannon?

6 A And Shannon also indicated to me that she was extremely
7 upset. She was feeling discouraged, unsure about how to
8 proceed, and that for her she at first felt hopeless but then
9 when she had indicated that she was going to try to fight the
10 exclusion, then she started to feel some hope. But beyond
11 trying to actually do something about it, there was definitely a
12 feeling of hopelessness.

13 Q I'd like you to take a look at another page from Exhibit
14 501.

15 I'm going to publish this to the jury, if that's all right.

16 THE COURT: You may. This is admitted, so you may
17 proceed.

18 MR. DUPUIS: I'm trying to -- there it is. Can people
19 see that?

20 THE COURT: Yes, it is on their screens.

21 MR. DUPUIS: Okay.

22 BY MR. DUPUIS:

23 Q So what is this that you're looking at right now on the
24 screen?

25 A This is the definition of "medically necessary" according

1 to ETF.

2 Q Can you read that -- well, actually I'm not going to ask
3 you to read the whole definition, but have you seen that before?

4 A I have.

5 Q Was genital surgery medically necessary for Shannon under
6 this definition?

7 A Yes.

8 Q Was facial feminization surgery medically necessary for
9 Shannon under this definition?

10 A Yes.

11 Q Was genital surgery medically necessary for Alina under
12 this definition?

13 A Yes.

14 MR. DUPUIS: No further questions.

15 THE COURT: All right. Cross-examination.

16 CROSS-EXAMINATION

17 BY MS. SCHMELZER:

18 Q Good afternoon, Dr. -- or good morning, Dr. Budge.

19 A Good morning.

20 Q In the narrative that the judge read for the jury, it
21 discussed your work at the Trans Research Lab, correct?

22 A Correct.

23 Q You've only conducted one study start to finish at that
24 Trans Lab since 2014, correct?

25 A I would say that we -- yes, but that we've completed many

1 other studies as a result of the lab.

2 Q And you've never conducted a study in that lab concerning
3 the effectiveness of gender confirmation surgery, correct?

4 A That's correct.

5 Q And you talked a little bit about being a clinical
6 psychologist at the University Hospital, correct?

7 A Yes.

8 Q And that is assessing adolescents there for gender
9 dysphoria, correct?

10 A That's correct.

11 Q And in your role as a psychologist at the UW Hospital, you
12 worked there for over a year, for approximately a year?

13 A Two summers, yes.

14 Q Two summers. And you've seen about nine to ten patients
15 during that time?

16 A Yes.

17 Q And for all of these patients, you wrote letters of
18 recommendation that they get some form of medical treatment for
19 gender dysphoria?

20 A Yes.

21 Q You recommended gender reassignment surgery for some of
22 those adolescents as well, correct?

23 A Yes.

24 Q In fact, you recommended reassignment surgery for three of
25 those adolescents that were only 17 years old?

1 A Two of them were 18 and one was 17.

2 Q You remember having your deposition taken in this case,
3 correct?

4 A Uh-huh.

5 Q Look at page 33. At the bottom of page 33, can you see
6 that okay, Dr. Budge?

7 A Yes.

8 THE COURT: All right. Go ahead.

9 BY MS. SCHMELZER:

10 Q I asked you the question at line 24:

11 "Sure. Sorry. I'm trying to determine which of the letters
12 of recommendations you wrote for surgery were for individuals
13 under the age of 18."

14 And you answered, "I'm recalling perhaps three, and all
15 three of them would have been at the age of 17."

16 Correct?

17 A That's correct.

18 Q And I want to talk about how much counseling you did in
19 that role. Prior to the start of the school year, this past
20 school year, you only spent about 10 to 15 percent of your time
21 doing that counseling, correct?

22 THE COURT: "That counseling" being?

23 MS. SCHMELZER: At the UW Hospital.

24 THE WITNESS: It's not considered counseling. I only
25 conduct evaluations.

1 BY MS. SCHMELZER:

2 Q You don't plan to see any patients during this school year,
3 correct?

4 A No.

5 Q You testified earlier about the definition or what the
6 criteria is for gender dysphoria and that I guess it was
7 criteria B that requires a finding of clinically significant
8 distress or impairment in social, occupational, educational, or
9 other important areas of functioning, correct?

10 A That's correct.

11 Q So having a diagnosis of gender dysphoria means you have to
12 have some form of clinically significant distress, correct?

13 A Yes, that's correct.

14 Q So if you have gender dysphoria early in life or as you
15 assessed Ms. Andrews and Ms. Boyden, as having that before
16 having any medical interventions, they were suffering clinically
17 significant distress at that time?

18 A When they were younger.

19 Q Yes.

20 A Yes.

21 Q And throughout most of their life?

22 A That's correct.

23 Q You noted that -- and I guess in your report you note that
24 Ms. Andrews enjoys work.

25 A Yes.

1 Q Feels efficacious in her work and receives positive
2 feedback about her employment.

3 A Yes.

4 Q And that she has several sources of support from her
5 girlfriend, a close friend, and work colleagues?

6 A Yes.

7 Q But before that she did suffer some distress as a child, in
8 her childhood and throughout adolescence?

9 A Yes.

10 Q And I think you said significant distress.

11 A Yes.

12 Q And it was so strong that she started to feel suicidal
13 thoughts at 8 years old.

14 A Yes.

15 Q And the significant distress from her genitals existed
16 extremely when she started puberty, correct?

17 A Yes.

18 Q And at the age of 17 she was experiencing significant
19 depression and feelings of withdrawal and alienation?

20 A Yes.

21 Q And this was all before March of 2014.

22 A That's correct.

23 Q And also December of 2013 you mentioned in your report she
24 got fired from a job?

25 A That's correct.

1 Q And her mental health was steadily declining.

2 A Yes.

3 Q She experienced impairment in functioning related to
4 employment at several points of her life.

5 A Yes.

6 Q Before 2014.

7 A Yes.

8 Q Then two months after she lost her job at the Institute for
9 Discovery -- that would have been February or March of 2014?

10 A Around then, yes.

11 Q She started working at her current employment at the
12 Carbone Research Center, correct?

13 A The Carbone Research Center.

14 Q Yes, Carbone. Sorry. And during that time she felt like
15 it was a turning point.

16 A Yes.

17 Q And she felt appreciated at work, and she was able to excel
18 at her job, which increased her confidence.

19 A These are things that she told me, yes.

20 Q At that point she began telling more people about her
21 gender identity?

22 A Yes.

23 Q And she told her parents, and they were very supportive of
24 her during that time.

25 A This is what she told me, yes.

1 Q And in your report you note that her --

2 MR. DUPUIS: Objection, Your Honor. Just shouldn't be
3 referring to the report --

4 THE COURT: We'll have a brief sidebar.

5 (Discussion held at sidebar at 9:26 a.m.)

6 THE COURT: First, Mr. Knight (sic), your objection is
7 she shouldn't be referring to the report?

8 MR. DUPUIS: No, no.

9 THE COURT: Shouldn't be referring to what?

10 MR. DUPUIS: She shouldn't -- she should just be asking
11 questions.

12 THE COURT: I'm not sure -- I don't know what that is.
13 That's not an objection --

14 MR. DUPUIS: Well --

15 THE COURT: -- that I recognize --

16 MR. DUPUIS: It's impeachment without --

17 THE COURT: All she's doing is having her confirm
18 specific facts.

19 MR. DUPUIS: The fact part --

20 THE COURT: Was there something in particular --

21 MR. DUPUIS: You said in your report --

22 THE COURT: I don't have -- it's probably more accurate
23 to say without the report. I am a little concerned that we're
24 spending so much time going over testimony that was given
25 directly by Ms. Andrews, and I'm not sure -- I understand the

1 general argument that she had a lot of hard times and then she
2 did better long before she was ever subject to the exclusion. I
3 get that general point. She's already established most of that
4 through -- or you've established that through Ms. Andrews'
5 testimony. If you could move this along, I'd appreciate it.
6 Thank you.

7 (Sidebar discussion ends at 9:27 a.m.)

8 BY MS. SCHMELZER:

9 Q Dr. Budge, after Ms. Andrews started hormone therapy, she
10 felt like the dysphoria had dissipated, correct, somewhat?

11 A Somewhat, yes.

12 Q And the voice training helped her dysphoria dissipate,
13 correct?

14 A Somewhat.

15 Q And expressing her gender through female clothing and
16 transitioning in that respect?

17 A Somewhat, yes.

18 Q And she certainly felt less distressed after hormone
19 therapy. It was like the blood was removed from her body and
20 replaced with lightning and everything was sharper, clearer, and
21 more immediately present.

22 A Yes.

23 Q I want to talk a little bit about -- from then she started
24 to progress towards having sex reassignment surgery, correct?

25 A (No verbal response.)

1 Q And you talked about the criteria for diagnosing gender
2 dysphoria, but I'd like to talk about the criteria for having
3 reassignment surgery. That's set forth in standards of care,
4 correct?

5 A Yes.

6 Q And those are the -- I think we referred to them yesterday
7 as the WPATH standards? Is that World Professional Association
8 for Transgender Health?

9 A That's correct.

10 Q And that's a source that you consider to be authoritative
11 in your field?

12 A Yes.

13 Q And they set the standard for transgendered health.

14 A Yes.

15 Q I'm going to show you page 60 of those standards. Can you
16 read that okay, Doctor?

17 A Yes.

18 Q And is this the part of the standards of care that set
19 forth the criteria for having the type of surgery that Ms.
20 Andrews had?

21 A Yes.

22 Q The first -- there's six of those, correct?

23 A Yes.

24 Q And the first of those is a persistent, well-documented
25 gender dysphoria, so a diagnosis of gender dysphoria.

1 Second is capacity to make --

2 THE COURT: I'm sorry, Counsel. If there's an
3 objection, you object. If it mischaracterizes, if it's a
4 misstatement, that's the process.

5 MR. DUPUIS: Objection.

6 THE COURT: With that said, Counsel, if you have a
7 question for the witness, you should pose it, not just start
8 reading.

9 MS. SCHMELZER: Okay. It is a learned treatise, so I
10 don't want --

11 THE COURT: That's not my concern.

12 MS. SCHMELZER: Oh.

13 THE COURT: It isn't offered as an exhibit. My concern
14 is that you treat this as a question and answer rather than just
15 make statements, which is what you just did. So let's begin
16 again with the first of these points.

17 BY MS. SCHMELZER:

18 Q Okay. And just to confirm, this is the criteria for the
19 vaginoplasty procedure that Ms. Andrews had, correct?

20 A Yes.

21 Q Okay. And we talked about the first two criteria. What is
22 the third criteria?

23 A Age of majority in a given country.

24 Q And what's the fourth criteria?

25 A If significant medical or mental health concerns are

1 present, they must be well controlled.

2 Q And the fifth criteria?

3 A 12 continuous months of hormone therapy as appropriate to
4 the patient's gender goals.

5 Q And the sixth criteria?

6 A 12 continuous months of living in a gender role that is
7 congruent with their gender identity.

8 Q And Ms. Andrews was at some point able to meet these
9 criteria to have surgery?

10 A Can you say the question again?

11 Q Yes. She did meet that criteria to have surgery at some
12 point, correct?

13 A That's my understanding, yes.

14 Q In June of 2015, she received -- and I should mention, are
15 there other criteria that's required to have surgery?

16 A There are two letters that are required to have surgery.

17 Q And those are from mental health professionals?

18 A Typically, yes.

19 Q In June of 2015, she got that first referral letter from
20 Mr. Biondi, correct?

21 A That's my understanding.

22 Q And in July of 2015, she got that second letter, correct?

23 A That's my understanding.

24 Q Without those referral letters, she couldn't have had
25 surgery, correct?

1 A That's my understanding.

2 Q You mentioned earlier that you had diagnosed Ms. Andrews as
3 having a social anxiety disorder.

4 A That's correct.

5 Q But you didn't -- you did not find that she met the
6 criteria for depression, correct?

7 A I did not find that she met the criteria for --

8 Q And she did not meet the criteria for post-traumatic stress
9 disorder?

10 A No.

11 Q And that was at the time of your interview in January of
12 2018, correct?

13 A That's correct.

14 Q So I want to talk a little bit about after her surgery. At
15 that point she felt, I guess the words were, "a low-grade,
16 omnipresent horror was gone, and the world made sense for the
17 first time," correct?

18 A That's what she told me, yes.

19 Q And she compared that feeling to "being buried alive but
20 then exhumed and able to breathe."

21 A That's what she told me.

22 Q You haven't spoken to -- or you haven't formed any opinions
23 as far as the distress that Ms. Andrews has felt after her
24 facial feminization surgeries, correct?

25 A Correct.

1 Q Now, Ms. Boyden had -- let's talk about Ms. Boyden for a
2 little bit here. You had assessed or it was your opinion that
3 she suffered gender dysphoria from a young age as well.

4 A That's correct.

5 Q And that she had -- but despite that significant distress
6 that she was suffering throughout her adolescence -- and I think
7 you said the most significant time period of that distress was
8 in college, correct?

9 A That's correct.

10 Q That despite that, she isn't currently experiencing, and
11 that was in January of 2018, any decrease in functioning related
12 to her academics?

13 A That's correct.

14 Q Or her social life?

15 A I would say the majority of her social life.

16 Q Or her occupational functioning?

17 A That's correct.

18 Q And she hadn't been feeling suicidal. She stopped feeling
19 suicidal in 2006, correct?

20 A That's correct.

21 Q And she was extremely successful in her academics, 3.9
22 grade point average?

23 A That's my understanding, yes.

24 Q And she also has support from her parents and her brother
25 and several close friendships in Madison.

1 A That's my understanding, yes.

2 Q So it was your opinion that she is experiencing clinically
3 significant distress related to how she was treated at some
4 medical appointments?

5 A That's correct.

6 Q And related to her genitals.

7 A That's correct.

8 Q I think you had mentioned that you obviously assessed her
9 with having gender dysphoria but also an anxiety disorder that
10 was otherwise specified.

11 A That's correct.

12 Q But you did not find that she met the criteria for
13 depression?

14 A No.

15 Q Or that she had met any criteria for post-traumatic stress
16 disorder?

17 A That's correct.

18 Q Even though she may have had those -- they may have --
19 those indicators may have been elevated in her past.

20 A That's correct.

21 Q And you also mentioned that she had some panic attacks that
22 factored into your assessment of her?

23 A That's correct.

24 Q But Ms. Boyden didn't describe her panic attacks as being
25 related to her not having insurance coverage, correct?

1 A My memory is that she had described that.

2 Q Let's look at your deposition transcript again. Page 37
3 (sic) on the top, line 16:

4 "Question: Did you attribute any panic attacks to her not
5 having insurance coverage for gender surgery?"

6 18: "In my clinical opinion, even though Alina did not
7 describe the two being connected to one another."

8 A Correct, and then I provide context for why I connected
9 those two together.

10 THE COURT: And in that sense, Counsel, this
11 impeachment is improper both in terms of the question that was
12 posed in the deposition versus what you asked here and also in
13 terms of you can't just pick out a line from the answer and read
14 that and treat that as impeachment. So going forward you should
15 correct that.

16 MS. SCHMELZER: Thank you, Your Honor.

17 BY MS. SCHMELZER:

18 Q If a graduate student like Ms. Boyden is experiencing
19 distress from being transgendered and having gender dysphoria,
20 there's a support group at the UW that -- for individuals,
21 correct, for transgendered individuals?

22 A Correct.

23 Q And there's also a therapist at the University Health
24 Services who specializes in transgendered-related care, correct?

