

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,**
Individually and on behalf of all others
similarly situated,

**Exhibit
21**

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

**DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR
ADMISSIONS TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES**

REQUESTS FOR ADMISSIONS

1. Admit that Gender-Confirming Care can be medically necessary care for the treatment of gender dysphoria.

RESPONSE: Upon information and belief, experts may differ in opinion as to whether gender-confirming care is medically necessary, both in general and with respect to a particular patient. This Request is admitted with the understanding that this area of treatment continues to evolve.

2. Admit that Defendants partially or fully cover counseling and/or therapy for some diagnoses not related to Gender-Confirming Care.

RESPONSE: Admitted.

3. Admit that Defendants partially or fully cover mastectomy, breast reduction surgery, and chest reconstruction surgery for some diagnoses not related to Gender-Confirming Care.

RESPONSE: Admitted.

4. Admit that Defendants partially or fully cover hysterectomy and oophorectomy surgical procedures for some diagnoses not related to Gender-Confirming Care.

RESPONSE: Admitted.

5. Admit that Defendants partially or fully cover vaginoplasty procedures for some diagnoses not related to Gender-Confirming Care.

RESPONSE: Admitted.

6. Admit that Defendants partially or fully cover orchiectomy, penectomy, and /or phalloplasty procedures for some diagnoses not related to Gender-Confirming Care.

RESPONSE: Admitted.

7. Admit that the Medicaid Plan only covers care that is medically necessary.

RESPONSE: Admitted. However, these Defendants deny any suggestion that Medicaid covers all care that is medically necessary.

8. Admit that the Medicaid Plan has covered all hormone therapy for the treatment of gender dysphoria from November 2017 to the present.

RESPONSE: It is admitted upon information and belief that from November 2017 to the present, coverage for hormone therapy has not been denied on the basis that it is for treatment of gender dysphoria. Upon information and belief, "hormone therapy for the treatment of gender dysphoria" may broadly involve several separate medications, doses, and formulations, and it is possible that coverage has been denied on other criteria, therefore, it cannot be admitted or denied that "all" such therapy has been covered.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,**

By counsel

/s/ Kimberly M. Bandy

Lou Ann S. Cyrus, Esquire (WVSB #6558)

Roberta F. Green, Esquire (WVSB #6598)

Caleb B. David, Esquire (WVSB #12732)

Kimberly M. Bandy, Esquire (WVSB #10081)

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

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**CHRISTOPHER FAIN; ZACHARY
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Individually and on behalf of all others
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Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

CERTIFICATE OF SERVICE

Now come Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 27th day of August, 2021, a true and exact copy of **DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES** was served on counsel via electronic means as follows:

Walt Auvil (WVSB#190)
Counsel for Plaintiffs
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
Counsel for Plaintiffs
Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
sbuchert@lambdalegal.org

Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

Nora Huppert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600
(213) 351-6050
nhuppert@lambdalegal.org

Carl. S. Charles, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(470) 225-5341
(404) 897-1884 (fax)
ccharles@lamdalegal.org

Tara L. Borelli, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
158 West Ponce De Leon Avenue, Suite 105
Decatur, GA 30030
tborelli@lambdalegal.org

Perry W. Oxley (WVSB#7211)
David E. Rich (WVSB#9141)
Eric D. Salyers (WVSB#13042)
Christopher K. Weed (WVSB#13868)
Oxley Rich Sammons, PLLC
Counsel for Ted Cheatham
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smcmillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
aboone@bowlesrice.com

/s/Kimberly M. Bandy
Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

Exhibit 2

**IN THE UNITED STATES DISTRICT COURT
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**Exhibit
Ex 0002**

**DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES
TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES**

INTERROGATORIES

1. Identify all persons with involvement in, or knowledge of, the creation, review, and maintenance of the Exclusion of coverage for Gender-Confirming Care in the Health Plans offered through West Virginia's Medicaid Program.

RESPONSE: Objection. All persons having "knowledge of" any exclusion is overly broad and burdensome and could entail countless people inside and outside of the Defendant WVDHHR. Knowledge of the creation of any exclusion by the individual Managed Care Organizations, as well as review and maintenance of any such exclusion, would be with the individual MCOs.

Without waiving these objections, the following individuals have been involved in the process of determining whether coverage is excluded:

Dr. James Becker, Medical Director, West Virginia Bureau for Medical Services

Jennifer J. Myers, Director of Professional Services, Bureau for Medical Services

Tanya Cyrus, Chief Quality and Integrity Officer, Bureau for Medical Services

Carrie Mallory, Program Manager, Bureau for Medical Services

Karen Burgess, Certified Coder, Office of Program Integrity

Cynthia Shelton, former Director of Operations, Bureau for Medical Services.

2. Describe in detail the factual basis for each governmental interest that Defendants contend supports the Exclusion.

RESPONSE: These Defendants state that they provide coverage that is mandated for coverage by the Centers for Medicare and Medicaid Services (CMS). These defendants are constrained by budgetary/cost considerations.

3. Identify and describe in detail every instance in which a Health Plan offered through West Virginia's Medicaid Program provides partial or full coverage for Gender-Confirming Care of any kind, including but not limited to counseling and/or therapy, hormone therapy, or surgery. Include in you answer the coverage criteria for such care and the date such coverage began.

RESPONSE: Objection. This question seeking "every instance" is overly broad and burdensome. Without waiving the objection, with respect to any gender-confirming care that it is requested through the Managed Care Organizations, these Defendants are not in possession of this information. This question would best be directed to the individual MCOs regarding any care requested through them.

Upon information and belief, counseling is a covered service. These defendants would not necessarily know the reason for counseling and whether it was related to gender-confirming care or some other reason.

To the extent that this Request includes hormone therapy, these defendants object to this question on the basis it is not calculated to lead to the discovery of admissible evidence due to the fact the Plaintiff's claim regarding hormones has been voluntarily dismissed.

Further, without waiving the objection, with regard to hormone therapy, these Defendants do not have a database where they keep track of the information in the manner requested. The data is not kept in a manner which would allow them to identify which patients have requested hormone therapy for gender confirming care. Information is tracked by the medication or drug requested, not the diagnosis or reason for the request. Upon information and belief, there are no gender edits for most estrogen and testosterone containing products, so coverage would not be denied on the basis that the hormone therapy was sought as part of gender-confirming care.

With respect to pharmacy services, please see BMS Provider Manual Chapter 518 Pharmacy Services that can be accessed online at:

https://dhhr.wv.gov/bms/Provider/Documents/Manuals/Chapter_518_Pharmacy_Services%20.pdf

and the most recently updated Preferred Drug List with Prior Authorization Criteria that can be accessed online at:

<https://dhhr.wv.gov/bms/BMS%20Pharmacy/Documents/Preferred%20Drug%20List/2021/WV%20PDL%202021.Q3b%20v11.pdf>

Please note that to the extent that the Provider Manual states in section 518.4 that “Other drugs may be limited in quantity, duration, or based on gender. The information regarding these drug products and their limitations is available on the BMS website[,]” the “Drug Limits” list available online was last updated June 1, 2016, and does not reflect the removal of the gender edit for most estrogen and testosterone containing products.

4. Identify all conditions, diagnostic codes, or instances where coverage for hormone therapy is available under the Health Plans offered through West Virginia’s Medicaid Program. Include in that identification:
 - a. Diagnostic code(s);
 - b. Procedure code(s);
 - c. Medical necessity criteria.

RESPONSE: These defendants object to this question on the basis it is not calculated to lead to the discovery of admissible evidence due to the fact the Plaintiff’s claim regarding hormones has been voluntarily dismissed. Without waiving this objection please see BMS Provider Manual Chapter 518 Pharmacy Services that can be accessed online at:

https://dhhr.wv.gov/bms/Provider/Documents/Manuals/Chapter_518_Pharmacy_Services%20.pdf

and the most recently updated Preferred Drug List with Prior Authorization Criteria that can be accessed online at:

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5. Identify all conditions, diagnostic codes, or instances where coverage for mastectomy, breast reduction surgery, and chest reconstruction surgery is available under the Health Plans offered through West Virginia’s Medicaid Program. Include in that identification:
 - d. Diagnostic code(s);
 - e. Procedure code(s);
 - f. Medical necessity criteria.

RESPONSE: With respect to any such care requested or provided through the Managed Care Organizations, these Defendants are not in possession of this information. This question would best be directed to the individual MCOs.

Please see BMS Provider Manual Chapter 519.16 Surgical Services that can be accessed online at:

https://dhhr.wv.gov/bms/Provider/Documents/Manuals/Chapter%20519%20Practitioner%20Services/Policy_519.16_Surgical_Services.pdf

6. Describe in detail the factual basis for the decision to no longer exclude coverage for hormone therapy as treatment for gender dysphoria in the Health Plans offered through West Virginia’s Medicaid Program.

RESPONSE: Upon information and belief, in or around 2017 it came to the attention of then-Pharmacy Director that claims were being denied based on gender edits that were in place for estrogen and testosterone containing products. After consulting with the Medical Director, a decision was made to remove the gender edits so that the hormone therapy would not be denied on the basis of gender.

7. Identify all persons, including but not limited to persons affiliated with the Rational Drug Therapy Program, who have been involved in the decision to provide coverage for hormone therapy as treatment for gender dysphoria.

RESPONSE: Upon information and belief, former Pharmacy Director Vicki Cunningham and Medical Director Dr. James Becker were involved in removal of the gender edit.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,**

By counsel

/s/ Lou Ann S. Cyrus

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SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

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Defendants.