25 A That's correct.

1 Q And there's no charge for those services for graduate
2 students, correct?

3 A Correct.

4 Q I want to talk about medically necessary care. Not all
5 transgendered individuals have gender dysphoria, correct?

6 A That's correct.

7 Q And in your clinical experience, about 70 percent would
8 meet that criteria for gender dysphoria.

9 THE COURT: Could you rephrase it, because I didn't
10 understand the question itself.

11 BY MS. SCHMELZER:

12 Q Sure. In your clinical experience, only about 70 percent
13 of transgendered individuals actually have gender dysphoria.

14 A That's correct.

15 Q And surgery would only be recommended for individuals with
16 gender dysphoria.

17 A That's correct.

18 Q Because then it would be medically necessary.

19 A That's correct.

20 Q But if you don't have gender dysphoria, it would not be
21 medically necessary if you were a transgendered individual.

22 A That's correct.

23 THE COURT: And just so we're clear, of those 70
24 percent of transgendered individuals who have dysphoria, not all
25 of them would necessarily be recommended for surgery.

1 THE WITNESS: That's correct. It would all be based on
2 what their dysphoria looks like.

3 BY MS. SCHMELZER:

4 Q You would agree with me, Doctor, that the effectiveness of
5 a treatment should be considered when determining whether that
6 treatment is medically necessary?

7 A Yes.

8 Q And you mentioned that there's a wealth of research that
9 it's effective -- that surgery is effective treatment for gender
10 dysphoria.

11 A Yes.

12 Q There's also some research though that says it isn't
13 conclusive that it is effective for gender dysphoria, correct?

14 A Some older evidence, yes, indicates that it might not be
15 conclusive.

16 Q In one of your actual reports, your bibliographies, you
17 include -- or you mention an article called *Mental Health and*
18 *Gender Dysphoria: A Review of the Literature*. Do you recall
19 that?

20 A Yes.

21 Q And that's a 2016 publication, correct?

22 A Correct.

23 Q And in the abstract for that publication, it notes that
24 research has also provided conflicting psychiatric outcomes
25 following gender confirming medical interventions, correct?

1 A I don't have it in front of me, but I would -- if it says
2 that, then yes.

3 Q Do you want to --

4 THE COURT: Why don't you just show it to the witness,
5 and we can move on. Thank you.

6 Do you recognize the article?

7 THE WITNESS: I do.

8 THE COURT: All right. And the question is?

9 BY MS. SCHMELZER:

10 Q And does it state what I just said about research having
11 conflicting psychiatric outcomes following gender confirmation
12 medical interventions?

13 A It does. It also has other conclusions as well.

14 Q And you're aware of the Centers for Medicare and Medicaid
15 Services, correct? You mentioned that in your report?

16 A Yes.

17 Q And in August of 2016, they made a determination that they
18 couldn't issue a national coverage determination for gender
19 reassignment surgery for Medicare beneficiaries that had gender
20 dysphoria, correct?

21 A Can you restate that, please?

22 Q Yes. They made a determination that the clinical evidence
23 regarding the effectiveness of surgery for Medicaid
24 beneficiaries with gender dysphoria was inconclusive, correct?

25 MR. DUPUIS: Objection. Misstates the --

1 THE COURT: We'll have a sidebar.

2 (Discussion held at sidebar at 9:42 a.m.)

3 THE COURT: The misstatement is?

4 MR. DUPUIS: The first time she had it right sort of,
5 although confusing, but it's Medicare population, not Medicaid
6 population.

7 THE COURT: So you can rephrase.

8 MS. SCHMELZER: Thank you.

9 THE COURT: And we'll go from there. Thank you.

10 (Sidebar discussion ends at 9:43 a.m.)

11 THE COURT: And counsel will rephrase the question.

12 You may proceed.

13 BY MS. SCHMELZER:

14 Q Doctor, in August of 2016, the Centers for Medicare and
15 Medicaid Services made a determination that the clinical
16 evidence regarding the effectiveness of sex reassignment surgery
17 for Medicare beneficiaries with gender dysphoria was
18 inconclusive, correct?

19 A If my memory serves, then that's likely true, yes.

20 Q And you're also familiar with the Hayes directory?

21 A I am.

22 Q And they do research to determine what the effectiveness of
23 specific kinds of treatments are, correct?

24 A That's correct.

25 Q And in 2014 the Hayes directory found that no conclusions

1 could be made about the comparative benefits of hormone therapy
2 alone and sex reassignment surgery or about different components
3 of sex reassignment surgery, correct?

4 A That's what it says, and they weren't conclusive -- they
5 weren't comprehensive in what they excluded. They excluded a
6 lot of studies that actually should have been included in that
7 report.

8 Q They found the quality of the evidence very low in that
9 area, correct?

10 A As defined by?

11 Q In the report.

12 A Yes.

13 Q And they also looked at, in 2014, the effectiveness of
14 ancillary procedures like facial modifications, correct?

15 THE COURT: Ancillary?

16 MS. SCHMELZER: Ancillary. I'm sorry, yes.

17 THE COURT: Do you understand the question?

18 THE WITNESS: I do. That's what the report says.

19 BY MS. SCHMELZER:

20 Q And it found that the evidence had serious limitations on
21 the effect of these types of procedures on overall individual
22 well-being was unknown, correct?

23 A That is what the report says, yes.

24 Q Doctor, you've served as an expert witness before, correct?

25 A Correct.

1 Q And that's in three prior cases, one is ongoing?

2 A Two prior cases and one ongoing, yes.

3 Q And one was an immigration case where you had diagnosed a
4 transgendered individual with gender dysphoria, correct?

5 A That's correct.

6 Q And that resulted in the individual being granted asylum,
7 correct?

8 A That's correct.

9 Q And another case, the *Whitaker* case, that was a
10 transgendered student, correct?

11 A That's correct.

12 Q And that was a case where they weren't allowed to use
13 bathrooms or locker rooms for the gender they identified with?

14 A That's correct.

15 Q And you provided an expert report in that case?

16 A I did.

17 Q And you found that that policy was harmful to that
18 transgendered student, correct?

19 A I did.

20 Q And the third case, that is the *Flack* case, correct?

21 A That's correct.

22 Q And that case involves a challenge to an exclusion for
23 procedures or surgeries for Medicaid recipients, correct?

24 A That's correct.

25 Q And you provided a report in that case on behalf of the

1 Medicaid recipients, plaintiffs, correct?

2 A That's correct.

3 Q And you also found in that case that surgery was medically
4 necessary for those two plaintiffs, correct?

5 A That's correct.

6 Q You had met with Ms. Boyden and Ms. Andrews prior to being
7 retained as an expert in this case?

8 A Yes, one time.

9 Q At a coffee shop?

10 A That's correct.

11 Q The plaintiffs are paying you for your work in this case,
12 correct?

13 A My understanding is that the law offices are paying me,
14 yes.

15 Q And that's \$200 an hour?

16 A That's correct.

17 Q And that's for the time you put into this case?

18 A Yes.

19 Q And your testimony here today?

20 A That's correct.

21 Q And that money goes directly to you, correct, not the
22 university?

23 A It goes directly to me.

24 MS. SCHMELZER: No further questions, Your Honor.

25 THE COURT: All right. Redirect.

REDIRECT EXAMINATION

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BY MR. DUPUIS:

Q Dr. Budge, you were just asked by Ms. Schmelzer about a statement in an article -- actually, I'm sorry. You were asked whether you had conducted any studies of the efficacy of gender confirmation surgery, and you said no; is that right?

A That's right.

Q Have you reviewed the research on the effectiveness of gender confirmation surgery?

A I have.

Q And what was your conclusion about the -- are you qualified as a psychologist to evaluate that research?

A Yes.

Q And what is your understanding of the results of that research on the effectiveness of gender confirmation surgery?

A My understanding is that the evidence overwhelmingly suggests that surgery and hormones are efficacious in reducing gender dysphoria and reducing distress.

Q You were asked about the findings of the Hayes reports, I believe?

A I was.

Q Do you agree with the conclusions that the Hayes reports arrived at about the quality of evidence?

A I do not.

Q Why not?

1 A There are a couple of reasons. First, the Hayes report was
2 published in 2014 and excludes a large number of studies that
3 have shown that surgery and hormones are extremely effective in
4 reducing gender dysphoria and distress, but also -- so they
5 didn't include a lot of studies that should have been included,
6 and I think if they had included those studies even in 2014,
7 that that report actually would have come to a different
8 conclusion, but that also there have been a lot of studies that
9 have been done since then that have been even more robust. But
10 also they indicate that there is a low quality of evidence in
11 the medical field. In order to have anything that would be
12 considered high quality, you have to conduct something called a
13 double-blind study, which actually isn't possible in this case.
14 So in the standard that the Hayes report is using, you could
15 never reach high quality evidence.

16 Q So --

17 THE COURT: Could you explain why that's true?

18 THE WITNESS: Yeah. So a double-blind study indicates
19 both the researcher and the participant does not know what
20 treatment they're getting. So, for example, in this case that
21 would mean the surgeon wouldn't know what surgery they are
22 performing and the patient wouldn't know what surgery they were
23 getting, so it's actually not possible to complete a
24 double-blind study in this case.

25 BY MR. DUPUIS:

1 Q You were also asked some questions about a Medicare
2 determination. Do you remember that?

3 A Yes.

4 Q Is it your understanding -- what is your understanding
5 about -- was Medicare saying that treatment -- surgical
6 treatment should not be covered from the Medicare population?

7 A That's not my understanding.

8 Q What is your understanding?

9 A My understanding is simply that the Medicare population, we
10 don't have a lot of information about them because people who
11 are typically in the Medicare population tend to be a little bit
12 older and may not -- because of the -- their age, they may not
13 have had the same exposure to transgender identity or gender
14 dysphoria that some of the younger generations may have had,
15 and, therefore, we don't have a lot of information about older
16 transgender individuals.

17 Q But with regard to the general population, how would you
18 characterize the strength of the evidence for the effectiveness
19 of gender confirmation surgery?

20 A I would characterize it as very strong.

21 Q You were asked a few questions about Ms. Andrews' distress
22 at various times in her life, correct?

23 A That's correct.

24 Q Was Ms. Andrews' distress significant -- clinically
25 significant at any time after March 2014 based on your

1 evaluation?

2 A It was.

3 Q Was it severe at any time after March of 2014?

4 A It was.

5 Q With regard to Alina, you were asked some questions about
6 her panic attacks, and you indicated that Ms. Boyden didn't
7 verbally connect the panic attacks to lack of insurance coverage
8 when she told you about them. Did you arrive at a conclusion
9 about any connection between her insurance coverage and her
10 panic attacks?

11 A I did. She may not have ever in a sentence said, "The
12 insurance exclusion caused my panic attacks," which is -- she
13 never said that to me, but when we were talking about her
14 psychological response to what was going on at that time, she
15 had indicated having panic attacks. Thus, I made the conclusion
16 that they would be related.

17 Q So how did you arrive at the conclusion that they were
18 related?

19 A When I was asking her about her general experience to being
20 upset about what had happened, she had indicated that she was
21 having anxiety symptoms related to the exclusion, and then she
22 had mentioned having panic attacks, but she'd never said in a
23 sentence the panic attacks were due to the exclusion.

24 MR. DUPUIS: No further questions now, Your Honor, but
25 we would like to reserve the possibility of calling Dr. Budge

1 back on rebuttal.

2 THE COURT: In a rebuttal case, if necessary.

3 And you may step down. Thank you very much.

4 (Witness excused at 9:52 a.m.)

5 THE COURT: At this point my understanding is the
6 plaintiff is resting its case-in-chief?

7 MR. DUPUIS: Yes, Your Honor.

8 THE COURT: All right. Then we'll have a brief
9 sidebar.

10 (Discussion held at sidebar at 9:53 a.m.)

11 THE COURT: I just want to give defendants an
12 opportunity to make a motion, if they wish to. I'm not sure,
13 given it's a damages case, it's really necessary, but I'll give
14 you the opportunity if you wish to.

15 (Inaudible.)

16 (Reporter clarification.)

17 THE COURT: The answer was? You just need to say it a
18 little louder.

19 MR. FAIRWEATHER: Oh, no.

20 THE COURT: All right. That's great. That's fine.
21 Just so we have a record.

22 MR. DUPUIS: I didn't know she was listening.

23 THE COURT: That's why we have this.

24 The second thing is simply to confirm that the next step is
25 going to be your case, and is it Ms. Mallow who will be

1 testifying? And you'd expect her to take about 15, 20 minutes
2 on direct?

3 MR. ROTH: Maybe 20, maybe 30. Maybe not that long.

4 THE COURT: So we'll probably do that direct.

5 How long do you expect your cross will be?

6 MR. FAIRWEATHER: Same.

7 MR. ROTH: Could we take a -- I could use a restroom
8 break before we do the direct.

9 THE COURT: All right. My only problem is that we're
10 going to -- we might want to take another break. Do you think
11 you can get through the direct, and then we'll probably take a
12 break?

13 MR. ROTH: Sure.

14 THE COURT: All right. Thank you. I appreciate it.
15 Thank you. We'll proceed on that basis. Thank you.

16 (Sidebar discussion ends at 9:54 a.m.)

17 THE COURT: All right. I apologize for the laughter at
18 sidebar. It was only because we were having mic issues, and I
19 wanted to make sure what the timing was as we go forward.

20 We're going to proceed with the -- at least the direct
21 examination of the witness to be called by the defendants, and
22 then from there I expect that we will complete, either before or
23 after the morning break, the defendants' case, and then we'll
24 move to my instructions on the law. Actually, we'll still have
25 a short rebuttal likely, and then I will -- I expect that --

1 we'll complete the trial today. Let's leave it at that, and
2 we'll see how the timing goes from there.

3 And you may call your first witness. That's fine. I think
4 someone went out to get her. Again, there's a sequestering of
5 witnesses who haven't been called yet, which is why we're --

6 And your witness is?

7 MR. ROTH: Eileen Mallow.

8 THE COURT: Ms. Mallow, if you'd come straight forward.
9 Thank you very much. And you can just stand in front of the
10 court reporter.

11 **EILEEN MALLOW, DEFENDANTS' WITNESS, SWORN**

12 DIRECT EXAMINATION

13 BY MR. ROTH:

14 Q Good morning, Ms. Mallow.

15 A Good morning.

16 Q Could you introduce yourself for the jury, please?

17 A Sure. My name is Eileen Mallow. I'm the Director of the
18 Office of Strategic Health Policy at the Department of Employee
19 Trust Funds.

20 Q And you said you're the Director of the Office of Strategic
21 Health Policy. What is that?

22 A We're the office within the Department of Employee Trust
23 Funds that sets overall reimbursement policy for the health
24 plans that are under contract to us. We work with the health
25 plans to make sure they understand what Uniform Benefits, which

1 is the contract we sign with all of our health plans, does. We
2 intervene when members are having difficulty or employers are
3 having difficulty understanding to try and help get those issues
4 resolved.

5 Q You mentioned --

6 A We also set rates. Sorry. We also set rates for the
7 health plans.

8 Q Very good. You mentioned health plans. Does that
9 essentially mean insurance companies --

10 A It is.

11 Q -- in the lingo?

12 A Yes, it is the insurance companies.

13 THE COURT: You want to be sure, just let him ask his
14 full question, and then just pause for a second and then
15 answer --

16 THE WITNESS: Yes.

17 THE COURT: -- so that we don't have an overlap for the
18 court reporter. So we'll take it one question at a time.

19 THE WITNESS: Okay.

20 THE COURT: You may proceed.

21 BY MR. ROTH:

22 Q So you described a few of the things that the Office of
23 Strategic Health Policy does. You're the director of that unit;
24 is that correct?

25 A Yes.

1 Q And not to be duplicative of what you just said, but what
2 are your roles as the Director of the Office of Strategic Health
3 Policy --

4 THE COURT: So your specific --

5 MR. ROTH: Your specific job duties.

6 THE WITNESS: I have a staff of 14 people. We work
7 with -- as I mentioned, we work with all the health plans to
8 develop Uniform Benefits, make recommendations to the Group
9 Insurance Board. We function as staff to the Group Insurance
10 Board in setting overall reimbursement policy under our health
11 plans, and we intervene on behalf of members and employers with
12 health plans when there are issues in understanding Uniform
13 Benefits.

14 BY MR. ROTH:

15 Q So you do have some work directly with insurance companies
16 in your role; is that correct?

17 A Yes, it is.

18 Q And can you -- I think you've -- explain that just a little
19 bit more for us.

20 A I would directly negotiate rates. When it's an issue that
21 staff can't resolve, I would step in and work directly usually
22 with the CEO of an insurance company. I also get the issue
23 resolved -- for example, this week I just sent an email to one
24 of them because we're having an issue with them that we can't
25 get resolved at a staff level. I would work directly on policy

1 language that's contained in Uniform Benefits.

2 Q I think you mentioned answering questions that come from
3 the insurance companies. What kinds of questions might those
4 be?

5 A The questions are of a nature of interpreting Uniform
6 Benefits where it's not specific or clear. If there's not a
7 language that would specifically address a benefit, for example,
8 that would be the kind of question that we would resolve in our
9 area.

10 Q So when you say questions about interpreting the Uniform
11 Benefits, would that be basically a question about whether a
12 claim by a state employee should be paid under the Uniform
13 Benefits?

14 A It can be, yes.

15 Q So I'd like to talk a little bit just about the general
16 structure of health insurance for state employees. What is the
17 Wisconsin Group Insurance Board? I think you've mentioned them
18 already. I think you called them GIB. What is that?

19 A The Group Insurance Board, or GIB, is the overall
20 policy-setting entity that exists that -- what's a good way to
21 explain it? The Group Insurance Board sets overall policy that
22 is implemented by the Office of Strategic Health Policy.

23 Q And is that a -- strike that.

24 So, Your Honor, permission to -- I'm going to use the
25 demonstrative that we discussed earlier.

1 THE COURT: As long as there wasn't any objection,
2 that's fine.

3 MR. FAIRWEATHER: No objection, Your Honor.

4 BY MR. ROTH:

5 Q So the Group Insurance Board is the group that sets the
6 policy for the state employee benefits -- health insurance
7 benefits program --

8 A Yes.

9 Q -- is that correct? Okay. What are some examples of
10 general coverage policies that the Group Insurance Board decides
11 for all state employees?

12 A They would set rates annually. They would set cost-sharing
13 requirements like deductibles, co-payments, co-insurance, and
14 they would identify or establish exclusions in the policy.

15 Q Can you explain briefly what a coverage exclusion is?

16 A It's specific language in Uniform Benefits, which is our
17 policy certificate, that would identify a benefit or service
18 that is not going to be covered by the plan.

19 Q So if a state employee received that service, their
20 insurance company would not pay the claim; is that correct?

21 A That's correct.

22 Q If it's a state employee.

23 A Yes.

24 Q Can you give me an example of a coverage exclusion, aside
25 from the one that we're talking about here today?

1 A Gastric bypass surgery would be a common one.

2 Q And what is gastric bypass, in your understanding?

3 A It would be surgery that would limit the size of
4 somebody's -- usually their stomach as a way to help manage
5 weight.

6 Q And so if a state employee wanted to receive gastric bypass
7 surgery, the Uniform Benefits would say that their insurance
8 company cannot provide insurance coverage for that surgery?

9 A Yes.

10 Q So what is the Wisconsin Department of Employee Trust
11 Funds, your employer, just very generally?

12 A It's the state agency that administers -- develops and
13 administers benefits for state employees.

14 Q Can you give me a few examples, just basic examples? You
15 said the Department of Employee Trust Funds administers health
16 benefits policy. What does that mean?

17 A Every year we do an annual review of Uniform Benefits, the
18 certificate, to make sure that it's current, it's
19 understandable, it reflects what the board intends to cover.

20 Q You say "the board." You mean the Group Insurance Board?

21 A Yes, the Group Insurance Board intends to cover. We would
22 step in if there's a misunderstanding or a misinterpretation of
23 what Uniform Benefits covers. We assist members who need to get
24 through an appeal process that's established in our certificate.
25 We establish rates every year.

1 Q And we've talked about insurance companies a few times
2 already. What role do these private insurance companies have in
3 the state employees health insurance program?

4 A We contract with ten health insurance plans to cover state
5 employees statewide to make sure that they all have the same
6 Uniform Benefits within our certificate.

7 Q Can you give me just a couple examples of some of those
8 private insurance companies that work -- that you work with?

9 A Good examples would be Quartz, which includes Gunderson,
10 Unity, and Physicians Plus; Dean Health Plan; WEA trust are all
11 examples of insurers.

12 THE COURT: Are those private insurance programs -- do
13 they have an acronym within ETF for example like PIPs or are
14 they assigned anything like that?

15 THE WITNESS: Sometimes you hear us refer to them as --
16 it's GHIP, which is group health insurance plans, but that's not
17 commonly in use.

18 THE COURT: Got it. Thank you.

19 BY MR. ROTH:

20 Q And so those insurance companies, again, those are private,
21 correct?

22 A Yes.

23 Q They're not state entities?

24 A No.

25 Q And are the private insurance companies the one who

1 actually pay claims for state employees?

2 A Yes.

3 Q Does ETF do that?

4 A No.

5 Q Does the Group Insurance Board do that?

6 A No.

7 Q My apologies. When I say ETF, I mean the Department of
8 Employee Trust Funds, correct?

9 A Correct.

10 THE COURT: How are they reimbursed?

11 THE WITNESS: When a health care service is delivered,
12 the health plan or the health insurance company would accept a
13 claim from the health care provider, adjudicate it. Most of the
14 time it's done on an automated system. Something like 90
15 percent of claims right now are auto-adjudicated through a
16 computer system and pay the claim back to the provider. So it
17 goes from the provider to the health insurer, and the payment
18 goes back to the provider.

19 THE COURT: All right. And the contractual
20 relationship that ETF or GIB, I'm not sure which, has with these
21 insurance programs, is that -- that's a separate contract, and
22 they're paid a set fee for the year for those -- how do they get
23 reimbursed by ETF or by the State of Wisconsin?

24 THE WITNESS: The contract is technically between the
25 Group Insurance Board and each individual health plan.

1 THE COURT: Okay.

2 THE WITNESS: We develop one contract that each health
3 insurance plan is required to sign with the Group Insurance
4 Board. We're setting them now. We pay a flat premium each
5 month on behalf of each member to whatever health plan that
6 they're enrolled in, so that's the way we pay them.

7 THE COURT: So basically it's a formula based on the
8 number of people covered by the plan who are then provided
9 insurance by one of these ten companies.

10 THE WITNESS: Yes.

11 THE COURT: Thank you. I apologize. You may proceed,
12 Counsel.

13 BY MR. ROTH:

14 Q You've mentioned the Uniform Benefits a couple of times
15 already, and that's come up in some of the earlier testimony in
16 this case, but can you just, again, explain to the jury what are
17 the Uniform Benefits?

18 A Uniform Benefits is the contract -- we, the State of
19 Wisconsin, develops its own contract with the health plans. We
20 have one contract that has benefits that are consistent or
21 uniform across every contract. It prevents people from shopping
22 for what they think is the best health plan. It allows us to
23 make sure that benefits are administered consistently across all
24 health plans, but it covers all medical services that are
25 delivered to each employee.

1 Q We talked about coverage exclusions. Coverage exclusions
2 might be found or would be found in the Uniform Benefits; is
3 that right?

4 A There's a specific section of Uniform Benefits with
5 exclusions.

6 Q And the Group Insurance Board has a role regarding the
7 Uniform Benefits; is that right?

8 MR. FAIRWEATHER: Objection. Leading.

9 BY MR. ROTH:

10 Q What role does the Group Insurance Board have with respect
11 to the Uniform Benefits?

12 A The Group Insurance Board sets overall the contract. They
13 approve the contract each year, and as I said, the contract is
14 between --

15 Q So you say "the contract." You mean --

16 A Uniform Benefits --

17 Q -- Uniform Benefits?

18 A -- is the contract that we sign that covers -- it's signed
19 between the Group Insurance Board and the health plan.

20 Q And how do private insurance companies use the Uniform
21 Benefits?

22 A It's the document that they use to adjudicate a claim, to
23 decide whether a claim is eligible for a payment when it comes
24 to them. So whether or not a benefit would be covered or not
25 covered, if there are limitations on whether something would be

1 covered, if there's cost sharing required for a service, all of
2 those are covered in Uniform Benefits.

3 Q This is probably pretty obvious, but how do state employees
4 fit into this picture? How do they interact with all the
5 different groups that we've talked about here?

6 A They every year go through an open enrollment. They're
7 allowed to pick whichever health plan they want. They don't
8 even have -- doesn't even have to be one in their neighborhood.
9 They could pick one in another area, but they would pick a
10 health plan, sign up. The state would deduct premium -- any
11 premium contribution, forward it to the health plan along with
12 the employer's share. Then they would utilize their health
13 coverage like any other person would use provider coverage.

14 Q So I'd like to next talk a little bit about the process
15 that's used when an individual state employee has a claim, a
16 health insurance claim.

17 Just one second. Sorry. We'll uncover these as we go
18 along.

19 So if a state employee wants insurance coverage for a
20 surgical procedure, what's the first step to get coverage?

21 A They would visit with their provider, usually a physician,
22 and settle on a course of treatment that's appropriate for the
23 person's medical condition.

24 Q And if the provider decides that surgery is the proper
25 treatment, what happens?

1 A The surgeon would submit what's called a prior
2 authorization request to the health plan. Basically they're
3 asking the health plan to make a decision ahead of time about
4 whether or not the surgery is appropriate given the
5 circumstances.

6 Q Is it fair to call that a claim before the procedure is
7 actually done?

8 A It's a good way to think about it, but it doesn't go
9 through all the edits that a claim would go through when it gets
10 to the health plan.

11 Q Can we call it a claim just --

12 A We can call it a claim.

13 Q -- for purposes of our discussion here?

14 THE COURT: Since it's already set up that way, let's
15 do that.

16 BY MR. ROTH:

17 Q I like claim more than prior authorization. I can't wrap
18 my head around it.

19 This is probably a silly question, but why is the prior
20 authorization done before you get the surgical procedure?

21 A It helps both the member and the provider know that the
22 claim will be paid. Some of these are substantial amounts of
23 money, and it would create a severe financial hardship for
24 someone if they found out after the fact that a service wasn't
25 going to be covered.

1 Q So who writes up the prior authorization request or the
2 claim request?

3 A The surgeon would normally or the provider would submit the
4 prior authorization request.

5 Q And what does the provider do with that request? Who do
6 they give it to?

7 A They would submit it to the health insurance company.

8 Q The health insurance company that the employee has signed
9 up with?

10 A Yes.

11 Q Do they send that request directly to the Department of
12 Employee Trust Funds?

13 A No.

14 Q Why not?

15 A We're not authorized to make those kinds of decisions.

16 Q And when you say "those kinds of decisions," what kind of
17 decisions?

18 A Medical necessity decisions.

19 Q Would a provider send the prior authorization request
20 directly to the Group Insurance Board?

21 A No.

22 Q Why not?

23 A They're not authorized to make those kinds of decisions.

24 Q And, again, when you say "those kinds of decisions" --

25 A Medical -- sorry. Medical necessity decisions.

1 Q So just generally, when an insurance company receives a
2 prior authorization request for a surgery, what does it do?
3 What does it do with that request?

4 A It would evaluate for a number of things, whether or not
5 the service was covered under the certificate, whether or not
6 the service was medically necessary and appropriate.

7 Q So when you say "covered under the certificate," what do
8 you mean by that?

9 A So there wouldn't be a clear policy exclusion or it would
10 be something that would be covered generally by the insurance
11 policy.

12 THE COURT: And that policy is the Uniform Benefits.

13 THE WITNESS: Yes.

14 BY MR. ROTH:

15 Q So when you say "certificate," you mean Uniform Benefits?

16 A Yes.

17 Q So the insurance company you said, I think, looks at both
18 coverage exclusions and whether a procedure is medically
19 necessary?

20 A Yes.

21 Q How does an insurance company use coverage exclusions to
22 decide what to do with a claim request or a prior authorization
23 request?

24 A The company would be permitted, if there's a clear
25 exclusion, to deny the claim.

1 Q So if there's an exclusion, it would deny the claim?

2 A Yes.

3 Q I apologize for these note cards. I'm not good with
4 technology. If there's -- so the first thing or one thing it
5 does, one thing it does is look to see whether there's a
6 coverage exclusion that applies to the surgery, right?

7 A Yes.

8 Q If there's no coverage exclusion that applies, will the
9 insurance company automatically agree to provide coverage for
10 the surgery?

11 A No. It would still need a medical necessity provision --
12 medical necessity review. We would not pay for anything that's
13 not medically necessary.

14 Q So under the Uniform Benefits, if the insurance company
15 decides that a surgery is not medically necessary, what will
16 they do to the prior authorization request or the claim request?

17 A They would deny it. They would respond in writing to both
18 the provider and the member and explain the denial reason.

19 Q And what if the insurance company found that the treatment
20 is medically necessary --

21 A It would --

22 Q -- and there's no exclusion that applies?

23 A It would be approved and returned to the provider.

24 Q So does this graphic on the screen I've shown, does that
25 accurately describe the process in general terms?

1 A Yes.

2 Q What we just discussed here?

3 A Yes.

4 THE COURT: I just want to make sure, you'd indicated
5 there's some kind of appeal process for the employee? Is there
6 any way to appeal this process back to ETF?

7 THE WITNESS: There is an appeal process that's written
8 into Uniform Benefits that would allow a member to basically
9 appeal any decision that's made by the insurance company. The
10 first step in the appeal process -- it's called a grievance
11 process in Uniform Benefits -- is to appeal directly to the
12 insurance company. They are required under their contract with
13 us to have a regular process to review a grievance and respond
14 in writing to the member. If a claim is denied for medical
15 necessity reasons, it would be subject to what we call
16 independent review, which is an external body of medical
17 professionals that would review the denial.

18 THE COURT: And that group works for ETF or is
19 retained -- who determines who that group is, the additional
20 doctors?

21 THE WITNESS: The independent review organizations are
22 now established under federal law, but state law also does it.

23 THE COURT: All right. And they're independent of ETF
24 as well?

25 THE WITNESS: Yes.

1 THE COURT: Thank you.

2 BY MR. ROTH:

3 Q So, Ms. Mallow, I'm going to show you a document that's
4 been marked as Exhibit 501, and this is excerpts from the 2016
5 version of the Uniform Benefits. Does that appear to be
6 correct? I'll give you a second to look over this. This is
7 just the front page. Oops. I did not mean to do that.

8 A Yes.

9 Q So this is the Uniform Benefits document that we've
10 discussed that provides the general coverage policies for state
11 employees; is that right?

12 A Yes.

13 Q So I'm going to turn to an excerpt in that Uniform Benefits
14 document, Page No. 4-28, and I'd like to direct your attention
15 to this sentence here. Can you please read that sentence for
16 us?