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Now come Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 27th day of August, 2021, a true and exact copy of **DEFENDANTS RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES** was served on counsel via electronic means as follows:

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Counsel for Plaintiffs
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

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Counsel for Plaintiffs
Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
sbuchert@lambdalegal.org

Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

Nora Huppert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600
(213) 351-6050
nhuppert@lambdalegal.org

Carl. S. Charles, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(470) 225-5341
(404) 897-1884 (fax)
ccharles@lamdalegal.org

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Inc.
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tborelli@lambdalegal.org

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Oxley Rich Sammons, PLLC
Counsel for Ted Cheatham
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smcmillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
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/s/Lou Ann S. Cyrus

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***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

Exhibit 3

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Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND SET OF
INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE,
AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES**

INTERROGATORIES

8. Identify all conditions, diagnostic codes, or instances where coverage for hysterectomy and/or oophorectomy surgical procedures is available under the Health Plans offered through West Virginia's Medicaid Program. Include in that identification:

- a. Diagnostic code(s);
- b. Procedure code(s);
- c. Medical necessity criteria.

RESPONSE: Objection, this Interrogatory seeks information regarding procedures for which Plaintiff Fain is not seeking relief. Therefore, this request is not relevant, is not proportional to the matters in issue, and is outside the scope of permissible discovery. Without waiving this objection, multiple factors go into the review of any particular request, including past medical history, surgical history, and diagnosis. In addition, we have requested documents which are used as part of the review process and these will be supplemented upon receipt.

9. Identify all conditions, diagnostic codes, or instances where coverage for vaginoplasty procedures is available under the Health Plans offered through West Virginia's Medicaid Program. Include in that identification:
 - a. Diagnostic code(s);
 - b. Procedure code(s);
 - c. Medical necessity criteria.

RESPONSE: Objection, this Interrogatory seeks information regarding procedures for which Plaintiff Fain is not seeking relief. Therefore, this request is not relevant, is not proportional to the matters in issue, and is outside the scope of permissible discovery. Without waiving this objection, multiple factors go into the review of any particular request, including past medical history, surgical history, and diagnosis.

10. Identify all conditions, diagnostic codes, or instances where coverage for orchiectomy, penectomy, and/or phalloplasty procedures is available under the Health Plans offered through West Virginia's Medicaid Program. Include in that identification:
- a. Diagnostic code(s);
 - b. Procedure code(s);
 - c. Medical necessity criteria.

RESPONSE: Objection, this Interrogatory seeks information regarding procedures for which Plaintiff Fain is not seeking relief. Therefore, this request is not relevant, is not proportional to the matters in issue, and is outside the scope of permissible discovery. Without waiving this objection, multiple factors go into the review of any particular request, including past medical history, surgical history, and diagnosis.

11. Taking necessary steps to comply with applicable privacy laws, for each year since 2016 through the present identify the number of Health Plan participants who have submitted one or more claims with a diagnosis code for Gender Dysphoria or Gender Incongruence. This includes, but is not limited to, the following diagnosis: F64.0, Transsexualism (ICD-10-CM); F64.2, Gender identity disorder of childhood (ICD-10-CM); F64.8, Other gender identity disorders (ICD-10-CM); F64.9, Gender identity disorder, unspecified (ICD-10-CM); HA60, Gender incongruence of adolescence or adulthood (ICD-11); and HA61, Gender incongruence of childhood (ICD-11).

RESPONSE: Upon information and belief:

2016 30 members
2017 50 members
2018 243 members
2019 439 members
2020 602 members
2021 (through 9/30) 686 members.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,
By counsel**

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esquire (WVSB #6558)

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1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
Counsel for Plaintiffs
Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
sbuchert@lambdalegal.org

Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

Nora Huppert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600
(213) 351-6050
nhuppert@lambdalegal.org

Carl. S. Charles, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1 West Court Square, Suite 105
Decatur, GA 300030
(404) 897-1880
(404) 506-9320 (fax)
ccharles@lambdalegal.org

Tara L. Borelli, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1 West Court Square, Suite 105
Decatur, GA 30030
tborelli@lambdalegal.org

Perry W. Oxley (WVSB#7211)
David E. Rich (WVSB#9141)
Eric D. Salyers (WVSB#13042)
Christopher K. Weed (WVSB#13868)
Oxley Rich Sammons, PLLC
Counsel for Ted Cheatham
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smcmillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
***Counsel for The Health Plan of West
Virginia, Inc.***
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
aboone@bowlesrice.com

/s/Kimberly M. Bandy
Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

Exhibit 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

CHRISTOPHER FAIN; ZACHARY MARTELL; BRIAN MCNEMAR, SHAWN ANDERSON a/k/a SHAUNTAE ANDERSON; and LEANNE JAMES, individually and on behalf of all others similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; **CYNTHIA BEANE**, in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; **WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES; JASON HAUGHT**, in his official Capacity as Director of the West Virginia Public Employees Insurance Agency; and **THE HEALTH PLAN OF WEST VIRGINIA, INC.**

**DEFENDANTS' FIRST SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST SET
OF INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA
BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL SERVICES**

INTERROGATORIES

5. Identify all conditions, diagnostic codes, or instances where coverage for mastectomy, breast reduction surgery, and chest reconstruction surgery is available under the Health Plans offered through West Virginia's Medicaid Program. Include in that identification:
 - a. Diagnostic code(s);
 - b. Procedure code(s);
 - c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE: Without waiving any objection, please see Exhibits 50, 51, 52, 53, 54, 55, 56, and 57, Bates Numbers DHHRBMS002754 – DHHRBMS002784, which are used as part of the review process.

a. **Diagnostic code(s):** Below is a sample listing. This is not an all-inclusive listing. Approval is based on many factors other than the diagnosis such as medical history, previous treatment, severity of diagnosis, and combination of other symptoms and conditions.

C50.01	C50.312	C50.619
C50.11	C50.319	C50.821
C50.012	C50.32	C50.822
C50.019	C50.321	C50.911
C50.02	C50.322	C50.929
C50.021	C50.329	N64.81
C50.11	C50.41	N60.2
C50.111	C50.411	Q83.1
C50.112	C50.412	N60.2
C50.119	C50.419	N60.09
C50.12	C50.421	N64.9
C50.2	C50.422	Q83.8
C50.211	C50.429	N64.51
C50.212	C50.511	N60.32
C50.219	C50.512	N60.39
C50.22	C50.519	N64.82
C50.221	C50.521	N60.01
C50.222	C50.522	C79.81
C50.229	C50.529	Z41.1
C50.31	C50.611	Z76.89
C50.311	C50.612	N62

b. **Procedure code(s):** 19160, 19162, 19180, 19182, 19200, 19240, 19301, 19302, 19303, 19304, 19305, 19306, 19307, 19340, 19342, 19357, 19361, 19364, 19366, 19367, 19368, 19369, 11920, 11921, 11922, 19350, 15200, 15877, 19318.

c. **Medical necessity criteria.** Medically Necessary Services – Services and supplies that are appropriate and necessary for the symptoms, diagnosis, or treatment of an illness. They are provided for the diagnosis or direct care of an illness within the standards of good practice and not for the convenience of the plan, member, caregiver, or provider. The appropriate level of care can be safely provided and the most efficient and cost effective services/supplies to meet the member’s need. For outpatient surgical procedures that require prior authorization, the surgeon must request prior authorization via the Utilization Management Contractor’s (UMC) web-based portal. Nationally accredited, evidence-based, medically appropriate criteria, such as InterQual, or other medical appropriateness criteria approved by BMS, are utilized for reviewing medical necessity of services requested.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,**

By Counsel

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esquire (WVSB #6558)

Roberta F. Green, Esquire (WVSB #6598)

Caleb B. David, Esquire (WVSB #12732)

Kimberly M. Bandy, Esquire (WVSB #10081)

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; BRIAN MCNEMAR, SHAWN
ANDERSON a/k/a SHAUNTAE ANDERSON;
and LEANNE JAMES**, individually and on
behalf of all others similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department Of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; JASON HAUGHT**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

CERTIFICATE OF SERVICE

I, Kimberly M. Bandy, counsel for Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, do hereby certify that on the 30th day of November, 2021, a true and exact copy of **DEFENDANTS' FIRST SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES** was served upon counsel via electronic means as follows:

Walt Auvil (WVSB#190)
Counsel for Plaintiffs
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
Counsel for Plaintiffs
Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
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1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
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Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
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3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
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Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
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(213) 351-6050
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Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1 West Court Square, Suite 105
Decatur, GA 30030
(404) 897-1880
(404) 506-9320 (fax)
ccharles@lambdalegal.org

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Lambda Legal Defense and Education Fund,
Inc.
1 West Court Square, Suite 105
Decatur, GA 30030
tborelli@lambdalegal.org

Perry W. Oxley (WVSB#7211)
David E. Rich (WVSB#9141)
Eric D. Salyers (WVSB#13042)
Christopher K. Weed (WVSB#13868)
Oxley Rich Sammons, PLLC
Counsel for Jason Haught
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
***Counsel for The Health Plan of West
Virginia, Inc.***

BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smemillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
***Counsel for The Health Plan of West
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BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
aboone@bowlesrice.com

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esquire (WVSB #6558)

Roberta F. Green, Esquire (WVSB #6598)

Caleb B. David, Esquire (WVSB #12732)

Kimberly M. Bandy, Esquire (WVSB #10081)

***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

Exhibit 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

CHRISTOPHER FAIN; ZACHARY MARTELL; BRIAN MCNEMAR, SHAWN ANDERSON a/k/a SHAUNTAE ANDERSON; and LEANNE JAMES, individually and on behalf of all others similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; **CYNTHIA BEANE**, in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; **WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES; JASON HAUGHT**, in his official Capacity as Director of the West Virginia Public Employees Insurance Agency; and **THE HEALTH PLAN OF WEST VIRGINIA, INC.**,

Defendants.