17 A "All services must be medically necessary, as determined by
18 the health plan and/or PBM," which stands for pharmacy benefits
19 manager.

20 Q So what does that mean in terms of who's deciding whether a
21 service is medically necessary?

22 A The health plan, the health insurance company.

23 Q So ETF isn't making that decision?

24 A No.

25 Q GIB isn't making that decision?

1 A No.

2 Q There's a definition elsewhere in this document of what it
3 means for a service to be medically necessary; is that right?

4 A Correct.

5 Q I'm going to show you that provision. It's on page 4-22.
6 And it's the section that says *Medically Necessary*. Does this
7 definition also provide that the health plan or health insurance
8 company is the person who decides whether a surgery is medically
9 necessary?

10 A Yes.

11 Q And where does it say that, if you could just read it for
12 us?

13 A It's in the opening paragraph which says, "A service,
14 treatment, procedure, equipment, drug, device, or supply
15 provided by a hospital, physician, or other health care provider
16 that is required to identify or treat a participant's illness or
17 injury and which is, as determined by the health plan and/or
18 PBM," and then it lists the four criteria for medical necessity.

19 Q That could include a surgery, right? It doesn't say
20 surgery in that definition, but that definition covers surgeries
21 as well; is that correct?

22 A Yes.

23 Q Yes?

24 THE COURT: I'm sorry. Your answer was?

25 THE WITNESS: Yes.

1 THE COURT: And the -- is this an excerpt from Exhibit
2 501, because you didn't make clear --

3 MR. ROTH: Yes, it is an excerpt from Exhibit 501.

4 THE COURT: All right. Thank you.

5 BY MR. ROTH:

6 Q And I should ask, this is an excerpt from the Uniform
7 Benefits from the 2016 plan year. Is it your understanding that
8 the provision I just showed you as well as this provision here
9 has been the same for the last, say, five years?

10 A The language is the same. It's moved around in the
11 document, but the language is the same.

12 Q So it may show up in a different place in the Uniform
13 Benefits, but it says the same thing?

14 A Yes.

15 Q So does this definition of medically necessary give any
16 role to either the Department of Employee Trust Funds or the
17 Group Insurance Board in deciding whether surgery is medically
18 necessary?

19 A No.

20 Q So under this definition of -- well, under this definition
21 of what's medically necessary, if an employee's doctor says that
22 a surgical procedure is medically necessary, does the insurance
23 company have to agree with that employee's doctor?

24 A No.

25 Q And why not?

1 A The health plan under contract has the ultimate
2 decision-making authority.

3 Q Over whether the procedure is medically necessary?

4 A Yes.

5 Q So under this provision and the one we just read, if an
6 employee's doctor thinks that a surgery is medically necessary
7 but the insurance company doesn't, what would happen to a claim
8 request or a prior authorization request?

9 A The claim would be denied, the member would be notified in
10 writing, and they would also be given their appeal rights at
11 that time.

12 Q So they wouldn't get coverage?

13 A They would not get coverage.

14 Q They'd have to pay for it themselves?

15 A If they wanted to have the procedure, yeah. They could
16 elect not to have the procedure.

17 Q So under the Uniform Benefits, on what basis could an
18 insurance company conclude that a surgery is not medically
19 necessary?

20 A The four criteria that are listed here, consistent with the
21 symptoms or diagnosis and treatment of the participant's
22 illness; appropriate by standards of acceptable medical
23 practice -- and I'm summarizing, I'm sorry -- not solely for the
24 convenience of the participant, physician, hospital, or other
25 health care provider; the most appropriate service, treatment,

1 procedure, equipment, drug, device, or supply which can safely
2 be provided to the participant and accomplishes the desired end
3 result in the most economical manner.

4 Q So if an insurance company concluded that any one of those
5 four requirements was not met, it would find the procedure not
6 medically necessary, right?

7 A Yes.

8 Q And deny the claim?

9 A Yes.

10 Q So we've mentioned this just a bit earlier, but if the
11 insurance company denies the claim because it finds that the
12 procedure is not medically necessary, is there a way that the
13 employee can challenge that decision?

14 A There is a grievance process outlined in Uniform Benefits.

15 Q And you testified I think that that is an independent body
16 of experts?

17 A It would go through internal grievance, and then it could
18 go to independent external review.

19 Q And whose -- do you know the external review body that
20 would do that?

21 A It's a company called Maximus.

22 Q And is that a private company?

23 A Yes.

24 Q So that challenge does not come to ETF?

25 A No.

1 Q Based on medical necessity?

2 A No.

3 Q So ETF couldn't reverse the insurance company's decision?

4 A No.

5 THE COURT: Although it sounds like you say you play
6 some role in this on occasion where there's a denial. I
7 couldn't understand that.

8 THE WITNESS: Our staff would step in if it was unclear
9 to the member about whether or not their claim was subject to
10 the grievance process, or if they had difficulty accessing the
11 grievance process, we would assist them with that. We have on
12 occasion encouraged companies to put claims into the independent
13 review process if there's a question about whether or not it was
14 appropriate for external review or not, independent review or
15 not.

16 THE COURT: Understood.

17 BY MR. ROTH:

18 Q Is there a coverage exclusion in the Uniform Benefits now
19 that applies to gender reassignment surgical procedures?

20 A Yes.

21 Q And just generally tell us what it provides.

22 A There's an exclusion for surgical or sex hormones related
23 to gender reassignment surgery.

24 Q So going back to our handy chart here, under the current
25 Uniform Benefits, if an employee -- a state employee requested a

1 prior authorization or a claim from their insurance company for
2 a gender reassignment surgery, what would happen given that
3 exclusion?

4 A It would be denied.

5 Q And why would it be denied?

6 A It did not meet the first blue box here of coverage
7 exclusion.

8 Q Coverage exclusion? So, yes, there's a coverage exclusion,
9 no coverage, correct?

10 A Correct.

11 Q So under the Uniform Benefits provisions that we just
12 discussed, would the insurance company, when getting that kind
13 of claim for that kind of surgery, would it need to decide
14 whether the surgery was medically necessary before denying
15 coverage?

16 A No.

17 Q And why not?

18 A There's -- since there's a coverage exclusion, that would
19 be one of the checks, and they could deny it on that basis.

20 Q So they wouldn't need to look at medical necessity?

21 A They would not.

22 Q Will this coverage exclusion that we've been talking about,
23 will it exist next year for state employees?

24 A No. The Group Insurance Board removed it as of 1/1/2019.

25 Q January 1st, 2019?

1 A Correct.

2 Q I think I can do this. So starting next year, that's gone?

3 A Yes.

4 Q I don't know -- if you look on my chart, I put a little
5 handy "X" over it.

6 A Yes.

7 Q So starting next year then when the coverage exclusion is
8 gone, how would the insurance company under the Uniform
9 Benefits -- what would it need to do before deciding whether to
10 cover the claim?

11 A It would still be evaluated for medical necessity if a
12 prior authorization was submitted.

13 Q And, again, what criteria would the insurance company use
14 to decide whether the surgical procedure, the gender
15 reassignment procedure, was medically necessary?

16 A It would go back to the four criteria that were outlined
17 earlier in the medical necessity description or language in the
18 policy.

19 Q Is that these four criteria from Exhibit 501; is that
20 correct?

21 A Yes.

22 Q When this coverage exclusion is gone, would ETF or GIB have
23 any role in deciding whether the gender reassignment surgery is
24 medically necessary?

25 MR. FAIRWEATHER: Objection. Relevance.

1 THE COURT: You can answer the question.

2 THE WITNESS: Can you ask the question again?

3 BY MR. ROTH:

4 Q Next year when this coverage exclusion is gone, will ETF or
5 GIB have any role --

6 THE COURT: You say "next year." The coverage
7 exclusion is essentially enjoined now, and going forward when
8 it's -- if it's going to be removed by the board, will it play
9 any role in the decision-making -- the exclusion, will it play
10 any role in the decision-making by the health care entity that's
11 agreed to cover the Uniform Benefits?

12 THE WITNESS: No.

13 BY MR. ROTH:

14 Q And will the Department of Employee Trust Funds or the
15 Group Insurance Board have any role in deciding whether the
16 procedure is medically necessary?

17 A No.

18 Q So when this coverage exclusion is gone under the Uniform
19 Benefits, could an insurance company decide that a genital
20 reconstruction surgery or a facial feminization plastic surgery
21 is not medically necessary and deny coverage to a state
22 employee?

23 A Yes.

24 Q So earlier this year Shannon Andrews, Ms. Andrews, had
25 facial feminization surgery. Would her insurance company have

1 been required to approve her claim even without the exclusion?

2 A No.

3 Q Why not?

4 A The claim would have still gone through a medical necessity
5 review by the company, by the insurance company, and they could
6 have decided it wasn't medically necessary.

7 Q In 2016, Alina Boyden, Ms. Boyden, requested a prior
8 authorization from her insurance company for genital
9 reconstruction surgery. Would her insurance company have had to
10 approve her claim even without the exclusion?

11 A No.

12 Q Why not?

13 A It would still be subject to the medical necessity
14 provisions of Uniform Benefits.

15 Q And the insurance company could come to its own conclusion?

16 A Yes.

17 THE COURT: Subject to the four elements under the
18 Uniform Benefits.

19 THE WITNESS: Yes, and subject to independent review
20 and grievance.

21 BY MR. ROTH:

22 Q Independent review and grievance by an entity that's not
23 associated with ETF or GIB?

24 A Grievance is internal. Independent review is external,
25 yes.

1 MR. ROTH: Just one second. Sorry. I have it. I
2 apologize. I have it right here.

3 BY MR. ROTH:

4 Q So I'm going to show you what's been marked as Exhibit 23B,
5 and this is a denial letter from Dean Health Plan to Alina
6 Boyden for a prior authorization for gender reassignment
7 surgery. Does that look like what this is? You can take a
8 second to review.

9 A Yes.

10 Q And does anything on this first page say that Dean, the
11 insurance company, found that Ms. Boyden's surgery was medically
12 necessary?

13 A No.

14 Q I'm going to turn to the second page of that letter. Does
15 anything on this page of the letter say that Dean concluded the
16 surgery was medically necessary?

17 A No.

18 Q Does that surprise you that Dean didn't say anything about
19 medical necessity?

20 A No.

21 Q Why not?

22 A It's an easy first gate for the health plan to get through
23 in terms of evaluating a claim. It's a fairly quick review. It
24 doesn't require them to devote any resources to reviewing
25 medical necessity.

1 Q When you say --

2 THE COURT: "Easy first gate" meaning if it's excluded
3 under the Uniform Benefits from coverage, then they'd never get
4 to medical necessity.

5 THE WITNESS: Yes.

6 BY MR. ROTH:

7 Q Because they don't have to send it to doctors or anything
8 like that to look at?

9 A Correct.

10 THE COURT: C and D have not been admitted.

11 MR. ROTH: Well, I'll move for admission of --

12 THE COURT: Of?

13 MR. ROTH: -- D.

14 THE COURT: All right. It is admitted.

15 BY MR. ROTH:

16 Q This is another letter from Dean to Ms. Boyden dated July
17 8th, 2016. Does it make sense that there might be two letters
18 from Dean to an employee regarding a denial?

19 A Yes.

20 Q Is that consistent with the grievance process?

21 A Yes.

22 Q There's maybe two levels of review within the health plan?

23 A The first one looked like a prior authorization denial, and
24 this one is the grievance.

25 Q So the first was just the original prior auth. This is a

1 grievance?

2 A That's what it looked like to me, yes.

3 Q So I'll give you a second to review this first page, and
4 let me know if you see anything in that page that says that Dean
5 had concluded the procedure was medically necessary that Ms.
6 Boyden wanted.

7 A I don't see anything for medical necessity review.

8 Q And I'll turn to the second page. I think it's just a
9 two-page letter. Same question. Do you see -- I'm sorry. Let
10 me zoom out a bit. Do you see anything on this page that says
11 Dean had concluded Ms. Boyden's surgery was medically necessary?

12 A No.

13 Q Does that surprise you?

14 A No.

15 Q For the same reasons we just discussed?

16 A Correct.

17 Q I'd like to show you what's been marked as Exhibit 24.
18 This is a letter from WPS to Ms. Andrews. It looks like it's a
19 grievance letter, so this isn't the original prior authorization
20 request. I'll let you review the letter. Does anything on this
21 page say that WPS concluded that Ms. Andrews' surgery that she
22 was asking for was medically necessary?

23 A No.

24 Q And you see where it says, "Regardless of the medical
25 necessity, this type of surgery is specifically excluded"?

1 A Yes.

2 Q And what does that mean to you? Why are they saying that?

3 A I believe what they are telling her is that it did not go
4 to medical necessity review because they relied on the exclusion
5 in the policy, the exclusion in Uniform Benefits to deny
6 coverage.

7 Q So going back to our handy chart, so do both those letters
8 seem to be saying that Ms. Boyden's and Ms. Andrews' claims
9 failed at the coverage exclusion step of this chart?

10 A Yes.

11 Q And so they never got to the medical necessity part?

12 A Correct.

13 Q So there was some testimony yesterday -- you weren't here
14 during it -- that -- well, let me back up. I'd like to ask you
15 just a couple basic questions about the --

16 THE COURT: Let me ask you, because I understood -- do
17 you have a few more questions or --

18 MR. ROTH: Yeah. Just two or -- four -- three, four,
19 five, more questions.

20 THE COURT: If you can wrap this up in the next five
21 minutes, we'll just complete it.

22 MR. ROTH: I promise.

23 THE COURT: That's actually more honest than most
24 lawyers who will say, "Yes, just one or two," and then they'll
25 ask three, four, or five, so go ahead.

1 MR. ROTH: It's always more than two.

2 THE COURT: Go ahead.

3 BY MR. ROTH:

4 Q I just want to ask you three, four, or five questions about
5 the exclusion at issue here and how it's supposed to work, and
6 before I ask you those questions, I'll put it in front of you so
7 you can look at it.

8 There was some testimony yesterday about issues that Ms.
9 Boyden and Ms. Andrews had -- I guess primarily Ms. Boyden had
10 in getting medical care in terms of blood work, blood tests,
11 cancer screening, that kind of thing from her health care
12 provider, Dean. Is there anything in the Uniform -- in this
13 exclusion here that should prevent state employees from getting
14 routine health care like physicals, checkups, blood work, that
15 kind of thing?

16 A No.

17 Q So they should get that coverage even if they're
18 transgender, correct?

19 A Yes.

20 Q And why is that?

21 A The certificate excludes -- in this language it only
22 excludes the specific surgical procedures that are listed here.
23 Everything else would be a covered benefit under the certificate
24 regardless of other conditions that might impact the person.

25 Q So if an insurance company was giving a transgender state

1 employee a hard time about covering routine medical care, that
2 would not be consistent with the Uniform Benefits; is that
3 correct?

4 A Correct.

5 Q If there was an improper denial of coverage for a
6 transgender state employee for routine health care, could --
7 would ETF have the ability to reverse that decision by the
8 insurance company?

9 A Yes.

10 Q And would that be through the appeals process?

11 A Normally, yes, it could go through appeals, and then it
12 could come to us. We would hope it would come to us so that we
13 could intervene on behalf of the member.

14 Q There was some testimony also from Ms. Boyden and Ms.
15 Andrews about their difficulty in finding medical providers that
16 specialized in transgender health care. Does the Department of
17 Employee Trust Funds or the Group Insurance Board have any
18 control over what kind of providers health care organizations
19 have available?