DEFENDANTS' SECOND SUPPLEMENTAL RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES

INTERROGATORIES

8. Identify all conditions, diagnostic codes, or instances where coverage for hysterectomy and/or oophorectomy surgical procedures is available under the Health Plans offered through West Virginia's Medicaid Program. Include in that identification:

- a. Diagnostic code(s);
- b. Procedure code(s);
- c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE:

a. **Diagnostic code(s):** Below is a sample listing of the approved diagnoses since 2016. This is not an all-inclusive listing. Approval is based on many factors other than the diagnosis such as medical history, previous treatment, severity of diagnosis, and combination of other symptoms and conditions.

C48.2	N81.10	N87.9
C50.919	N81.2	N88.2
C53.0	N81.3	N92.0
C53.9	N81.4	N92.1
C54.1	N81.5	N92.4
C55	N81.6	N92.6
C79.60	N81.89	N93.8
C79.62	N81.9	N93.9
C79.82	N82.0	N94.10
D06.1	N83,521	N94.6
D06.9	N83.00	N94.89
D07.39	N83.02	N95.0
D22.72	N83.11	N95.9
D25.1	N83.12	N99.4
D25.2	N83.20	N99.83
D25.9	N83.201	N99.89
D26.1	N83.202	O00.001
D27.1	N83.209	O00.101
D36.9	N83.225	O00.80
D39.10	N83.291	O02.0
D39.11	N83.292	O03.9
D82.1	N83.511	O72.1
N13.30	N83.512	O72.2
N39.3	N83.521	Q51.4
N70.03	N83.53	R10.2
N70.11	N83.581	R10.31
N70.93	N83.6	R19.00
N72	N83.8	R19.03
N73.6	N84.0	R19.04
N80.0	N84.1	R93.8
N80.3	N85.2	Z15.02
N80.9	N87.1	Z31.84

b. Procedure code(s): CPT 58150-58294 and 58661 and 58943.

c. Medical necessity criteria: Medically Necessary Services – Services and supplies that are appropriate and necessary for the symptoms, diagnosis, or treatment of an illness. They are provided for the diagnosis or direct care of an illness within the standards of good practice and not for the convenience of the plan, member, caregiver, or provider. The appropriate level of care can be safely provided and the most efficient and cost effective services/supplies to meet the member’s need. For outpatient surgical procedures that require prior authorization, the surgeon must request prior authorization via the Utilization Management Contractor’s (UMC) web-based portal. Nationally accredited, evidence-based, medically appropriate criteria, such as InterQual, or other medical appropriateness criteria approved by BMS, are utilized for reviewing medical necessity of services requested.

9. Identify all conditions, diagnostic codes, or instances where coverage for vaginoplasty procedures is available under the Health Plans offered through West Virginia’s Medicaid Program. Include in that identification:

- a. Diagnostic code(s);
- b. Procedure code(s);
- c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE:

a. Diagnostic code(s): We have had no claims or approvals for these services.

b. Procedure code(s): 57335, 57291, and 57292.

c. Medical necessity criteria. Medically Necessary Services – Services and supplies that are appropriate and necessary for the symptoms, diagnosis, or treatment of an illness. They are provided for the diagnosis or direct care of an illness within the standards of good practice and not for the convenience of the plan, member, caregiver, or provider. The appropriate level of care can be safely provided and the most efficient and cost effective services/supplies to meet the member’s need. For outpatient surgical procedures that require prior authorization, the surgeon must request prior authorization via the Utilization Management Contractor’s (UMC) web-based portal. Nationally accredited, evidence-based, medically appropriate criteria, such as InterQual, or other medical appropriateness criteria approved by BMS, are utilized for reviewing medical necessity of services requested.

10. Identify all conditions, diagnostic codes, or instances where coverage for orchiectomy, penectomy, and/or phalloplasty procedures is available under the Health Plans offered through West Virginia's Medicaid Program. Include in that identification:

- a. Diagnostic code(s);
- b. Procedure code(s);
- c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE:

a. **Diagnostic code(s):** Below is a sample listing of the approved diagnoses since 2016. This is not an all-inclusive listing. Approval is based on many factors other than the diagnosis such as medical history, previous treatment, severity of diagnosis, and combination of other symptoms and conditions.

C61	N49.3
C62.91	N50.0
K40.30	N50.819
K40.31	N50.82
M72.6	N50.9
N36.9	Q53.10
N43.3	Q53.112
N44.00	Q53.20
N44.02	Q55.23
N45.4	Q55.64
N47.1	S31.30XA
N47.5	S31.31XA
N48.83	S31.33XA
N49.1	S39.840A
N49.2	S39.94XA

b. **Procedure code(s):** CPT: 54520 and 54690, 54125, 53410-53430; 55899; 55175 and 55180 and 56805.

c. **Medical necessity criteria.** Medically Necessary Services – Services and supplies that are appropriate and necessary for the symptoms, diagnosis, or treatment of an illness. They are provided for the diagnosis or direct care of an illness within the standards of good practice and not for the convenience of the plan, member, caregiver, or provider. The appropriate level of care can be safely provided and the most efficient and cost effective services/supplies to meet the member's need. For outpatient surgical procedures that require prior authorization, the surgeon must request prior authorization via the Utilization

Management Contractor's (UMC) web-based portal. Nationally accredited, evidence-based, medically appropriate criteria, such as InterQual, or other medical appropriateness criteria approved by BMS, are utilized for reviewing medical necessity of services requested.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,
By counsel**

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esquire (WVSB #6558)

Roberta F. Green, Esquire (WVSB #6598)

Caleb B. David, Esquire (WVSB #12732)

Kimberly M. Bandy, Esquire (WVSB #10081)

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; BRIAN MCNEMAR, SHAWN
ANDERSON a/k/a SHAUNTAE ANDERSON;
and LEANNE JAMES**, individually and on
behalf of all others similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department Of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; JASON HAUGHT**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

CERTIFICATE OF SERVICE

I, Kimberly M. Bandy, counsel for Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 30th day of November, 2021, a true and exact copy of **DEFENDANTS' SECOND SUPPLEMENTAL RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,**

BUREAU FOR MEDICAL SERVICES was served upon counsel via electronic means as follows:

Walt Auvil (WVSB#190)
Counsel for Plaintiffs
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
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Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
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Sasha Buchert, Visiting Attorney
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Lambda Legal Defense and Education Fund, Inc.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
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Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund, Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
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Nora Huppert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund, Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
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Carl S. Charles, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund, Inc.
1 West Court Square, Suite 105
Decatur, GA 300030
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(404) 506-9320 (fax)
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1 West Court Square, Suite 105
Decatur, GA 30030
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Counsel for Jason Haught
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
***Counsel for The Health Plan of West
Virginia, Inc.***

BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smcmillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
***Counsel for The Health Plan of West
Virginia, Inc.***

BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
aboone@bowlesrice.com

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
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Kimberly M. Bandy, Esquire (WVSB #10081)
***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

Exhibit

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
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CHRISTOPHER FAIN, and
SHAWN ANDERSON,
a/k/a Shauntae Anderson,
individually and on behalf of all others
similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

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CYNTHIA BEANE, in her official capacity as
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Medical Services; and **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES**,



Defendants.

**DEFENDANTS' NINTH SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST SET
OF REQUESTS FOR PRODUCTION TO DEFENDANTS WILLIAM CROUCH,
CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES**

DOCUMENT REQUESTS

2. All documents relating to Plaintiff's communications, injuries, requests for coverage, requests for prior authorization, requests for reimbursement and/or complaints regarding coverage for Gender-Confirming Care through the West Virginia Medicaid Program. This Request includes but is not limited to:

- a. All communications to and from Plaintiff relating to coverage for Gender-Confirming Care;

- b. All Documents and communications regarding Plaintiff's requests for Gender-Confirming Care, including but not limited to communications among Defendants, and/or the employees, entities, agents, representatives, contractors, vendors, and/or consultants of Defendants and/or West Virginia Department of Health and Human Resources, Bureau of Medical Services;
- c. All Documents and communications relating to consideration or processing by third-party administrators, contractors, and/or vendors of requests for Gender-Confirming Care by Plaintiff.

SUPPLEMENTAL RESPONSE: Pursuant to the Protective Order, *see* Member Notes (pharmacy) for Plaintiff Anderson, attached as Exhibit 172 (Bates No. DHHRBMS021560 - 21562).

3. Taking necessary steps to comply with applicable privacy laws and making all necessary redactions to protect any personal health information. Documents in electronic, delimited, and importable format (e.g., excel spreadsheet) sufficient to show number of individuals who have requested coverage for Gender-Confirming Care, the number of claims each individual has made for Gender-Confirming Care, whether those claims were approved or denied, the factual reasons for each decision, and whether any denials were based in whole or in part on the Exclusion.

SUPPLEMENTAL RESPONSE: *See* hormones data, attached as Exhibit 173 (Bates No. DHHRBMS021563).

6. All Documents and communications relating to the Exclusion and/or Gender-Confirming Care considered by the individuals responsible for adopting and/or maintaining the Exclusion in the Health Plans. Please identify the responsive Documents by Bates number. This includes, but is not limited to:

- a. Documents and communications regarding the safety or efficacy of Gender-Confirming Care;
- b. Documents and communications regarding the medical necessity of Gender-Confirming Care; and
- c. Documents and communications regarding the cost of Gender-Confirming Care.

SUPPLEMENTAL RESPONSE: Upon information and belief, see the following documents that have previously been produced as part of Exhibit 86: DHHRBMS012313-012314; DHHRBMS012318; DHHRBMS012322-012323; DHHRBMS012333; DHHRBMS012338; DHHRBMS012434-012447; DHHRBMS012483-012501; DHHRBMS012648-012653; DHHRBMS012665-012668; DHHRBMS012711-012823; DHHRBMS013523-013524; DHHRBMS015304; and DHHRBMS015453-15489. The following documents are designated CONFIDENTIAL: DHHRBMS012649-012653 and DHHRBMS012714-12823.