20 A We qualify health plans for provider access such as
21 hospital, number of primary providers, not to the level of
22 detail of specialty providers.

23 MR. ROTH: I have no further questions right now.

24 THE COURT: All right. We're going to take our morning
25 break then, and we'll reconvene at 11:00 a.m. to continue with

1 testimony, and until then -- we're getting to the end. You
2 haven't heard all of the defendants' case. You certainly
3 haven't heard what the law is that you need to decide, so please
4 just keep that in mind and talk about something else until you
5 have all of that information and are deliberating.

6 All rise for our jury, please.

7 (Jury exits the courtroom at 10:39 a.m.)

8 THE COURT: Ms. Mallow, you can step down as long as
9 you'd just be back here -- thank you.

10 And if the parties would just be seated for a moment.

11 Ms. Mallow, you can go ahead. Thank you.

12 I just wanted to confirm the timing. You still expect a
13 cross of about 30 minutes?

14 MR. FAIRWEATHER: That's correct.

15 THE COURT: All right. And you would expect short
16 redirect?

17 MR. ROTH: Short redirect.

18 THE COURT: And then at that point do you expect a
19 short rebuttal? What would you expect your rebuttal -- you're
20 not certain if you'll do a rebuttal.

21 MR. DUPUIS: Correct.

22 THE COURT: If you did a rebuttal, I am assuming it
23 would be relatively short.

24 MR. DUPUIS: Yes, Your Honor.

25 THE COURT: So that would take us to about 11:40,

1 something like that. I have a 1:00 p.m. sentencing, so how long
2 do you anticipate your conclusion -- your closing argument would
3 be?

4 MR. KNIGHT: I would say 15 minutes, maybe slightly
5 more than that.

6 THE COURT: All right. And for the defendants?

7 MR. KILPATRICK: Probably around the same time.

8 THE COURT: All right. If we finish up by quarter to
9 noon, we'll probably go with my instructions and proceed to
10 closing arguments. If we get much past that, we may have to
11 wait until after my sentencing and reconvene at 1:30. What I
12 may do is at least get in the closing instructions, and then
13 we'll take the break for lunch and then come back after my
14 criminal sentencing, but I just wanted to make the parties
15 generally aware.

16 Anything more for the plaintiffs at this time?

17 MR. KNIGHT: Perhaps Mr. Dupuis thinks that my closing
18 might be longer than 15 minutes, so I just want to be fair to
19 you in saying maybe it's going to be more like 20.

20 THE COURT: That's fine. 15 -- when I hear 15 minutes,
21 I think 20 to 25.

22 MR. KNIGHT: Three or four more questions.

23 THE COURT: I understand.

24 Anything more for the defendants?

25 MR. KILPATRICK: No, Your Honor.

1 THE COURT: All right. Very good. We'll take our
2 break now and reconvene at 11:00 p.m. -- a.m., excuse me.

3 (Recess at 10:42 a.m. until 11:03 a.m.)

4 THE COURT: All right. We'll bring our jury in. While
5 we're doing that, I just want to let the parties know, the
6 criminal sentencing is going to have to be in this courtroom,
7 which is not typical. That just means you're going to need to
8 clear your table. You can leave everything else there, but the
9 tables will need to be cleared. I'll try to remember to tell
10 you again, but we just don't have enough courtrooms right now
11 with renovation.

12 (Jury enters the courtroom at 11:03 a.m.)

13 THE CLERK: This Honorable Court is again in session.
14 Please be seated and come to order.

15 THE COURT: All right. We will proceed with
16 cross-examination of Ms. Mallow, and you may proceed.

17 MR. FAIRWEATHER: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. FAIRWEATHER:

20 Q Ms. Mallow, you testified in response to questions from the
21 State's attorney about the Uniform Benefits. Do you recall that
22 testimony?

23 A Yes.

24 Q Okay. I'm going to show that exhibit to you again. It's
25 been admitted. And you would agree that the health plan -- I

1 think you've also referred to them as the certificates; is that
2 right?

3 A Correct.

4 Q -- has no ability to alter any of the language, benefits,
5 or exclusions in this document; is that right?

6 A Correct.

7 Q And you also testified at length about medical necessity.
8 Do you recall that testimony?

9 A Yes.

10 Q And it's your understanding that plans -- or plans must
11 follow the definition -- the criteria of medical necessity
12 that's set forth in the Uniform Benefits, true?

13 A Yes.

14 Q So in effect the plans and the Uniform Benefits set the
15 terms of what comprises medical necessity, true?

16 A Yes.

17 Q You also testified that the exclusion that we've been
18 talking about here today and that you've talked about at length
19 and testified about at length has been removed; is that right?

20 A As of the first of the year, yes.

21 Q As of the first of 2019?

22 A Yes.

23 Q And you're aware that the Group Insurance Board had voted
24 to remove the exclusion at a different point in the past, true?

25 MR. ROTH: Objection. Outside the scope of direct.

1 THE COURT: You've opened the door, and I'll overrule
2 it, and you can answer.

3 THE WITNESS: Yes, they have.

4 BY MR. FAIRWEATHER:

5 Q And you recall that that was in July of 2016; is that
6 right?

7 A Correct.

8 Q And you also recall that on December 30th of 2016, the
9 board voted to reinstate the exclusion, true?

10 A Correct.

11 Q And there's nothing that would prevent them from doing the
12 exact same thing with respect to its recent decision to remove
13 the exclusion, is there?

14 THE COURT: We'll have a brief sidebar.

15 (Discussion held at sidebar at 11:06 a.m.)

16 THE COURT: He opened the door, but now you're
17 running -- no, hang on Counsel -- you're running into the wall,
18 which is that I just ruled it's illegal, so to ask this witness
19 that question --

20 MR. FAIRWEATHER: Sure.

21 THE COURT: -- is kind of absurd. I'm going to just
22 explain to the jury what the status is and the likelihood of an
23 injunction, but, I mean, you guys started down this road, so now
24 I'm going to clarify.

25 MR. FAIRWEATHER: Exactly.

1 THE COURT: Step back, please.

2 (Sidebar discussion ends at 11:06 a.m.)

3 THE COURT: By virtue of the counsel's questioning, I'm
4 just going to instruct you that, as you know, since you're here
5 deciding damages, there's already been a determination made that
6 under federal law this exclusion can't be enforced and, in fact,
7 going forward will not be enforced. In fairness, there could be
8 a change in the law, there could be some ruling by another court
9 that would then free up the board to go back if they wish to
10 since they've already done it once, but that's a contingency
11 you'll just have to consider as part of your decision as to
12 damages here.

13 I'll give you much clearer instructions as to the time frame
14 for damages as part of my legal instructions, but this sort of
15 scenario and asking this witness if there's anything that
16 prevents -- well, right now what prevents the board from going
17 back would be my ruling. Whether or not that's upheld over time
18 is not for you to decide, ultimately not for me to decide, but
19 that's the state of the situation now, and we're just going to
20 proceed with your next question, Counsel.

21 BY MR. FAIRWEATHER:

22 Q And, Ms. Mallow, you testified about the contents of the
23 letters that were sent from the various plans to my clients, Ms.
24 Boyden and Ms. Andrews; do you recall that testimony?

25 A Yes.

1 Q And there's nothing in those letters that indicate any of
2 those plans actually considered medical necessity, true?

3 A I did not see it in the letters, no.

4 MR. FAIRWEATHER: I have nothing further, Your Honor.

5 THE COURT: All right. Any redirect?

6 MR. ROTH: No, Your Honor.

7 THE COURT: You may step down then.

8 (Witness excused at 11:08 a.m.)

9 THE COURT: Anything further for the case-in-chief for
10 the defendants?

11 MS. SCHMELZER: No, Your Honor.

12 THE COURT: All right. Having completed the
13 defendants' case-in-chief, I'll ask if the plaintiffs wish to
14 put on any rebuttal case.

15 MR. FAIRWEATHER: Your Honor, we would call Ms. Andrews
16 for some brief rebuttal.

17 THE COURT: Very good. Ms. Andrews, you've already
18 been sworn -- no, please proceed. Sorry. I was just going to
19 say you don't need to be sworn again, and you can simply take
20 the stand, and then we'll proceed from there.

21 MS. ANDREWS: Thank you, Your Honor.

22 **SHANNON ANDREWS, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN**

23 THE COURT: And if you would just move forward as best
24 you can, and then you may proceed.

25 MR. FAIRWEATHER: Thank you.

DIRECT EXAMINATION

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BY MR. FAIRWEATHER:

Q Ms. Andrews, you were in court today and heard the testimony of Dr. Stephanie Budge, right?

A I did, yes.

Q And you heard the questions from the State's attorneys about -- posed to Ms. Budge?

A I did, yes.

Q Do you recall the line of questioning regarding the timing, that is, when you actually requested and started the process for surgical intervention in 2015?

A I do, yes.

Q And why is it that you waited until the time that you started that process as opposed to doing it earlier?

A When I started to transition, I was strongly encouraged by everyone I talked to to come up with a plan, and my plan always ran through surgery. I didn't want to get stuck in a place where I couldn't pass as male anymore and couldn't pass as female, so I waited until I had the money for surgery to even start.

MR. FAIRWEATHER: I have nothing further. Thank you.

THE COURT: Any further questions for this --

MR. ROTH: No, Your Honor.

THE COURT: You may step down then, Ms. Andrews. Thank you.

1 (Witness excused at 11:10 a.m.)

2 THE COURT: Any further rebuttal for the plaintiffs?

3 MR. FAIRWEATHER: No. Thank you.

4 THE COURT: Very good. This completes then the
5 evidence in the case. We're going to have to rely on some
6 assistance by the parties. Do you have the final version of the
7 instructions, closing instructions? A clean version?

8 MR. FAIRWEATHER: I believe so, yes.

9 THE COURT: I'm going to give you the closing
10 instructions, and then we'll hear closing arguments. Normally I
11 would have a clerk do this, but because this wrapped up much
12 more quickly than was anticipated, I'm just going to have one of
13 the counsel put -- you might want to just take it out of the
14 binder and then just show it.

15 I find that if I have the jury able to read along with me
16 in the closing instructions, that some people absorb the
17 information better the first time around. Remember you're going
18 to have these instructions with you in deliberations, multiple
19 copies, so you'll be able to refer back to them, but for those
20 of you who find it of assistance to review along with me as I
21 give you these substantive instructions, please feel free to do
22 so. We may or may not have it available. Do you have a clean
23 version?

24 MR. KILPATRICK: May I approach?

25 THE COURT: Yes, please. Why don't we wait for both

1 counsel. If you just want to confirm which is which?

2 (Discussion held off the record.)

3 THE COURT: Sorry. There was one last typo that is
4 still going to be reflected in their version but not in the
5 copies that will be provided to you.

6 THE CLERK: Would you like me to do it?

7 THE COURT: That would be great. Thanks. Thank you.
8 When we come to that change, I'll point it out. So first page:

9 Ladies and gentlemen of the jury, you are about to hear
10 closing arguments of the parties. Before these arguments, I
11 will instruct you on the law. After closing arguments, I will
12 provide you very brief instructions governing your
13 deliberations. After that, the case will be in your hands.

14 As I explained at the outset of this trial, my job is to
15 decide what rules of law apply to this case and to explain those
16 rules to you. It is your job to follow the rules, even if you
17 disagree with them or don't understand the reason for them. You
18 must follow all of the rules; you may not follow some and ignore
19 others.

20 This case will be submitted to you in the form of a special
21 verdict consisting of four questions. And I'm not sure you have
22 that, Andy, so I can give you my copy. Very good.

23 The first question is: "Has plaintiff Alina Boyden proven
24 by a preponderance of the evidence that the exclusion
25 proximately caused her injury or damage?" And you will answer

1 "yes" or "no." You'll see if you answer the question "yes,"
2 then you'll answer Question No. 2. If you answer "no," you'll
3 go to Question No. 3 without answering 2.

4 Question No. 2 reads: "What amount of money do you award as
5 compensatory damages to plaintiff Alina Boyden?"

6 Question No. 3, which you will answer regardless: "Has
7 plaintiff Shannon Andrews proven by a preponderance of the
8 evidence that the exclusion proximately caused her injury or
9 damage?" And you'll answer that question "yes" or "no." If you
10 answer Question No. 3 "yes," then you'll answer Question No. 4.
11 Just as with Question 1, if you answer Question 3 "no," then
12 you'll skip Question No. 4 and proceed to the end of the verdict
13 form.

14 Question No. 4 reads: "What amount of money do you award as
15 compensatory damages to plaintiff Shannon Andrews?"

16 That is the special verdict that you're going to be asked to
17 answer.

18 In answering the questions, you should consider only the
19 evidence that has been received at this trial. Do not concern
20 yourselves with whether your answers will be favorable to one
21 side or another or with what the final result of this lawsuit
22 may be.

23 A word about the burden of proof. When a party has the
24 burden to prove any matter by "a preponderance of the evidence,"
25 it means that you must be persuaded by the testimony and

1 exhibits that the matter sought to be proved is more probably
2 true than not true.

3 As the party asking for damages, plaintiff has the burden of
4 convincing you by a preponderance of the evidence that: (1) the
5 exclusion proximately caused each plaintiff injury or damage;
6 and (2) the amount of those damages.

7 Each plaintiff must prove by a preponderance of the evidence
8 that the exclusion proximately caused her injury or damage. You
9 may recall that's Questions 1 and 3. Here an injury or damage
10 is "proximately caused" by the exclusion if it appears from the
11 evidence in the case that the exclusion was a substantial factor
12 in bringing about or actually causing the injury or damage to
13 the plaintiff and that the plaintiff's injury or damage was
14 either a direct result or a reasonably probable consequence of
15 the exclusion.

16 If you find that a plaintiff has not met her burden of
17 demonstrating proximate causation, you must answer the relevant
18 question for that plaintiff on the verdict form "no." If you
19 find that a plaintiff has met her burden of demonstrating
20 proximate causation, you must answer the relevant question for
21 that plaintiff on the verdict form "yes." Please note that
22 Question Nos. 2 and 4 on the verdict form are only to be
23 answered if you answer the immediately preceding question "yes."
24 Please read any bolded directions after a question carefully to
25 ensure that you are not answering questions needlessly.

1 Now, as to amount of damages, which are Questions 2 and 4,
2 if you find that either plaintiff has shown the exclusion of
3 coverage for gender confirming surgery and related hormone
4 therapy for state employees caused her injury or damage, then
5 you must determine the amount of money that will fairly and
6 reasonably compensate that plaintiff for any injury or damage
7 sustained as a result of the exclusion. Your award must be
8 based on evidence and not speculation or guesswork. This does
9 not mean, however, that compensatory damages are restricted to
10 the actual loss of money. If you find they were caused by the
11 exclusion, a damage award may include both the physical and
12 mental aspects of injury, even if they are not easy to measure.

13 Do not measure damages by what lawyers ask for in their
14 arguments. Their opinions as to what damages should be awarded
15 should not influence you unless their opinions are supported by
16 the evidence. It is your job to determine from the evidence you
17 have seen and heard what amount of damages, if any, were
18 sustained by virtue of the exclusion.

19 That doesn't happen often, but we have a backup generator,
20 so we're probably good regardless.

21 Examine the evidence carefully and impartially, that is, the
22 evidence of damage. Do not add to the damages award or subtract
23 anything from it because of sympathy to one side or because of
24 hostility to one side.