9. Documents sufficient to identify the circumstances in which hormone therapy is covered through the West Virginia Medicaid Program, including but not limited to Diagnostic Codes, Procedure Codes, contracts, Health Plans, clinical guidelines and/or criteria, medical necessity criteria, and pre/prior authorization requirements and procedures where applicable.

SUPPLEMENTAL RESPONSE: *See Limits 2022 Preferred Drug List, attached as Exhibit 174 (Bates No. DHHRBMS021564 – 21581).*

15. The Rational Drug Therapy Program's criteria for coverage of hormone therapy for transgender and non-transgender West Virginia Medicaid participants.

SUPPLEMENTAL RESPONSE: *Upon information and belief, see RDTP Email Correspondence and Attachments, marked as Exhibit 175 (Bates No. DHHRBMS021582 – 21620).*

18. Documents that Defendants intend to use as exhibits at deposition, summary judgment, or trial, or that may be used to refresh the recollection of a witness at depositions or trial.

SUPPLEMENTAL RESPONSE: *See Exhibits 176 to 187 (Bates No. DHHRBMS021621 - 21691), which represent materials that may be referred to by Brandon Lewis in connection with his anticipated testimony on Topic 14 in the Second Amended 30(b) Notice.*

24. To the extent not requested above, all Documents that Defendants may rely upon to support their defenses against Plaintiff's claims in this action.

SUPPLEMENTAL RESPONSE: *See* Gender Edit Information 2010, attached as Exhibit 188 (Bates No. DHHRBMS021692 - 21700), and Gender Edit Information 2011, attached as Exhibit 189 (DHHRBMS021701 - 21709).

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,**

By counsel

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esq. (WVSB #6558)

Roberta F. Green, Esq. (WVSB #6598)

Caleb B. David, Esq. (WVSB #12732)

Kimberly M. Bandy, Esq. (WVSB #10081)

Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human

Resources, Bureau for Medical Services

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

CHRISTOPHER FAIN, and
SHAWN ANDERSON,
a/k/a Shauntae Anderson,
individually and on behalf of all others
similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department Of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; and **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES**,

Defendants.

CERTIFICATE OF SERVICE

Now come Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 25th day of March, 2022, a true and exact copy of **DEFENDANTS' NINTH SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES** was served on counsel via electronic means as follows:

Walt Auvil (WVSB#190)
Counsel for Plaintiffs
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Anna P. Prakash, Visiting Attorney
Nicole J. Schladt, Visiting Attorney
Counsel for Plaintiffs
Nichols Kaster, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
(612) 256-3200
(612) 338-4878 (fax)
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
(202) 804-6245
(202) 429-9574 (fax)
sbuchert@lambdalegal.org

Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

Nora Huppert, Visiting Attorney
65 E. Wacker Pl, Suite 2000
Chicago, IL 60601
Counsel for Plaintiffs
(312) 663-4413
(312) 663-4307
nhuppert@lambdalegal.org

Carl. S. Charles, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(470) 225-5341
(404) 897-1884 (fax)
ccharles@lambdalegal.org

Tara L. Borelli, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal Defense and Education Fund,
Inc.
158 West Ponce De Leon Avenue, Suite 105
Decatur, GA 30030
tborelli@lambdalegal.org

/s/Kimberly M. Bandy

Lou Ann S. Cyrus, Esq. (WVSB #6558)

Roberta F. Green, Esq. (WVSB #6598)

Caleb B. David, Esq. (WVSB #12732)

Kimberly M. Bandy, Esq. (WVSB #10081)

***Counsel for William Crouch, Cynthia Beane,
and West Virginia Department of Health and
Human Resources, Bureau for Medical Services***

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

Exhibit 6

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Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
3 HUNTINGTON DIVISION
4

5 CHRISTOPHER FAIN,
6 SHAWN ANDERSON,
7 a/k/a Shauntae Anderson;
8 individually and on behalf of all
9 others similarly situated,
10 Plaintiffs,

v. Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge

11 WILLIAM CROUCH, in his
12 official capacity as
13 Cabinet Secretary of the
14 West Virginia Department Of
15 Health and Human Resources;
16 CYNTHIA BEANE, in her official
17 capacity as Commissioner for the
18 West Virginia Bureau for Medical
19 Services; and WEST VIRGINIA
20 DEPARTMENT OF HEALTH AND HUMAN
21 RESOURCES, BUREAU FOR MEDICAL
22 SERVICES,
23 Defendants.

24 VIDEOTAPED ZOOM DEPOSITION OF CHRISTOPHER FAIN

On the 28th day of April 2022, beginning at approximately 10:00 a.m., via Zoom, before, Melanie Smith, Court Reporter and Notary Public, appeared CHRISTOPHER FAIN, Witness, who being by me first duly sworn, gave his oral deposition in the causes pursuant to notice of counsel and for the respective parties as hereinafter set forth.

CONFIDENTIAL

Page 2

1 APPEARANCES:

2
3 ON BEHALF OF THE PLAINTIFFS:
4 ANNA P. PRAKASH, VISITING ATTORNEY
5 NICHOLS KASTER, PLLP
6 IDS CENTER, 80 SOUTH 8TH STREET
7 SUITE 4600
8 MINNEAPOLIS, MN 55402
9 (612) 256-3200
10 aprakash@nka.com

11
12 ON BEHALF OF THE PLAINTIFFS:
13 WALT AUVIL, ESQ.
14 THE EMPLOYMENT LAW CENTER, PLLC
15 1208 MARKET STREET
16 PARKERSBURG, WV 26101-4323
17 (304) 485-3058
18 auvil@theemploymentlawcenter.com

19
20 ON BEHALF OF THE PLAINTIFFS:
21 AVATARA SMITH CARRINGTON, VISITING ATTORNEY
22 LAMBDA LEGAL DEFENSE AND
23 EDUCATION FUND, INC.
24 3500 OAK LAWN AVENUE, SUITE 500
DALLAS, TEXAS 75219-6722
(214) 219-8585
asmithcarrington@lambdalegal.org

ON BEHALF OF THE PLAINTIFFS:
TARA L. BORELLI, VISITING ATTORNEY
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
158 WEST PONCE DE LEON AVE., SUITE 105
DECATUR, GA 30030
tborelli@lambdalegal.org

CONFIDENTIAL

Page 3

1 APPEARANCES (cont'd)

2

ON BEHALF OF THE DEFENDANTS:

3

LOU ANN S. CYRUS, ESQ.

KIMBERLY M. BANDY, ESQ.

4

SHUMAN MCCUSKEY SLICER PLLC

P.O. BOX 3953

5

CHARLESTON, WV 25339

(304) 345-1400

6

lcyrus@shumanlaw.com

kbandy@shumanlaw.com

7

8

ALSO PRESENT:

ANDREW BAKER

9

(VIDEOGRAPHER)

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CONFIDENTIAL

Page 10

1 Q. Okay. And in this case, your case, based upon
2 having a vagina, you were identified as female at birth;
3 is that correct?

4 MS. PRAKASH: Objection. Form.

5 THE WITNESS: I was assigned female at
6 birth.

7 BY MS. CYRUS:

8 Q. Okay. But you identify as male; correct?

9 A. Yes.

10 Q. Okay. Therefore, do you consider yourself to
11 be a transgender male?

12 A. Yes, I am transgender male.

13 [REDACTED]

14 [REDACTED]

15 Q. What is your age?

16 A. I'm 46.

17 Q. And where do you currently reside?

18 A. Huntington, West Virginia.

19 Q. Does anyone live with you?

20 A. No.

21 Q. What is your marital status?

22 A. Divorced.

23 Q. And how many times have you been married?

24 A. Once.

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1 A. Right. Well, it happened -- it happened in
2 phases because I tried it twice before, but yes, 2017.

3 Q. Okay. Did you begin taking male hormones at
4 some point?

5 A. Yes.

6 Q. And when was that?

7 A. March of 2019.

8 Q. Okay. There was a letter that was produced
9 yesterday regarding your hormones --

10 A. Yes.

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 MS. PRAKASH: Can I -- Lou Ann, you're
15 holding up a document and it looks like you're
16 attempting to show it to the witness.

17 MS. CYRUS: Oh, sorry. No, I'm not.
18 Actually, it's not even the one I was referring to.
19 Sorry. I just moved this out of the way.

20 BY MS. CYRUS:

21 Q. Yeah. Is that -- was that the -- as far as you
22 know, that was -- was that the first time it was
23 recommended that you take male hormones?

24 A. Yes, that was the first time a professional

CONFIDENTIAL

Page 32

1 recommended hormones to me, and surgery.

2 Q. Okay. And did you -- did you give that
3 letter -- well, first of all, when you obtained that
4 letter in June of 2018, were you insured by any entity?

5 A. Medicaid.

6 Q. Okay. So you were insured by Medicaid when you
7 got that letter?

8 A. Yes.

9 Q. Okay. When did you become insured by Medicaid?

10 A. On and off throughout my adult life, but since
11 2016, 2000- -- yeah, 2016 this last time, but yeah, most
12 of my adult life.

13 Q. Did you undergo any counseling before you
14 started male hormones?

15 A. I had six months of counseling before that
16 letter was given to me.

17 Q. And did you give that letter to anyone with
18 Medicaid after you received it?

19 A. No. I took it to my primary care physician.

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 Q. And then did your primary care physician do
24 anything with that?

CONFIDENTIAL

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1 MS. PRAKASH: Objection. Foundation.

2 THE WITNESS: She started the process of
3 referring me to an endocrinologist.

4 BY MS. CYRUS:

5 Q. Then did you go to an endocrinologist?

6 A. Yes.

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q. Was your understanding that the purpose of the
15 male hormones was for some -- a type of
16 gender-confirming care?

17 MS. PRAKASH: Objection to form.

18 THE WITNESS: Yes. That's what sex
19 hormones are for. Mine are for masculinization, yes.

20 BY MS. CYRUS:

21 Q. And you started taking those in March of 2019?

22 A. Yes.

23 Q. Are you familiar with the term
24 "gender-confirming surgical procedures"?

CONFIDENTIAL

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1 transgender health care?

2 MS. PRAKASH: Objection. Document speaks
3 for itself. Vague as to "Did you say." Go ahead.

4 THE WITNESS: This was how I worded it to
5 Brigitte, yes.

6 BY MS. CYRUS:

7 Q. And that was not a correct statement; is that
8 right?

9 MS. PRAKASH: Objection. Form. Argumentative.
10 Go ahead.

11 THE WITNESS: It's very obvious that this
12 was what was being written at the moment; however, I
13 think you're again playing with semantics.

14 BY MS. CYRUS:

15 Q. But it is not accurate to say there is a
16 blanket refusal for all transgender health care; is it?

17 MS. PRAKASH: Objection. Form.

18 THE WITNESS: No, it would not be entirely
19 accurate because again, as I've pointed out over and
20 over again, I get therapy and I get hormones. However,
21 I want top surgery, and therefore I need, just like
22 everybody else in the state of West Virginia like me,
23 needs to have the exclusion struck down.

24 BY MS. CYRUS:

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BY MS. CYRUS:

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Q. Regarding your diagnosis of gender dysphoria, what does that condition mean to you?

9

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MS. PRAKASH: Objection. Form. Go ahead.

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THE WITNESS: It's difficult to describe what it means to you to have something riding around inside of you that -- it's like living in a machine because you learn not to pay attention to your body. But gender dysphoria is -- is horrific and it's painful and it's disorienting and it makes you want to hide. That's what gender dysphoria is like, and often that's what it means.

19

BY MS. CYRUS:

20

Q. If I were to --

21

A. It --

22

Q. I'm sorry. Go ahead.

23

A. It cuts -- it cuts your life in half.

24

Q. If I were to ask you what -- to describe for me

CONFIDENTIAL

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1 the symptoms you experience that you believe are gender
2 dysphoria, would your answer be the same as what you
3 just said or would you have other things you would add?

4 A. I would --

5 MS. PRAKASH: Object to form.

6 THE WITNESS: I would go in and describe
7 the symptoms. Is that something that you actually need?

8 BY MS. CYRUS:

9 Q. Yes. I just didn't want to ask you to repeat
10 yourself. What -- can you describe for me what symptoms
11 you experience that you believe are gender dysphoria?

12 A. I experience severe pain in my breasts. I
13 experience stomach and heart anxiety, palpitations and
14 tightenings. I experience trembling. I experience
15 hostility and fear.

16 Q. Okay. Are there certain procedures you believe
17 you need to treat your gender dysphoria?

18 A. Yes.

19 Q. Okay. And what do you believe you need to
20 treat it?

21 A. I believe top surgery is necessary.

22 Q. Okay. And, when you refer to top surgery, what
23 is it that you would anticipate would happen?

24 A. The complete removal of my breast tissue and

CONFIDENTIAL

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1 remodeling of my nipples so that they would be placed in
2 a better place, a better position on any chest.

3 Q. Okay. So would that be a mastectomy and some
4 sort of reconstruction?

5 MS. PRAKASH: Objection to form. Go ahead.

6 THE WITNESS: Yeah. Yes.

7 BY MS. CYRUS:

8 Q. Okay. And you -- have you obtained a letter
9 from a doctor recommending you have a mastectomy?

10 A. Yes, two letters.

11 Q. Okay. When did you obtain the first letter?

12 A. In November of 2018.

13 Q. Now, is that the one where you were referred --
14 recommended to have the hormones?

15 A. And further on the surgery.

16 Q. Okay. Did you ever provide a copy of the
17 November letter to anyone with Medicaid or UniCare?

18 A. Yes. My doctor, my primary care physician, was
19 given a copy when she made -- before she made the
20 referral for hormones.

21 Q. Okay. But my question was: Did you ever give
22 a copy of the November 2018 letter to either Medicaid or
23 UniCare?

24 A. I'm pretty sure that the letter has to be

CONFIDENTIAL

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A. No.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Q. Okay. Assuming you were to have a mastectomy, how do you believe that would affect your gender dysphoria, if at all?

A. Well, it would greatly alleviate it.

Q. Okay. Do you -- do you believe it would fully alleviate it?

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1 Q. Okay. What about your birth certificate, has
2 it been changed?

3 A. No. I have not worked at getting that changed
4 yet because for the most part my birth certificate is
5 not important in my daily life. So it's not something I
6 get asked for, so I don't really think about it. But,
7 yes, I intend to have it changed, or amended, I should
8 say.

9 Q. Okay. And then you say -- in 14, paragraph 14,
10 you say you started counseling at Marshall University in
11 or around June of 2018; is that right?

12 A. Yes.

13 Q. Okay. Okay. And in paragraph 17 and 18 you
14 talk about wearing a binder; is that right?

15 A. Yes.

16 Q. Okay. How long have you been wearing a binder,
17 approximately?

18 A. From age 13 until 18 I wore it on and off most
19 days. Back then they didn't have them for sale on the
20 market. I made my own. I did not wear a binder between
21 age 18 and 30. And then I picked up a binder and wore
22 it on again and -- you know, on and off again until
23 about 2015, and then with my back problems I couldn't do
24 anything at all.

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1 But, once I reached the point where I could
2 put things on overtop of my head again, I started
3 wearing an official binder, the ones on the market now,
4 and that was in 2017. And I have not worn anything even
5 resembling a bra since mid 2017.

6 Q. Okay. And, if you'll go to paragraph 19, you
7 say you require a bilateral mastectomy as medically
8 necessary to care and treat your gender dysphoria, and
9 it's my understanding and you go on to talk about, that
10 would eliminate your need for the binder; is that right?

11 A. That's absolutely true, yes.

12 Q. Okay. And, again, that's the only procedure
13 that you're seeking at this time?

14 A. Yes.

15 Q. Okay. In No. 20 you say your Medicaid -- as a
16 Medicaid participant you receive coverage through the
17 managed care organization UniCare, which we've talked
18 about, and you say you are aware there is an exclusion
19 in the state Medicaid plan that bans the
20 gender-confirming surgery care you need; is that right?

21 A. That's true.

22 Q. Okay. Have you had some instance where you
23 felt like you needed to drop this lawsuit for some
24 reason?

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1 CERTIFICATION OF COURT REPORTER AND NOTARY PUBLIC

2

3 I, Melanie Smith, Court Reporter and Notary
4 Public, duly Commissioned and qualified, do hereby
5 certify that the foregoing deposition was duly taken by
6 me and before me at the time and place and for the
7 purpose specified in the caption hereof, the said
8 witness having been by me first duly sworn.

9

10 I do further specify that the said
11 deposition was correctly taken by me in Stenotype and
12 that the same was reduced to computer print by me or
13 under my direct supervision.

14

15 I further certify that I am neither
16 attorney or counsel for, nor related to or employed by,
17 any of the parties to the action in which this
18 deposition is taken, and further that I am not a
19 relative or employee of any attorney or counsel employed
20 by the parties hereto, or financially interested in the
21 action.

22

23 I certify that the attached transcript
24 meets the requirements set forth within article twenty-

1 seven, chapter forty-seven of the West Virginia Code.^{Page 135}

2

3 Before completion of the deposition, review
4 of the transcript { X } was { } was not requested. If
5 requested, any changes made by the deponent (and
6 provided to the reporter) during the period allowed are
7 appended hereto.

8

9 Given under my hand this 11th day of May,
10 2022.

11

12 My Commission expires February 13, 2026.

13

14

Melanie E. Smith

15

Melanie E. Smith

16

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19

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Exhibit 7

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
3 HUNTINGTON DIVISION

4 CHRISTOPHER FAIN,
5 SHAWN ANDERSON,
6 a/k/a Shauntae Anderson;
7 individually and on behalf of all others
8 similarly situated,
9 Plaintiffs,

10 v. Civil Action No. 3:20-cv-00740
11 WILLIAM CROUCH, in his official capacity as
12 Cabinet Secretary of the West Virginia
13 Department of Health and Human Resources;
14 CYNTHIA BEANE, in her official capacity as
15 Commissioner for the West Virginia Bureau for
16 Medical Services; and WEST VIRGINIA
17 DEPARTMENT OF HEALTH AND HUMAN
18 RESOURCES, BUREAU FOR MEDICAL
19 SERVICES;

20 Defendants.

21 VIDEOTAPED DEPOSITION OF SHAUNTAE ANDERSON
22
23
24

25 On the 22nd day of April 2022, beginning at
26 approximately 10:00 a.m., via Zoom Conference, West
27 Virginia before me, Magdalena Szczerba, Court
28 Reporter and Notary Public, appeared SHAUNTAE
29 ANDERSON, Witness, who being by me first duly
30 sworn, gave her oral deposition in the causes
31 pursuant to notice of counsel and for the
32 respective parties as hereinafter set forth. Said
33 deposition is to be used for purposes of discovery
34 and for any and all other purposes permitted by the
35 Federal Rules State of West Virginia Rules of Civil
36 Procedure.