25 In assessing damages here, you should consider the following

1 types of compensatory damages:

2 a) The cost of surgeries and hormone therapy received and
3 paid for by the plaintiffs that were not covered by their state
4 employee health insurance because of the exclusion, including
5 costs of financing that medical care;

6 b) The reasonable costs of other medical care that
7 plaintiffs reasonably needed, actually received, and paid for
8 that would have been covered but for the exclusion; and

9 c) Mental and emotional suffering resulting from the
10 exclusion. No evidence of dollar value of physical, mental, or
11 emotional pain and suffering has been or needs to be introduced.
12 There is no exact standard for setting the damages to be awarded
13 on account of pain and suffering. You are to determine an
14 amount that will fairly compensate plaintiffs for the injuries
15 they have sustained.

16 And I should have noted, the copy you get, which includes
17 the "b" where you see the strikeout of the word "not," the
18 strikeout is accurate. You'll have a clean version that won't
19 even have that extra "not." It became a -- well, it's not an
20 accurate statement, but as I read it is the accurate standard
21 for that category of damages.

22 On the other hand, if you find that plaintiffs have failed
23 to prove any compensatory damages, you must return a verdict for
24 them in the amount of \$1.

25 Now, I said I would instruct you on the damages period that

1 you are to consider. As described above, you should compensate
2 plaintiffs for any injury that you find they sustained during
3 the period of their employment by the State of Wisconsin to the
4 present day directly resulting from the wrongful exclusion at
5 issue in this lawsuit. Shannon Andrews has been a state
6 employee and subject to the exclusion from March 2014 to the
7 present. Alina Boyden has been a state employee and subject to
8 the exclusion from May 2015 to the present. You heard testimony
9 from plaintiffs about their gender dysphoria and efforts to
10 treat that medical condition which predate their employment with
11 the State of Wisconsin and, thus, also predate being subject to
12 the exclusion of coverage at issue in this lawsuit. In
13 determining the appropriate damages award, you should not award
14 plaintiffs damages for any uncovered out-of-pocket costs or
15 emotional distress they experienced before the dates of their
16 employment, as described above, or beyond today.

17 Those are the instructions that will apply, and now we'll
18 hear closing argument from the parties.

19 And you can go ahead, Andy, and set up the podium.

20 Again, I apologize for -- normally we would have this set
21 up, but things ended a bit more quickly than expected. Once the
22 podium is set up, we'll hear closing arguments from both sides.
23 As the plaintiff, they will be given the opportunity to speak
24 first because they have the burden of proof and also be given a
25 chance for brief rebuttal remarks.

1 And, Mr. Knight, you may proceed.

2 MR. KNIGHT: Thank you, Your Honor.

3 THE COURT: Why don't you give Mr. Wiseman one minute
4 to confirm we have a mic.

5 I think we're ready to go. You may proceed.

6 MR. KNIGHT: Good morning, ladies and gentlemen of the
7 jury, and, again, my name is John Knight, one of the attorneys
8 for the plaintiffs. At the beginning of this trial, I explained
9 that our case was about the State of Wisconsin breaking the law
10 by treating Shannon Andrews and Alina Boyden differently because
11 they're transgender. I also explained that it's only fair that
12 the State pay for the harm it has caused to these women because
13 it discriminated against them and broke the law. And now you've
14 heard from Alina and Shannon who talked about the ways in which
15 being denied coverage hurt them, as well as Dr. Budge who
16 explained the nature of the medical condition that affects them
17 and the harm from her perspective as an expert in this field.

18 As Judge Conley told you in his opening instructions, he's
19 already decided that the State's exclusion, the policy of
20 denying the insurance coverage for gender confirmation surgery,
21 violates federal nondiscrimination laws. This is what Shannon
22 and Alina have called exclusion, and the Court has also used
23 that language, exclusion, in his closing -- in the closing
24 instructions, which you'll receive. What is for you to decide,
25 as the instructions say, is whether the State's exclusion

1 proximately caused my clients' injury and how much the State
2 should pay to Alina and Shannon to compensate them for the harm
3 they have experienced.

4 So Shannon told you about who she is and how it felt to be
5 denied coverage for life-saving medical care because of this
6 exclusion and because of who she is, because it denies coverage
7 to her because she's transgender. She struggled over time to
8 deny her core identity, but that wasn't something she could do.
9 She had no choice but to live as a woman. In her job for the
10 state, she's devoted her life to helping people with cancer. As
11 a transgender woman, particularly before she transitioned,
12 Shannon has often felt isolated and rejected by society.
13 Shannon's service to others helps her feel connected to society
14 and has given her a sense of purpose. Shannon struggled for
15 years to get the medical care she needed to treat her gender
16 dysphoria. Her drive in the face of adversity and
17 discrimination shows just how urgently she needed this kind of
18 medical care.

19 The State of Wisconsin has tried to tell you that they
20 didn't cause Shannon's injury, but the evidence shows otherwise.
21 Shannon was forced to pay tens of thousands of dollars,
22 liquidating her savings to get surgical care she needed, all
23 because the State of Wisconsin inserted themselves between her
24 and her doctors and would not cover it. And the nightmare of
25 fighting for that coverage made the harm she already was

1 experiencing that much worse.

2 Alina has also told you about what she's gone through in
3 order to get the health care that she needed. At a time when
4 Alina should have been focusing on her studies and on educating
5 young University of Wisconsin students, Alina had to worry about
6 being denied health care for being transgender. When she had a
7 cancer scare in 2015 and realized that her hormones weren't
8 working, her doctor recommended that she get surgery to treat
9 her gender dysphoria and to lessen some of the serious health
10 risks associated with high levels of drugs, the hormone
11 suppressants, that she was taking. Alina was terrified that a
12 spike in her testosterone levels would undo all the benefits
13 that had occurred to her, that had happened for her as a result
14 of taking hormones for decades. She worried that her body would
15 begin to, as she put it, mutate outside of her control and she
16 would sprout facial hair and develop a deep voice, which was not
17 something that a woman could live with like Shannon. Alina
18 makes less than \$15,000 per year as a graduate student, was not
19 able to scrape together the money she needed to get the surgery
20 that she needed so badly.

21 The State, however, is going to try to get you to believe
22 that they didn't cause the harm that Shannon and Alina have
23 talked about. They're telling you that you should now assume
24 something that could not have happened here, that Shannon and
25 Alina's request for coverage would have been denied by the

1 insurance providers who administer those state insurance plans
2 on the grounds that the surgery was not medically necessary for
3 Shannon and Alina. I think you'll see that you should reject
4 that argument for a number of reasons.

5 First of all, there's no question that the State had a
6 Uniform Benefits exclusion in place at the time, an exclusion
7 that the Court has already decided is illegal, and there's no --
8 the testimony has shown, the evidence has shown, that Shannon
9 and Alina's insurance providers could not have granted that
10 coverage because it was barred by the State. So whether or not
11 these insurance companies decided it was medically necessary, it
12 was not -- it was denied. It was going to be denied because of
13 the State's exclusion.

14 Secondly, Shannon and Alina are not required to prove the
15 impossible, which is what the State is essentially requiring
16 them to do, to prove what their providers would have done if
17 there had been no State-established exclusion. The simple fact
18 is the State's exclusion prevented their insurance providers
19 from covering these procedures. There was nothing more that
20 Shannon and Alina could have done to get the coverage they
21 needed.

22 Third, the evidence shows that the State's exclusion was the
23 reason for the denials from their providers. Alina testified
24 that when she applied for coverage, her provider denied it based
25 on the State's exclusion, and I believe the testimony from

1 Ms. Mallow confirms it was denied because of the State's
2 exclusion.

3 Fourth, the private insurers cannot have coverage that's
4 different from the Uniform Benefits. They can't have terms that
5 are different from those established by the State. Eileen
6 Mallow made that abundantly clear. Those terms are set by the
7 State. They can't be varied by the insurance providers, so it
8 was the State who caused the exclusion of coverage here.

9 Fifth, even if we imagine the State's own exclusion did not
10 exist, there's no evidence that these insurance companies, the
11 companies that contracted with the State, were going to deny the
12 surgery because it wasn't medically necessary, and, in fact, the
13 evidence you've heard shows that this evidence [verbatim] was
14 medically necessary.

15 Dr. Budge testified that gender confirmation surgery was
16 necessary for Shannon and is necessary for Alina, even though
17 Alina has not been able to have it, and Dr. Budge testified both
18 with respect to the genital surgery as well as the facial
19 feminization surgery that Shannon asked -- or that Shannon was
20 denied coverage for because of the exclusion. I'm sorry. To be
21 clear, she was denied -- she could not get coverage for the
22 facial feminization surgery because of the exclusion, so in that
23 instance she didn't even apply for the coverage. It was
24 pointless for her to try to do that.

25 Dr. Budge testified that not every transition will look the

1 same for individuals and not every transgender person with
2 gender dysphoria will need surgery. But she did testify and
3 made it very clear that it was medically necessary for them.
4 She also looked at the definition of "medical necessity" from
5 the Uniform Benefits exclusion, the State's definition of
6 medical necessity, and she confirmed that Alina and Shannon
7 fulfilled that particular definition.

8 Dr. Budge determined that both kinds of gender confirmation
9 surgery, both the genital surgery and the facial feminization
10 surgery, were medically necessary for Shannon and that it is
11 likely that she would have killed herself had she not been able
12 to receive this surgery. So to suggest, as the State seems to
13 be doing, that Shannon should have waited -- continued to wait
14 around for the State to get rid of the exclusion and then go
15 through a medical necessity approval process is something that
16 Your Honor -- that I believe you, the jury, will see right
17 through.

18 Alina and Shannon's medical doctors have also agreed that
19 for them these surgeries are a vital part -- are or were a vital
20 part of treating their severe gender dysphoria. You'll remember
21 that Shannon and Alina gave letters from the people who oversee
22 their medical care recommending surgery to treat their medical
23 condition.

24 The Court will instruct you on the law and has already read
25 off the instructions. He will tell you and you will see in the

1 instructions yourself that Alina and Shannon must prove by a
2 preponderance of evidence that the exclusion was a substantial
3 factor in bringing about or actually causing the injury or
4 damage to the plaintiffs and the plaintiffs' injury or damage
5 was either a direct result or a reasonable probable consequence
6 of that exclusion. The evidence you've heard yesterday and
7 today easily meets that standard. At the very least, the
8 evidence shows that the State's exclusion of coverage was, under
9 this standard, a substantial factor in bringing about or
10 actually causing this injury or damage to the plaintiffs. Who
11 else could have caused those denials but the State in these
12 instances? It was the State's exclusion that led to the denial
13 of coverage. It's the State's exclusion that led to Shannon not
14 even applying for coverage for the facial feminization surgery
15 because she knew it wouldn't be covered.

16 The judge also has talked to you about the kinds of evidence
17 you can consider. You can consider each, either direct or
18 circumstantial evidence, and here there is both. There is
19 direct evidence in this case that the State caused my clients
20 harm, and that includes the testimony that you've heard.
21 There's also direct evidence of the damage that occurred for my
22 clients. You've heard their testimony about the harm to them as
23 well as Dr. Budge who talks about how harmful this was to them.

24 There's also -- you can also consider circumstantial
25 evidence, and circumstantial evidence is proof of one or more

1 facts from which you could find another fact. So if it's
2 reasonable for you to find, based on the facts that you've
3 heard, another fact, which in this case would be that the
4 exclusion caused the denial at issue here, the denial of
5 coverage, then that is sufficient -- can be sufficient evidence
6 to find in favor of the plaintiffs.

7 It's also important to keep in mind the burden of proof that
8 Shannon and Alina must meet in showing the State has caused the
9 harm and in proving the amount of damages. The Court will tell
10 you that the plaintiffs must prove both facts under a
11 preponderance of the evidence standard. The Court has explained
12 that under that standard you must be persuaded by the testimony
13 and exhibits that the matter sought to be proved is more
14 probably true than not true, more probably true than not true.
15 We believe you'll see that the plaintiffs have easily met that
16 standard and shown that the State caused the harm to them and
17 that this is harm that they have experienced and should be
18 compensated, and it's harm from the State's policy.

19 As to the damages themselves, Shannon spoke about the cost
20 of the surgery that she had and that she paid out of her own
21 pocket. The cost of the first surgery was \$21,500, and the cost
22 of the second surgery, again, that she paid out of her own
23 pocket, was \$49,508.49. Shannon [verbatim] also testified about
24 some out-of-pocket costs, \$95 in hormone co-payments that she
25 would not have had to pay had she been able to have the surgery

1 she needed and -- as well as \$516.67 for blood work. These,
2 however, are small in comparison to the harm caused to the
3 mental -- to them -- to who they are through the mental and
4 emotional suffering that it caused them, and as the judge has
5 already instructed you, you may provide award to the plaintiffs
6 for this mental and emotional suffering that they experienced
7 because of the exclusion.

8 Alina struggled with crushing depression and desperation as
9 a result of not getting the care she needed. Alina has
10 testified about how not being able to have surgery has been
11 difficult for her self-esteem. She talks about her deep disgust
12 with her body not matching her gender identity of female as well
13 as her fears about safety, dating men, every time she goes --
14 and every time she goes through an airport's body scanner. She
15 also told you about, as I mentioned before, the added costs and
16 health risks associated with these high doses of hormones that
17 she's having to take, which would be addressed by being able to
18 have this surgery that she asked the State to cover. She also
19 testified about her extreme distress when her hormones stopped
20 working and her need for surgery became especially urgent.

21 The State has tried to downplay how badly Alina and Shannon
22 suffered during this time. Contrary to what the State tried to
23 tell you, Shannon was not fine. She testified about being
24 deeply depressed and even suicidal, in large part due to not
25 getting the treatment she needed. She testified that she had to

1 wait to be able to get the treatment she needed and go through a
2 longer period of this kind of serious distress because she had
3 to wait until she had the money to pay for it herself, again
4 because of the exclusion.

5 When Shannon experienced brief moments of hope and relief
6 after taking important steps in transitioning, including
7 starting to live openly as a woman and starting hormone therapy,
8 she had moments of relief, but then the dysphoria came back, and
9 she struggled with depression, anxiety, and other distress as a
10 result of not being able to get surgery. And after she
11 completed the genital surgery, again, she had a great relief for
12 a period of time, but then the distress recurred as she faced
13 the fact that her face was not consistent with her female self
14 and consistent with who she is. Shannon delayed her surgeries,
15 as she mentioned, including draining her retirement account, for
16 which she incurred a penalty. This in addition to the
17 humiliation of, as she put it, being told she was not -- she was
18 good enough to provide care for others but not good enough to
19 receive it herself.

20 Another part of this harm to plaintiffs has been in the way
21 in which the State's exclusion has involved a challenge to who
22 they are. The wording of the exclusion, the denials of
23 coverage, the long challenge they faced in getting this care
24 because it is care for people like them, transgender people, has
25 been devastating. The State will tell you that you should deny

1 compensation to Alina and Shannon because they've had some hard
2 times in the past, but hard times in the past are not an excuse
3 for what the State has done to Shannon and Alina, and you can
4 consider how hard it would be for someone who's faced
5 discrimination in the past to face that same kind of
6 discrimination again, as Shannon and Alina did here.

7 The State also asks you to penalize Alina and Shannon
8 because they feel good sometimes and are successful at work and
9 in their education at school for Alina. They've also asked you
10 to penalize Shannon and Alina because Shannon has been able to
11 scrimp and save and pay for the surgery herself, but that has
12 come at great cost to her, and while the State may suggest to
13 you that she could come up with a retirement again that's
14 actually quite good for her because she's so careful about
15 saving money, that you should penalize her and deny her a
16 fair -- fair compensation for what the State has done to you.

17 Thank you for your attention and time. We hope you'll
18 review the evidence and return a verdict that fairly compensates
19 Alina and Shannon for the devastating harm the State has caused
20 them.

21 THE COURT: And we're now going to hear closing
22 argument from the defendant, but we're going to have a brief
23 sidebar before we do that.

24 (Discussion held at sidebar at 11:41 a.m.)

25 THE COURT: I apologize for this, but I just wanted, in

1 fairness to you, Mr. Kilpatrick, I want to make sure that you
2 don't cross a line. The plaintiffs haven't asked for it and I'm
3 not going to give an instruction on the fiduciary obligations of
4 a health care provider. I just want to make sure you don't in
5 making an argument that they were -- you don't argue they were
6 free to do whatever they wanted to.

7 MR. KILPATRICK: No.

8 THE COURT: They're contractually bound, so just don't
9 open a door to suggest that -- as long as you make the argument
10 that there was room for them to deny consistent with the
11 contract, but just don't cross over a line that somehow this
12 is -- they make the decision without any controls so we don't
13 get into this question of a fiduciary issue.

14 Thank you, all. Step back.

15 (Sidebar discussion ends at 11:42 a.m.)

16 THE COURT: You may proceed, Mr. Kilpatrick.

17 MR. KILPATRICK: Thank you, Your Honor.

18 Good morning again, ladies and gentlemen of the jury.
19 Again, I'm Steve Kilpatrick, one of the attorneys for the
20 defendants, the State Group Insurance Board, the State
21 Department of Employee Trust Funds. I want to thank you again
22 for sitting through this trial, for being attentive, listening
23 to all the testimony, seeing all the evidence. You've heard a
24 lot. You've seen a lot. Now is the time when the rubber meets
25 the road and you have to go back in the jury room and digest it

1 and make a decision. And you've got, as the Judge pointed out,
2 two questions to answer, one for each plaintiff, and that first
3 one is did the health insurance coverage exclusion cause the
4 plaintiffs to suffer emotional distress and out-of-pocket
5 expenses, and then only if you answer "yes" are you to determine
6 what amount of money the defendants should pay to them to fairly
7 and reasonably compensate them for the injury they sustained.

8 Now, again, as I stressed before, it is the plaintiffs'
9 burden, it has been the plaintiffs' burden, to prove these
10 things. It was not the defendants'. It was the plaintiffs who
11 had to produce enough evidence to prove that the coverage
12 exclusion caused emotional distress and out-of-pocket expenses
13 for the damages periods that are at issue here, and, again, for
14 Ms. Andrews, March 2014 to the present; Ms. Boyden, May 2015 to
15 the present. So when you go back in the jury room and you're
16 given the verdict form, Question No. 1 for Ms. Boyden, Question
17 No. 3 for Ms. Andrews asks if the plaintiffs have proven that
18 the exclusion caused injury or damage. There will be a line for
19 "yes," and there will be a line for "no," and you must check
20 that line for "no," and let me explain why.

21 First, we have a lot of testimony and evidence that falls
22 simply outside the damages period. You heard testimony that the
23 plaintiffs suffered distress, depression, anxiety, and suicidal
24 thoughts for a large part of their lives. They suffered
25 distress for a long time, as children, in middle school and high

1 school, and some of their stories were heartbreaking. I'm sure
2 that you feel for them. Your heart may go out to them. You
3 heard them suffer in college and grad school. But as the judge
4 said, you are not to compensate them for distress suffered
5 before the start of the damages period. And you may recall what
6 the judge also just instructed is that you can't add or subtract
7 to a damages award because of sympathy. So while you may feel
8 for the plaintiffs and what they suffered outside of the damages
9 period, you simply can't compensate them for any distress
10 suffered outside of that time.

11 So, next, the plaintiffs, they want to be compensated for
12 the time that they had to live their lives without the benefit
13 of sex reassignment surgery. For Alina Boyden, that's the
14 entirety of her damages period. For Ms. Andrews, that's from
15 the start of her damages period until after she received what
16 she calls the second phase of her sex reassignment surgery.
17 It's February 2018 when she obtained the facial feminization
18 surgery, all those procedures that we described last time. But
19 you can't compensate them for this time or for any out-of-pocket
20 costs for the surgeries to Ms. Andrews or medical costs to Ms.
21 Boyden because they have not shown that it was more likely than
22 not that their health plans would have covered these procedures
23 anyway absent the exclusion. If they would not have received
24 coverage for the surgeries in the first place, the insurance
25 coverage exclusion at issue could not have caused them emotional

1 distress, and they cannot be reimbursed for the out-of-pocket
2 costs. As a result, again, the answers to your questions of
3 causation need to be "no."

4 So you heard Shannon Andrews testify that she even had to go
5 to Pennsylvania for the genital reconstruction surgery in 2015
6 because there was no one here in the state who could perform the
7 surgery, and you did not hear anyone testify from WPS -- that's
8 the health plan that she had at the time -- that it was more
9 likely than not that it would have approved her claim for
10 genital reconstruction surgery, the \$21,000 claim, even absent
11 the exclusion.

12 Same goes for the \$50,000 facial feminization surgery that
13 she had in 2018. No one here from Dean came to testify that it
14 would have been more likely than not that it would have covered
15 these multiple procedures absent the exclusion. Plaintiffs'
16 attorney said there's nothing that could have been done. They
17 could have called someone from Dean, someone from WPS, brought
18 them in here and asked them questions about whether they would
19 have covered. You didn't hear that. Same goes for Ms. Boyden
20 too. No one from Dean came in here to testify that it was more
21 likely than not that it would have been covered for genital
22 reconstruction surgery that she had asked for even absent the
23 exclusion.

24 So plaintiffs, they're saying that it's all because of the
25 exclusion that they were denied, but you heard Ms. Mallow from

1 the Department of Employee Trust Funds testify that it is these
2 private health plans, and not the State Group Insurance Board or
3 the State Employee Trust Funds, that determines whether a
4 procedure is medically necessary or not. They simply can't.
5 Medical necessity is not a question that the State Group
6 Insurance Board or the state employee -- Department of Employee
7 Trust Funds, the defendants in this case, have any role in.
8 They do not have any role in making a decision whether
9 treatments are medically necessary or not.

10 And importantly, although Dr. Budge, the plaintiffs'
11 expert -- she certainly testified that these surgeries are
12 medically necessary in her opinion -- and, of course, why
13 wouldn't she? She's there to help her patients -- but just
14 because a doctor says it's medically necessary, that doesn't
15 mean that health plans must accept the doctor's opinion and
16 grant approval for the procedure. If it were only so easy.
17 Medical necessity, as Ms. Mallow testified, has its own
18 definition in the Uniform Benefits, and it's the health plans
19 that are the ones that determine whether a state employee
20 patient's procedures meet that definition of medical necessity,
21 not the state.

22 So did plaintiff meet their burden of proof that the
23 exclusion caused their emotional distress? No, they didn't meet
24 that. Did the plaintiffs meet their burden of proof that the
25 exclusion caused them to suffer out-of-pocket costs, for Ms.

1 Andrews approximately \$70,000 in surgical fees and for Ms.
2 Boyden a much smaller amount? No, they didn't. The judge told
3 you that your award must be based on evidence and not
4 speculation or guesswork, but you would be engaging in
5 speculation or guesswork if you were to give a compensatory
6 damages award to the plaintiffs for suffering emotional distress
7 during the period in which they lived their lives without sex
8 reassignment surgery when they have produced no evidence from
9 the health plans it was more likely than not that they would
10 have covered those surgeries.

11 Now, plaintiffs also seek emotional distress simply because
12 of the exclusion, and the judge told you the exclusion has been
13 found to violate antidiscrimination laws, but this trial isn't
14 about that. This trial is about damages. The plaintiffs still
15 have to meet their burden to prove that the exclusion caused
16 them injury. They have to prove that they suffered emotional
17 distress, and they haven't met that burden. So I want to just
18 break it down by plaintiffs.

19 First, Ms. Alina Boyden. Ms. Boyden testified that she
20 suffered -- still suffers distress because of the exclusion.
21 While those may be her words, the actions say otherwise. First,
22 you heard her testify that she always wanted sex reassignment
23 surgery, but her medical records, which you saw earlier, say
24 otherwise. They show that Ms. Boyden had no interest in
25 engaging in sexual activity, that it was not important to her,

1 and she was not defined by the genitals that she has. In her
2 explanation for why she said what she said several years ago,
3 that she was young and that she was in a bad mental state, it
4 just isn't convincing.

5 You heard Ms. Boyden testify that she thought about taking
6 out a loan to pay for the surgery, but she ultimately didn't.
7 You heard her admit that she didn't even take the time to visit
8 anyone at a bank, no loan officer, to discuss the possibility of
9 a loan. In fact, she even said that she was concerned about the
10 interest on the loan. Now, loan interest, that's a pretty
11 common thing in this day and age. It seems like a small price
12 to pay for a surgery that she claims that she really needs,
13 especially since she didn't even have any student loan debt to
14 worry about either. In addition, Ms. Boyden testified that she
15 did not even ask her family, did not ask her dad for a loan, and
16 this despite the fact that just before her damages period began,
17 January 2015, she received a brand new Toyota Corolla from him.

18 So while Ms. Boyden testified that she suffers the stress
19 from the insurance coverage exclusion, you heard her admit that
20 not once did she ever seek counseling or therapy to address
21 mental distress that she claims to suffer from.

22 Finally, you heard Ms. Boyden testify that she is doing
23 research on her dissertation that has taken her to India for the
24 past several months, and she testified that right after this
25 trial is done she's headed back to Asia, this time to Pakistan.

1 If she was so significantly distressed because of the exclusion
2 not permitting her to obtain the surgery that she claims she
3 needs, would she really be taking off the moment this trial is
4 done for Pakistan for the next 12 months? Why not stay here in
5 Wisconsin? Why not get the surgery? You heard the testimony
6 that the Group Insurance Board voted recently to remove the
7 exclusion so that as of January 1, just a few months away,
8 there's no longer going to be an exclusion. You also heard the
9 judge state that an injunction may appear prohibiting
10 enforcement of the exclusion. It just doesn't add up.

11 Now let's move on to Shannon Andrews. She testified that
12 she began receiving hormone therapy in October 2013 and felt
13 distress from her gender dysphoria as a result. And Dr. Budge
14 even reported that a significant amount of her distress was
15 alleviated through this hormone therapy. She also testified,
16 Dr. Budge, that it was alleviated from the genital
17 reconstruction surgery. Ms. Andrews testified that in March
18 2014, again, she was feeling pretty good. She had come out as
19 transgender to her family. She had just gotten a new job. She
20 had a checkup with a clinic in Illinois in April 2014, told her
21 that her problems with depression were resolved, and she had
22 felt substantial relief.

23 In June 2014, she came out to her co-workers. She was not
24 hiding at that point any aspect of her transgender status. She
25 testified of a substantially reduced level of social distress,

1 told her therapist that she felt good, that things felt aligned.
2 Her mood had improved significantly, and this lasted for two
3 years. Over the course of those two years in October of 2014,
4 the evidence showed that she told a provider that overall things
5 were going much better than she thought ever possible.

6 In June 2015, her depression and anxiety had all but
7 disappeared. In July 2015, about 15 months after the beginning
8 of her damages period, she told -- or Mr. Biondi, her therapist,
9 discharged her from his therapy saying that she was living a
10 full and vibrant life living as a woman and she had made
11 tremendous progress. Then after she obtained genital
12 reconstruction surgery in October 2015, she testified that her
13 distress level was a two out of a ten. Her distress level again
14 had been substantially reduced, and all this evidence does not
15 prove that Ms. Andrews was suffering from significant distress
16 because of the State's insurance coverage exclusion.

17 Now, not only has she not proven that, the evidence shows
18 that you can't compensate her for any emotional distress for not
19 having the surgery done at the beginning of her damages period
20 because she didn't qualify for surgery at that time anyway. You
21 heard her testify that she did not obtain the second of two
22 letters of recommendation that are required to be obtained
23 according to the medical standards of care guidelines that she
24 would qualify for surgery until July 2015, well after the
25 beginning of that March 2014 damages period, and Dr. Budge

1 confirmed that today.

2 So Ms. Andrews purposely waited to have the surgery done
3 because of the fears that she had about the surgery and how it
4 would affect her social and professional life. She testified
5 that she also had enough money to pay for the genital
6 reconstruction surgery at the beginning of that time frame. So
7 you can't force the defendants to compensate her for the time
8 she claims to have suffered living without the surgery when it
9 was her own choice not to have the surgery until October 2015
10 when she certainly, certainly just began qualified -- being
11 qualified to have it.

12 Ms. Andrews also seeks compensation for the time after her
13 genital reconstruction surgery all the way up through -- after
14 receiving the facial feminization surgery in February 2018, but,
15 again, you heard her testify that her level of distress after
16 the genital reconstruction surgery was a two out of ten, and
17 then after the facial feminization surgery, her distress level
18 was a one or a two out of ten. She also said that she had a
19 substantial reduction in anxiety and stress after the surgeries.
20 She woke up from a nightmare. People even commented about how
21 they saw the change of her. So if you heard that her distress
22 level was a two after the October genital reconstruction surgery
23 and her distress level was a one or a two after the facial
24 feminization surgery two-and-a-half years later, it questions,
25 it questions whether that second surgery was helpful, was

1 effective. So the evidence shows that you cannot give her
2 compensation for emotional distress for the time after her
3 genital reconstruction surgery until the facial feminization
4 surgery because it calls into question the effectiveness of that
5 surgery.

6 You also heard testimony from Ms. Andrews about other
7 stresses in life like her relationship with her partner. For
8 several years she had been supporting her partner financially.
9 You also heard testimony that she had been fired from a job
10 before -- just before the damages period and suffered distress
11 because of that, but that distress is not because of the
12 exclusion. So, again, what distress did Ms. Andrews suffer
13 during the time frame at issue here? Very little. And what
14 distress was because of the exclusion? None. So should Ms.
15 Andrews be compensated for suffering during the time of her life
16 when she lived without the facial feminization surgery? Should
17 she be reimbursed for these out-of-pocket costs? The answer to
18 those questions are "no."

19 You also heard Alina Boyden testify that she had a very bad
20 experience at the Dean Clinic, and it sounded very bad. That
21 was unfortunate, but it was not because of the exclusion. It
22 was not because of the defendants in this case. She testified
23 how Dean treated her, not how the Group Insurance Board treated
24 her or the Department of Employee Trust Funds treated her. And
25 you heard Dr. Budge admit that most of the distress was, for Ms.

1 Boyden, even before the damages period anyway. So there's
2 speculation also as to how Ms. Boyden would even respond to the
3 surgery. Indeed, Dr. Budge testified that the surgery might not
4 reduce gender dysphoria.

5 So let's talk a little bit about Dr. Budge. She gave an
6 opinion on the level of distress of the plaintiffs and the
7 effectiveness of the surgeries. Well, she testified that she
8 made three prior appearances in transgender lawsuits, all in
9 favor of the transgender plaintiffs. She offered mental health
10 services to the plaintiffs before she got involved in this case
11 as an expert. She has recommended that all of her patients
12 obtain gender reassignment surgery, even three 17-year-olds.
13 She's an advocate for transgender individuals. She's an
14 advocate for the two plaintiffs. She always tries to help
15 transgender persons. Judge her testimony in that way. She's
16 not an impartial witness. Also recall that she never evaluated
17 Ms. Andrews after she received her facial feminization
18 surgeries. Recall that she also admitted that Ms. Boyden did
19 not meet the criteria for depression or PTSD, so, again, how
20 significant was the distress she was suffering?