APPEARANCES:

On behalf of the Plaintiffs:

Walt Auvil, Esquire

auvil@theemploymentlawcenter.com

THE EMPLOYMENT LAW CENTER, PLLC

1208 Market Street

Parkersburg, WV 26101

Sasha Buchert, Esquire

sbuchert@lambdalegal.org

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

1776 K Street, N.W. 8th Floor

Washington, D.C. 20006-2304

Anna P. Prakash, Esquire

aprakash@nka.com

Nicole J. Schladt, Esquire

nschladt@nka.com

NICHOLS KASTER, PLLP

IDS Center, 80 South 8th Street

Suite 4600

Minneapolis, MN 55402

612 256-3200

Avatara Smith-Carrington, Esquire

asmithcarrington@lambdalegal.org

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

3500 Oak Lawn Avenue, Suite 500

Dallas, TX 75219-6722

214-219-8585

Tara L. Borelli, Esquire

tborelli@lambdalegal.org

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

158 West Ponce De Leon Avenue, Suite 105

Decatur, GA 30030

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4
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14
15
16
17
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19
20
21
22
23
24

APPEARANCES (Continued)

On behalf of the Defendants:

Lou Ann Cyrus, Esquire

Kimberly M. Bandy, Esquire

lycrus@shumanlaw.com

SHUMAN, MCCUSKEY & SLICER, PLLC

1411 Virginia Street, Suite 200

Charleston, WV 25339

304 345-1400

1 Q. So I was going to ask you: Are you a
2 transgender female, do you disagree with that? Do
3 you not agree you're a transgender female?

4 A. I agree --

5 MS. BUCHERT: Objection to form.

6 BY MS. CYRUS:

7 Q. I'm sorry. I didn't hear your answer.

8 A. I'm a transwoman, yes.

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] [REDACTED]

12 [REDACTED] [REDACTED]

13 [REDACTED] [REDACTED] [REDACTED]

14 [REDACTED]

15 [REDACTED] [REDACTED]

16 [REDACTED]

17 [REDACTED] [REDACTED]

18 [REDACTED]

19 [REDACTED] [REDACTED]

20 [REDACTED] [REDACTED]

21 Q. And what is your age?

22 A. I'm 45.

23 Q. Where do you currently live?

24 A. Charleston, West Virginia.

1 [REDACTED] [REDACTED]
2 [REDACTED] [REDACTED]
3 [REDACTED] [REDACTED]
4 [REDACTED] [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] [REDACTED]
8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED] [REDACTED]
11 [REDACTED]

12 BY MS. CYRUS:

13 Q. I'm going to turn your attention to
14 another topic, to the Medicaid plan. Do you know
15 when you became a Medicaid recipient?

16 A. On or around 2019.

17 Q. What prompted you to sign up with
18 Medicaid, if you know?

19 A. When I got to the halfway house, they sent
20 us to a free clinic to get a physical. At that
21 time, they asked us if you had any insurance or you
22 wanted to try to apply for Medicaid, and that's
23 what I did.

24 Q. Do you know when you first became eligible

1 can be detrimental to my health, so that's why they
2 haven't stopped it. I don't know the specific
3 reasons why, but I do know that it can cause blood
4 clots which can lead to your death.

5 BY MS. CYRUS:

6 Q. Do you know that your hormone therapy is
7 actually covered under Medicaid?

8 MS. BUCHERT: Objection.

9 THE WITNESS: I haven't received a bill
10 yet, so I assume that it is covered by my Medicaid.

11 BY MS. CYRUS:

12 Q. And you've been getting that -- getting
13 those hormones since you signed up on Medicaid in
14 2019 up to the present; is that right?

15 A. I mean, 2019 when I was in prison, I left
16 from prison with hormones on a hormone regimen.
17 They just continued it when I got transitioned into
18 the outside world.

19 Q. So let me ask you: What is your
20 understanding of what this lawsuit is about?

21 MS. BUCHERT: Objection to form.

22 THE WITNESS: My understanding is that I
23 have insurance that doesn't cover anything that's
24 medically necessary for me to continue the quality

1 My question is about counseling and
2 hormone replacement therapy, that's correct.

3 A. But if you're going to talk about
4 something you need to discuss it all. That would
5 not make -- that would make that statement still
6 factual, would it not --

7 Q. Do you have any -- do you have any reason
8 to dispute the testimony that both counseling and
9 hormone replacement therapy are covered by Medicaid
10 for its participants even the transgender ones?

11 MS. BUCHERT: Objection to form.

12 THE WITNESS: I can't speak for everybody
13 else. I can only speak for myself.

14 BY MS. CYRUS:

15 Q. And based upon your own experience, that
16 is a true statement, both your counseling and
17 hormone replacement therapy are covered by
18 Medicaid; is that right?

19 MS. BUCHERT: Objection to form.

20 THE WITNESS: To my knowledge, yes.

21 BY MS. CYRUS:

22 Q. Is it your understanding that you have
23 been diagnosed with gender dysphoria?

24 A. Yes.

1 Q. What -- and I'm finished with the exhibit
2 for the moment.

3 What does that condition mean to you?

4 MS. BUCHERT: Objection to form.

5 THE WITNESS: I'm not a doctor so I can't
6 put it into technical terms but --

7 BY MS. CYRUS:

8 Q. I don't need you to.

9 A. But as far as myself, it's just what I've
10 always known my whole life that my outward
11 appearance does not reflect my inward appearance,
12 who I am on the inside, who I've always been.

13 Q. Does that have some impact on you?

14 A. A great deal of impact.

15 Q. That's what I'm trying to get at. What is
16 the impact on you? Can you describe for me
17 symptoms that you experience that you believe are
18 gender dysphoria?

19 MS. BUCHERT: Objection to form.

20 THE WITNESS: Not being able to be my
21 authentic self, to have to live a lie, to have to
22 be -- to be something that someone else says I'm
23 supposed to be. To let somebody else make the
24 decisions about my life and about my care. It's

1 hurtful.

2 BY MS. CYRUS:

3 Q. Is there somebody who is mocking you now?

4 MS. BUCHERT: Objection to form.

5 THE WITNESS: Everywhere I go. I live in
6 a state full of people that are not always
7 receptive of people of being transgender. That's
8 why I try to live as stealth as possible.

9 BY MS. CYRUS:

10 Q. Are there certain procedures that you
11 believe you need that will treat your gender
12 dysphoria?

13 MS. BUCHERT: Objection to form.

14 THE WITNESS: Just the treatment that is
15 prescribed and that's all the cosmetic that's
16 considered medically necessary treatment.

17 BY MS. CYRUS:

18 Q. And what -- I'm sorry.

19 A. Go ahead.

20 Q. No. I was going to say what is that? Can
21 you tell me specifically what the treatment is that
22 you're referring to?

23 MS. BUCHERT: Objection to form.

24 THE WITNESS: Gender confirmation,

1 whatever else that I would need, whatever a doctor
2 thinks would give me the best quality of life.

3 BY MS. CYRUS:

4 Q. And are you able to be more specific
5 beyond just gender confirmation? Are there
6 specific procedures that you believe you need that
7 are medically necessary to treat your gender
8 dysphoria?

9 MS. BUCHERT: Objection to form.

10 THE WITNESS: There are other procedures
11 that -- it's not that -- not just what I believe,
12 it's what a whole list of doctors believe and know
13 to be true. I mean, but me specifically, a breast
14 augmentation is one of them.

15 BY MS. CYRUS:

16 Q. And is that the only one?

17 MS. BUCHERT: Objection to form.

18 THE WITNESS: No. But it was -- I mean, I
19 could go on for hours about things of that nature
20 but I'm not.

21 BY MS. CYRUS:

22 Q. I had an understanding that you were at
23 least initially saying you believed you needed
24 breast augmentation and vaginoplasty?

1 A. Yes, from my understanding when you asked
2 the line of questioning, vaginoplasty was -- we
3 already knew that that's what I wanted. That
4 was -- I do want -- let me go on the record and say
5 that a vaginoplasty, which is gender confirmation
6 surgery, and a breast augmentation, and not to be
7 limited to just those two things but ...

8 Q. Believe me. I'm not limiting you -- I'm
9 trying to find out what it is that you're seeking.

10 What is your -- I don't know if you want
11 to call it a wish list, but if you were to, you
12 know, have what you believe you need to treat your
13 gender dysphoria, what is it you're seeking it and
14 I had understood it would be a breast augmentation
15 and vaginoplasty; is that correct?

16 MS. BUCHERT: Objection to form.

17 THE WITNESS: That's correct. And any
18 surgical care that a doctor would recommend for me
19 to have.

20 BY MS. CYRUS:

21 Q. Has any doctor recommended you have breast
22 augmentation and vaginoplasty?

23 A. No doctor has said these things on the
24 record because they know that Medicaid does not

1 STATE OF WEST VIRGINIA, To-wit:

2 I, Magdalena Szczerba, a Notary Public and
3 Registered Professional Reporter within and for the
4 State aforesaid, duly commissioned and qualified,
do hereby certify that the videotaped deposition of
5 Shauntea Anderson was duly taken by me and before
me at the time and place specified in the caption
6 hereof.

7 I do further certify that said proceedings were
correctly taken by me in stenotype notes, that the
8 same were accurately transcribed out in full and
true record of the testimony given by said witness.

9 I further certify that I am neither attorney or
counsel for, nor related to or employed by, any of
10 the parties to the action in which these
proceedings were had, and further I am not a
11 relative or employee of any attorney or counsel
employed by the parties hereto or financially
interested in the action.

12 I certify that the attached transcript meets
13 the requirements set forth within article
twenty-seven, chapter forty-seven of the West
14 Virginia Code.