21 As far as the studies that Dr. Budge cites, you heard her
22 admit that some of the studies she even cited had questions
23 about the medical effectiveness of gender reassignment surgeries
24 to treat gender dysphoria. One was a 2016 publication. The
25 other was a report by the Center for Medicare and Medicaid

1 Services. You also heard her admit that she has not conducted a
2 study in her lab on the effectiveness of gender confirmation
3 surgeries.

4 Also important to remember is that Dr. Budge's determination
5 of the level of distress of the plaintiffs, which she called
6 severe, was based on what the plaintiffs told her, based on the
7 plaintiffs' self-reports, but we surely didn't hear that level
8 of distress being testified by Ms. Boyden and Ms. Andrews as to
9 how the exclusion itself affected them while they were on the
10 stand. Also, Dr. Budge said that she spoke with Mr. Biondi, who
11 was Ms. Andrews' therapist, and he was most worried about Ms.
12 Andrews, but that concern is not reflected in the notes or the
13 letters that he wrote about Ms. Andrews. Dr. Budge also
14 testified about Ms. Boyden, that she suffered distress again
15 from the treatment that she received at medical appointments,
16 but you heard her testify, Ms. Boyden testify, that it was the
17 Dean employees who treated her badly, not anyone from the State,
18 and Ms. Mallow testified that if Dean was interpreting the
19 exclusion to refuse treatment of health care for transgender
20 persons in general, that's not how the exclusion should be
21 interpreted. No way. That was wrong of what Dean did.

22 So in closing, you as a jury need to be fair. You need to
23 answer those questions based on evidence, not based on
24 speculation, not based on guesswork, as the Judge told you.
25 After hearing all the evidence, all the testimony, seeing all

1 the documents, it's clear that the plaintiffs have failed to
2 carry their burden of proof in this case. The coverage
3 exclusion did not cause them emotional distress and to suffer
4 out-of-pocket expenses. So when you get back in the jury room
5 and you're filling out the verdict form, the answers to the
6 Questions 1 and 3 need to be "no." Thank you for your time.

7 THE COURT: Thank you, Mr. Kilpatrick.

8 And as I said, plaintiffs have an opportunity for rebuttal.
9 Mr. Knight.

10 MR. KNIGHT: Thank you. I think I've, in my argument
11 before, I've addressed a number of the arguments that the State
12 has already made. I would like to point out a few things about
13 the argument that the State is making with respect to causation.

14 First of all, Ms. Mallow today testified that 90 percent of
15 claims are approved automatically, and, secondly, I don't know
16 about your experience with insurance companies, but the notion
17 that we would bring someone in from Dean or WPS to testify about
18 something that just wasn't the case at the time this coverage
19 was denied and -- as Ms. Mallow said, they didn't even consider
20 medical necessity and they would never have done that because
21 it's the State who established the exclusion that led to the
22 denial of coverage here. So why would Dean or WPS come in and
23 say, "Well, maybe if it hadn't existed, we might -- we would
24 have considered it medically necessary"? That just isn't the
25 way that would have worked, and the reality is the evidence --

1 there's overwhelming evidence that this is medically necessary
2 care for Alina and Shannon.

3 And I would just remind you that under the standard the
4 Court has given to you, what the plaintiffs must prove was that
5 the exclusion was a substantial factor in bringing about or
6 actually causing the injury or damage to the plaintiff. We've
7 easily shown that. The exclusion was clearly a substantial
8 factor. In fact, in a sense it was the only factor that led to
9 them being denied coverage for this care because that's the only
10 reason why the care was denied.

11 The State has made -- the State has suggested that Ms.
12 Boyden could have gone out and gotten a loan. Ms. Boyden
13 testified about how little she makes as a graduate student, and
14 I think you can rely on your common sense to understand that
15 making as little as Ms. Boyden was making as a graduate student
16 would have made it extremely difficult for her to get a loan to
17 pay for this medical care. That would be medical care -- that
18 would be a loan that would have included -- that would have --
19 as I recall would have been close to the amount that she makes
20 in a year, and I believe that would be quite difficult for her
21 to get a loan without substantial assets to back up that kind of
22 a loan like a house or something of that sort, which there was
23 no testimony to support that she has those kinds of assets, and
24 she doesn't.

25 And, finally, I'll just remind you that the State's argument

1 that there were some times when the plaintiffs felt better about
2 themselves, were successful in their lives, is not something
3 that you should consider or that should be a reason to penalize
4 them for the harm that the State has caused them in their not
5 being able to get this care because of who they are.

6 Thank you, and I thank you for your service today.

7 THE COURT: Thank you, Mr. Knight.

8 Members of the jury, now that you have heard the evidence,
9 the law, and the arguments, I will give you these brief
10 instructions to govern your deliberations in the jury room. The
11 decision you reach in the jury room must be unanimous. In other
12 words, you must all agree on the answer to each question. Your
13 deliberations will be secret. You will never have to explain
14 your verdict to anyone.

15 If you have formed any idea that I have an opinion about how
16 the case should be decided, disregard that idea. It is your
17 job, not mine, to decide the facts of this case.

18 When you go to the jury room to begin considering the
19 evidence in the case, you should first select one of the members
20 of your jury to act as your presiding juror. This person will
21 help to guide your discussions in the jury room.

22 You are free to deliberate in any way you decide or select
23 whomever you like as a presiding juror. When thinking about who
24 should be presiding juror, you may want to consider the role
25 that the presiding juror usually plays. He or she serves as the

1 chairperson during the deliberations and has the responsibility
2 of ensuring that all jurors who desire to speak have a chance to
3 do so before any vote. The presiding juror should guide the
4 discussion and encourage all jurors to participate. I encourage
5 you all at all times to keep an open mind if you ever disagree
6 or come to conclusions that are different from your fellow
7 jurors. Listening carefully and thinking about the other
8 juror's point of view may help you understand that juror's
9 position better or give you a better way to explain why you
10 still think your position is correct.

11 Once you are in the jury room, if you need to communicate
12 with me, the presiding juror or some other member of the jury
13 may send a written message to me through your bailiff, who will
14 be sworn in momentarily. However, do not, do not tell me how
15 you stand as to your verdict, numerically or otherwise, on any
16 of the four questions submitted to you.

17 As I've mentioned before, the decision you reach must be
18 unanimous. You must all agree. When you have reached a
19 decision, the presiding juror will sign the verdict form, put a
20 date on it, and all of you will return with the verdict into the
21 courtroom.

22 Finally, in order to help you determine the facts, you may
23 want to consider discussing one question at a time and use my
24 instructions to you as a guide. I also suggest that any public
25 votes on a verdict be delayed until everyone has a chance to say

1 what they think without worrying what others as a group might
2 think of their opinion.

3 Momentarily you'll be provided with the instructions, all of
4 the instructions I've given you, numerous copies, copies of the
5 special verdict, and shortly thereafter all of the exhibits that
6 I've admitted into evidence. Then it will be up to you to
7 complete your deliberations.

8 With that, we'll bring Officer Wagner forward to be sworn as
9 your bailiff.

10 **BAILIFF, SWORN**

11 THE COURT: We await your verdict. All rise for our
12 jury, please.

13 (Jury exits the courtroom at 12:13 p.m.)

14 THE COURT: Please be seated. A couple housekeeping
15 matters. Each side is responsible for gathering their exhibits
16 that have been admitted. You should exchange them with each
17 other just so you're all on the same page as to what exhibits
18 will be going back. If you're all in agreement, you should then
19 provide the exhibits to the clerk, and he will see that it is
20 passed to the bailiff and given to the jury, so that should be
21 your first priority of business as soon as we break.

22 The second housekeeping matter is that I'm not going to
23 require you to stay in the courthouse during deliberations, but
24 I do need you to be close and 10 to 15 minutes max from the
25 courthouse if we do need to reassemble. I'd also like to make

1 sure that you provide us with a cell phone number and provide
2 that to the clerk. That should be a number that is -- the phone
3 is on at all times. On a few occasions we have had people turn
4 off their phones, which is sort of inexplicable, but make sure
5 that that's near you and that if we do need to reach you we can.
6 If we get a straightforward question, I may even take that up by
7 phone rather than reassemble, but we'll play that by ear. If we
8 get a verdict, obviously you'll be notified and asked to come
9 back into the courtroom to accept it.

10 I'll hear if there's anything else for the plaintiffs at
11 this time.

12 MR. FAIRWEATHER: No.

13 MR. KNIGHT: Your Honor, how many copies of exhibits
14 does the Court need?

15 THE COURT: One set is fine.

16 MR. KNIGHT: Okay.

17 THE COURT: If the jury asks for more, we'll make
18 copies, but typically they work off a single set, so it should
19 just be a clean set of exhibits that's acceptable to the
20 defendants. Similarly, a clean set of exhibits that's
21 acceptable to the plaintiffs. If there is any disagreement
22 between the parties on this subject, let me know as soon as
23 possible. I'll come right back down and clarify.

24 MR. ROTH: Just one question. I think there may have
25 been some ambiguity on Exhibit 24. We had preserved an

1 objection this morning, but then I used it with Mallow, and I'm
2 not sure that we went through actually moving to admit it. I
3 don't think they have any objection. They wanted to put it in
4 in the first place.

5 THE COURT: Hang on just a moment. 24 was the WPS
6 letter?

7 MR. ROTH: Correct.

8 THE COURT: I think since it was shown to the jury, it
9 is admitted.

10 MR. ROTH: Okay. Just wanted to confirm, Your Honor.

11 THE COURT: The only one that wasn't technically
12 admitted was 23C, and that wasn't shown, and I don't know --
13 that was the additional Dean denial. I don't think either side
14 really used it. 23A, B, and D are all in. If either side wants
15 23C admitted, I would consider it. Otherwise that is not. All
16 right. Then I'm not aware of any other ambiguities as to the
17 exhibits, but, again, let me know as soon as possible if there
18 is.

19 Anything more for the defendants at this time?

20 MR. KILPATRICK: No, Your Honor.

21 THE COURT: All right. Then we will adjourn and await
22 further word from the jury. Thank you, all.

23 (Recess at 12:17 p.m. until 3:16 p.m.)

24 THE COURT: I have been apprised that we have a
25 unanimous verdict, and we'll bring out our jury.

1 (Jury enters the courtroom at 3:16 p.m.)

2 THE CLERK: This Honorable Court is again in session.
3 Please be seated and come to order.

4 THE COURT: Members of the jury, I am advised that you
5 have reached a unanimous verdict. If that's correct, I would
6 ask your presiding juror to provide the verdict to your bailiff.

7 THE CLERK: In the United States District Court for the
8 Western District of Wisconsin, Case No. 17-CV-264, *Alina Boyden*
9 *and Shannon Andrews v. The State of Wisconsin Department of*
10 *Employee Trust Funds and State of Wisconsin Group Insurance*
11 *Board*, we, the jury, for our damages verdict, do find as
12 follows:

13 Question No. 1: "Has plaintiff Alina Boyden proven by a
14 preponderance of the evidence that the exclusion proximately
15 caused her injury or damage?"

16 Answer: "Yes."

17 Question No. 2: "What amount of money do you award as
18 compensatory damages to plaintiff Alina Boyden?"

19 Answer: "\$301,000."

20 Question No. 3: "Has plaintiff Shannon Andrews proven by a
21 preponderance of the evidence that the exclusion proximately
22 caused her injury or damage?"

23 Answer: "Yes."

24 Question No. 4: "What amount of money do you award as
25 compensatory damages to plaintiff Shannon Andrews?"

1 Answer: "\$479,500."

2 Signed by the presiding juror this 10th day of October,
3 2018, Madison, Wisconsin.

4 THE COURT: Members of the jury, I want to thank you
5 very much for your service, in particular the attention you
6 clearly paid throughout this process. You were asked to step in
7 in a fairly difficult situation because I already ruled on
8 certain liability issues, and you were asked a very specific
9 question. But it was clear you listened closely, you understood
10 the evidence, and you reached a verdict, which was exactly what
11 was asked of you, and I thank you very much for your service, as
12 I'm sure do the parties.

13 I am happy to talk with you. I need to address the parties
14 for just a few minutes, but it will only be a few minutes, and
15 then I'll come back and speak with anyone who wishes to discuss
16 how they happened to end up being charged with this difficult
17 task, and I'm happy to describe that to you to the extent I can,
18 as well as answer any questions that you have.

19 On the other hand, you've discharged your obligations as
20 jury members, and if anyone would prefer to just be on their way
21 and get on with the rest of their lives, you're welcome to do
22 that as well, but I'll be back shortly to speak to anyone who
23 might wish to do that. And with that, we excuse you, again with
24 our thanks.

25 All rise for our jury.

1 (Jury exits the courtroom at 3:20 p.m.)

2 THE COURT: If the parties would be seated. I'm not
3 sure there is much that we can accomplish remaining today.
4 You'll have an opportunity to bring motions after verdict, if
5 you wish. I'm not sure which way they will go. I do think --
6 my biggest concern for the plaintiffs was that you, regardless
7 of the verdict, you understand what it is that you did and that
8 you take pride in what you've accomplished in this case, and I
9 do -- I don't think -- and obviously this jury didn't
10 underestimate the courage that it took for you to step forward.
11 I was struck by the fact that as two very articulate, talented
12 young women, that you were able to describe, and still succeed
13 over, very difficult challenges and, regardless of the verdict,
14 that I hope you take that away as something you should be very
15 proud of. As to the verdict, the jury clearly understood that
16 pain and reflected it in their award, which far exceeded
17 out-of-pockets.

18 I do want to thank both side's counsel. Obviously this is a
19 matter of passion for plaintiffs' counsel, but I also want to
20 thank defense counsel. I think their conduct of this trial and
21 difficult issues was very professionally handled, and I thank
22 you for your work and particularly the cooperation between
23 counsel that allowed us to try this case in a fairly
24 straightforward manner despite the oddities of some aspects of
25 it. So I thank you all for your work. If either side wants to

1 be heard on some matter, I certainly will do that, and I'll
2 begin with the plaintiffs.

3 Judgment will be entered as reflected by the verdict.
4 There's nothing for you to do there.

5 MR. DUPUIS: The injunction.

6 THE COURT: The injunction is something that I would
7 expect we can enter, but if you want to brief the issue, I'll
8 hear from either side. I'm simply going to -- I mean, it's a
9 straightforward injunction preventing enforcement of the
10 exclusion.

11 MR. DUPUIS: Right, right.

12 THE COURT: And there will be a final judgment, which I
13 suspect the State will want to appeal. Perhaps not. Perhaps
14 we've come to the end, but that will be up to them. If there's
15 something you want me to do, I'm happy to hear it, or if you
16 want to submit something in writing --

17 MR. DUPUIS: I don't think we need to submit anything
18 in writing. I think you're right; it's a fairly straightforward
19 issue.

20 THE COURT: Did the defendants want to be heard on that
21 subject --

22 MR. KILPATRICK: Not on the injunction right now --

23 THE COURT: -- or any other?

24 MR. KILPATRICK: Or any subject, no.

25 THE COURT: All right. Then we are -- I have one more

1 matter, so I'm in recess, you're adjourned, and we're off the
2 record.

3 Thank you, all.

4 (Proceedings concluded at 3:23 p.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 10th day of October, 2018, before the Honorable
5 William M. Conley, U.S. District Judge for the Western District
6 of Wisconsin, in my presence and reduced to writing in
7 accordance with my stenographic notes made at said time and
8 place.

9 Dated this 7th day of June, 2019.

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_____/s/ Jennifer L. Dobbratz____

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Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

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