15 My commission expires the 3rd day of July,
2022.

16 Given under my hand and seal this 1st day of
17 May, 2022.



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19 _____
Magdalena Szczerba
Registered Professional Reporter
20 Notary Public
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Exhibit 8

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

Christopher Fain, individually and on behalf of all
others similarly situated, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 3:20-cv-00740

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF SECRETARY BILL J. CROUCH

DATE: March 17, 2022

TIME: 10:30 a.m. CST

PLACE: Veritext Virtual Videoconference

REPORTED BY: KELLEY E. ZILLES, RPR (Via Videoconference)

JOB NUMBER: 5096130

1 APPEARANCES

2
3 On Behalf of the Plaintiffs (Via Videoconference):

4 TARA L. BORELLI, ESQ.

5 Lambda Legal Defense and Education Fund, Inc.

6 158 West Ponce De Leon Ave., Suite 105

7 Decatur, Georgia 30030

8 470.225.5341

9 tborelli@lambdalegal.org

10
11 AVATARA SMITH-CARRINGTON, ESQ.

12 Lambda Legal Defense and Education Fund, Inc.

13 3500 Oak Lawn Avenue, Suite 500

14 Dallas, Texas 75219

15 214.219.8585

16 asmithcarrington@lambdalegal.org

17
18 NICOLE J. SCHLADT, ESQ.

19 Nichols Kaster PLLP

20 80 South 8th Street, Suite 4700

21 Minneapolis, Minnesota 55402-2224

22 612.256.3291

23 nschladt@nka.com

24

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WALT AUVIL, ESQ.
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, West Virginia 26101
304.485.3058
auvil@theemploymentlawcenter.com

On Behalf of Defendants William Crouch; Cynthia Beane;
and West Virginia Department of Health and Human
Resources, Bureau for Medical Services (Via
Videoconference):

KIMBERLY M. BANDY, ESQ.
LOU ANN S. CYRUS, ESQ.
Shuman McCuskey Slicer, PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
304.345.1400
kbandy@shumanlaw.com
lcyrus@shumanlaw.com

1 On Behalf of Defendant Jason Haught (Via
2 Videoconference):

3 ERIC D. SALYERS, ESQ.
4 Oxley Rich Sammons, PLLC
5 517 Ninth Street, Suite 1000
6 Huntington, West Virginia 25701
7 304.522.1138
8 esalyers@oxleylawwv.com

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10
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12
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NOTE: The original deposition transcript will be delivered to Nicole Schladt, Esq., as the taking attorney.

1 Q. Great. Glad that we established that. And, Mr.
2 Secretary, do you use he/him pronouns?

3 A. No, I do not.

4 Q. What pronouns do you use?

5 A. I've never been asked that. For me?

6 Q. For you, yes. If I wanted to refer to you like
7 Bill went to the store, instead of saying Bill, would I
8 say he went to the store?

9 A. Yes, that would be fine.

10 Q. Great. Thanks. And you are the Cabinet
11 Secretary of West Virginia Department of Health and
12 Human Resources, is that correct?

13 A. That is correct, yes.

14 Q. How do you refer to the West Virginia Department
15 of Health and Human Resources, because I know that's
16 quite a mouthful?

17 A. How do I refer to them?

18 Q. Do you have a short terminology for that, like
19 WVDHHR or DHHR?

20 A. DHHR, yes.

21 Q. Great. So if I use DHHR today, you'll know that
22 I'm talking about the full West Virginia Department of
23 Health and Human Resources?

24 A. I will, yes.

25 Q. Great. That will save us both a few words

1 today.

2 A. All right, good.

3 Q. And you were appointed Cabinet Secretary in
4 January 2017, is that right?

5 A. That is correct, yes.

6 Q. And you were appointed by Governor Jim Justice
7 of West Virginia?

8 A. That is correct.

9 Q. And you held the position for a little over five
10 years then, is that right?

11 A. That is correct.

12 Q. And, Mr. Secretary, what are your job duties as
13 Cabinet Secretary of DHHR?

14 A. DHHR is a provider of, of funds and services and
15 a safety net for individuals, vulnerable individuals
16 throughout the state. So we have a 7 and a half billion
17 dollar budget, we have over 6,000 employees, we have
18 over 150 programs. So I try to make sure that the
19 funding that comes in from the federal government or
20 through the state legislature is pushed out
21 appropriately to those folks in communities who need
22 those funds to provide services.

23 We also provide some direct services such as CPS
24 and APS, Child Protective Services and Adult Protective
25 Services to those children and vulnerable adults who

1 need protection, who need intervention at times. I also
2 operate seven facilities in the state, one acute care
3 facility, two psychiatric hospitals, and four long-term
4 care facilities are operated out of DHHR. So it's a
5 broad range of services. The Medicaid program is under
6 DHHR, we have six bureaus, so provide quite a range of
7 services for folks out there.

8 Q. And you just mentioned that you have a
9 \$6 billion budget, is that split between state and
10 federal funding?

11 A. It's a 7 and a half billion dollar budget, 6,000
12 employees, and yes, that is split between state dollars
13 and federal dollars. The majority of that is federal
14 money coming in, I believe that's about 4 and a half
15 billion to \$5 billion in federal funding.

16 Q. Great.

17 A. It's closer, probably closer to 5 and a half
18 billion of that is federal dollars. The bulk of that
19 comes through various programs in the federal
20 government, CMS, SAMHSA, HRSA funding, so we get a
21 variety of funds from a variety of sources. We actually
22 have 154 different funding, federal funding streams that
23 come into the Department.

24 Q. Can you tell me what CMS stands for?

25 A. Center for Medicare/Medicaid.

1 Q. And how about you mentioned something, SAMHSA
2 perhaps?

3 A. SAMHSA is the, I actually have a huge document
4 giving acronyms, sometimes I forget those, but SAMHSA is
5 the, I'm trying to think of the actual name, but it's
6 the organization at the federal level that provides
7 funding for substance abuse disorder and for mental
8 health services, I'll think of it in just a second, but
9 that is the federal agency that provides funding for
10 those services to states.

11 Q. And did you also mention HRSA?

12 A. Yes, that's Health Services Research
13 Administration I believe that provides funding as well,
14 a variety of different funding. They have historically
15 handled more primary care type community services. And
16 of course CMS provides funding for our hospitals through
17 Medicaid funding.

18 Q. And, Mr. Secretary, you yourself, what does your
19 role look like in general with overseeing all of the
20 programs that you just mentioned?

21 A. My role -- and SAMHSA by the way is the
22 Substance Abuse & Mental Health Services for the state,
23 to clear that up. My role is going to be kind of being
24 the conductor I guess of the orchestra, making sure that
25 again that funding that comes into the state gets pushed

1 come back and get started again.

2 A. Thank you.

3 (A break was taken at 11:16 a.m.)

4 BY MS. SCHLADT:

5 Q. I want to start with some questions following up
6 on some of the testimony you already gave, Mr.
7 Secretary, and specifically I'm interested in going
8 through the five bureaus of DHHR. So to make this go
9 faster and to aid memory, although you likely already
10 have these memorized, I'm going to read all five out as
11 far as I understand them and you can let me know if they
12 sound accurate, okay?

13 A. Certainly.

14 Q. So the five bureaus under DHHR are the Bureau
15 for Behavioral Health & Health Facilities, the Bureau
16 for Child Support Enforcement, the Bureau for Children &
17 Families, the Bureau for Public Health, and the Bureau
18 for Medical Services, is that correct?

19 A. No, not exactly.

20 Q. Good thing I asked.

21 A. Yeah, there have been some changes to that. The
22 Bureau for Behavioral Health now stands alone, the
23 facilities have been pulled out of those, out of that
24 bureau and operate directly from my office, so that's
25 changed. And then the Bureau of Children & Families was

1 actually split, is still in the process of being
2 finalized, but was split to the Bureau of Social
3 Services and the Bureau of Family Assistance, so there
4 are really six now.

5 Q. Okay. So it was split to the Bureau of Social
6 Services and the Bureau of Family Assistance, is that
7 correct?

8 A. Correct.

9 Q. Okay. I'd like to quickly go through each of
10 these and just learn high level a little bit about what
11 each bureau does, if that's okay. So the Bureau for
12 Behavioral Health, what is encompassed by that Bureau's
13 work?

14 A. That's the Bureau that primarily pushes those
15 federal dollars for mental health services throughout
16 the state. So that is a program that focuses on
17 supporting our regional behavioral health centers,
18 comprehensive behavioral health centers throughout the
19 state and make sure that all of those providers out
20 there that receive funding, whether they're group homes
21 for IDD patients or for forensic individuals who have
22 come through the court system, forensic patients receive
23 that funding and that they operate the way they should.

24 Q. And you mentioned that the Health Facilities
25 aspect of what the Bureau was formerly called now

1 is that right?

2 A. That's correct.

3 Q. And what does their work encompass?

4 A. That's the Medicaid agency for the state of West
5 Virginia that really makes sure that those federal
6 Medicaid dollars are spent according to CMS guidelines
7 and requirements.

8 Q. Okay. Thanks for running through those with me
9 quickly. I think the bulk of our conversation for the
10 rest of the day will be focused on the Bureau for
11 Medical Services and DHHR more generally, but to the
12 extent any answers of yours moving forward need to
13 reference other Bureaus, if you could just let me know
14 that you're talking about those, that will be helpful,
15 okay?

16 A. Certainly.

17 Q. So transitioning to your role as Cabinet
18 Secretary of DHHR, how would you describe your role in
19 determining and/or offering healthcare coverage to West
20 Virginia Medicaid participants?

21 A. I try to tell all our commissioners they should
22 run their programs. I'm not a micromanager, but I
23 certainly have to make sure that things are being done
24 in an appropriate way, in a proper manner. I mean, part
25 of the role is making sure that every program we have,

1 not just Bureau of Medical Services, meets the
2 requirements and the mandates under the federal
3 guidelines. So if we don't do that we jeopardize
4 funding coming from the feds, so that's one of the
5 primary reasons is making sure that our commissioners
6 are staying focused on that. But I'm not a
7 micromanager, I tell them all that, they should run
8 their programs.

9 Q. And how often do you interact with Commissioner
10 Beane during your day-to-day?

11 A. Day-to-day, it varies. We just finished up a
12 legislative session, so it may be a little bit more.
13 But weekly, I have a weekly meeting of commissioners and
14 office directors, and that's gotten cancelled quite a
15 few times these last few weeks, but that's probably been
16 the most interaction I have with any commissioner,
17 unless there's a problem.

18 I have been communicating probably once or twice
19 a week with Commissioner Beane over a couple of issues
20 that have popped up, but once a week is probably,
21 probably even a little bit more than, probably once a
22 week maybe on average.

23 Q. And when you are communicating with her is that
24 typically via email or phone or a variety of ways of
25 communicating?

1 A. A variety, yes.

2 Q. Okay. But you do call her and you do email her,
3 is that right?

4 A. Sure, certainly.

5 Q. So as far as your role in relation to the
6 Medicaid program, I understand that West Virginia Code
7 Section 929(a)(1) states that, "The Cabinet Secretary is
8 responsible for developing a managed care system to
9 monitor the services provided by the Medicaid program to
10 individual clients." Does that sound accurate to you
11 based on what you know?

12 A. Yes, there are a great number of places in the
13 statute where the Secretary has the overall authority,
14 certainly.

15 Q. And what does developing a managed care system
16 to monitor services provided by the Medicaid program,
17 what does that look like practically for you in your
18 role?

19 A. Well, we did that several years ago, I don't
20 think we've redid that for a while, and usually in state
21 government a very large contract like that gets bid out,
22 we accept proposals, go through a very fairly elaborate
23 process to make sure that those decisions are made in
24 the best interest of the state, best interest of the
25 people of West Virginia. So we want to make sure that

1 we get applicants who can provide those services in a
2 very adequate way and provide quality services to our
3 residents, we're serving hundreds of thousands of people
4 in West Virginia through that program.

5 As I recall, it's been several years since we
6 have rebid that, there's usually a bidding process that
7 allows for renewals on those bids. So the issue of the
8 MCO's and what they do is left to the commissioner for
9 the most part. I was certainly part of the process
10 before and was comfortable that we did that in the right
11 way.

12 Q. So when you say you rebid that, are you
13 referring to calling for bids from managed care
14 organizations or MCO's to help administer the Medicaid
15 program?

16 A. Yes.

17 Q. Okay. And another --

18 A. Well, let me, if I can. When you say administer
19 the Medicaid program, that's the commissioner, that's
20 the state function. So the MCO's really make sure that
21 the services are provided to the clients out there. So
22 when you said MCO's oversee, maybe I misheard you,
23 oversee the Medicaid, the administration, that's really
24 the Bureau and the commissioner.

25 Q. Okay. I appreciate that clarification. I may

1 have misspoke, and either way it's good to have that on
2 the record. So West Virginia Code Section 926 Sub 12
3 states that, "The Cabinet Secretary is authorized to
4 prepare and submit state plans which meet the
5 requirements of federal laws, rules governing federal
6 state assistance." Does that sound accurate as one of
7 your job roles as Cabinet Secretary?

8 A. That sounds accurate, yes.

9 Q. And what does that particular piece look like
10 practically for you in your role, preparing and
11 submitting state plans which meet the requirements of
12 federal law?

13 A. Well, again, that's a function of the
14 commissioner and her staff. The changes we've made to
15 the state plan through state plan amendments, they of
16 course run through me and I give an ultimate sign-off on
17 those, but those state plan amendments and changes are
18 done at the Bureau itself, not directly here at the
19 Cabinet Office. I'm not trying to say that it's not my
20 responsibility, under the statute I certainly have to
21 review those and make sure I agree with those.

22 Q. And how often are those state plans prepared and
23 submitted?

24 A. Not too often. We made a couple of changes in
25 the last year or two because of COVID in terms of how we

1 Q. No problem. MCO's, I'm just trying to get an
2 idea of the MCO structure.

3 A. Okay.

4 Q. So I know of Mountain Health Trust, UniCare
5 Health Plan of West Virginia, Incorporated, The Health
6 Plan, Aetna Better Health of West Virginia, and then I'm
7 not sure if this counts as an MCO or not, but The
8 Rational Drug Therapy Program. Have I missed any MCO's
9 or is there anything about those that you wouldn't
10 describe them as MCO's, for example?

11 A. I don't believe the last one you mentioned is an
12 actual MCO, but that sounds like a pretty good list. I
13 can't recall any others at this point.

14 Q. Okay. And then just so that I'm clear, I think
15 you testified to this already, but the Medicaid program
16 through Commissioner Beane and the DHHR, they have a
17 process of bidding by which these MCO's are chosen and
18 then the MCO's provide the services to the patients
19 based on the Medicaid programs, guidelines of what's
20 covered or not, does that sound accurate?

21 A. That sounds accurate, yes.

22 Q. Okay. What is DHHR's role in establishing
23 eligibility standards for Medicaid providers?

24 A. Eligibility standards. I'm not sure, I'm not
25 sure what you mean by that, eligibility standards.

1 A. I think so, yes.

2 Q. What do you know about the exclusion?

3 A. I didn't know much until recently. Again, this
4 had not been brought to my attention, I was not aware
5 there was an exclusion. I do understand now after our
6 folks did some digging trying to see what that exclusion
7 was or when that exclusion took place, it was well
8 before my tenure began in this position. So I do
9 understand that surgery is excluded. Is that what
10 you're referring to?

11 Q. Sure. So the exclusion I'm referring to is the
12 exclusion of gender confirming care as I've described
13 it. You just referenced this, but it sounds, I'll just
14 ask, do you know how the exclusion was developed?

15 A. I do not, I do not.

16 Q. Do you have any understanding of when it was
17 developed?

18 A. I was told it was somewhere around 2004, 2006,
19 somewhere in that era. No one seems to know any more
20 detail than that, I certainly don't know any more detail
21 than that.

22 Q. Do you know why the exclusion is maintained
23 today?

24 A. I do not.

25 Q. Why don't West Virginia Medicaid health plans

1 Q. Okay. Sorry about that, I think it's good for
2 us all to be on the same page though. Do you believe
3 excluding gender confirming care from West Virginia's
4 Medicaid plans to the extent it is excluded is in
5 compliance with federal law?

6 MS. CYRUS: Object, calls for a legal
7 conclusion. But if you know, you can answer.

8 A. My understanding, we have a set of mandatory
9 required services according to CMS and we provide all of
10 the services that are mandatory under CMS through the
11 Medicaid program, they're required.

12 We have a huge number of services that are not
13 required, hearing aids, eyeglasses are good examples of
14 services that are not required but are seen by many to
15 be necessary in terms of their health. So we provide
16 all the mandatory.

17 We have additional services we provide,
18 primarily through waiver programs for our IDD
19 population, for our aged population. So we provide
20 everything that's required under Medicaid and some
21 optional programs that through the years, long, long
22 period of time years, have been developed as a part of
23 the West Virginia state plan. So I hope that answers
24 your question.

25 Q. Do you view gender confirming care as optional

1 So we're looking to possibly be in the red as I
2 recall in 2024, which the lag is because the number
3 changes, the match changes depending upon how the state
4 does. If the state is doing well economically, and West
5 Virginia is doing well right now, then the match goes
6 down because the federal approach to this is you're
7 going to need less money if the state is doing well
8 financially. So we're looking at a very difficult time
9 here I'm afraid in the next few years. The governor has
10 said our budget will be flat for the next three years,
11 we will not increase our budget. So I have concerns
12 about the Medicaid budget right now, we're going to work
13 through that as we need to.

14 But back to the issue of additional services.
15 I'm very concerned in terms of the budget adding to the
16 Medicaid budget at this point for anything. It's a
17 difficult time looking forward with regard to Medicaid,
18 although again, the states still want financially.

19 Q. You mentioned waiver services in your last
20 answer, what are those?

21 A. Those are optional Medicaid services. I'm
22 sorry, maybe I wasn't clear on that. When you asked
23 what those optional services were, those waiver, what we
24 call waiver services are optional services that are not
25 required under the Medicaid program.

1 A. No, I have not.

2 Q. Have you ever consulted with an expert on care
3 for transgender people?

4 A. No, I have not.

5 Q. Are you aware of any research or analysis within
6 the Department regarding providing access to gender
7 confirming care for West Virginia Medicaid participants?

8 A. No, I am not.

9 Q. Have you had any internal discussions with staff
10 about the issue of gender confirming care?

11 A. About the issue?

12 Q. Mm-hmm.

13 A. Only with the commissioner in preparation for
14 this deposition.

15 Q. Okay. Have you ever spoken with representatives
16 of any other Medicaid program about gender confirming
17 care?

18 A. No, I have not.

19 Q. Have you personally conducted any research about
20 the cost of providing gender confirming care?

21 A. No, I have not.

22 Q. Are you aware of any research within the
23 Department regarding the cost of providing gender
24 confirming care?

25 A. No, I am not.

1 Q. Have you done any other work with respect to
2 this issue of gender confirming care beyond what I just
3 asked about?

4 A. No, I have not.

5 Q. Have you been involved in any litigation or
6 complaints related to the denial of gender confirming
7 care other than this case?

8 A. No, I have not been.

9 Q. Has the Department?

10 MS. CYRUS: I'm going to object to the form
11 of the question. If you know you can answer.

12 A. I don't think so. I think I would have known
13 about that and been involved in that, but I don't recall
14 any, no.

15 Q. Are you aware of legislation or lobbying
16 surrounding the exclusion or coverage for medical care
17 for trans people?

18 A. No, I am not.

19 Q. Have you personally conducted any research or
20 analysis regarding the legality of the exclusion?

21 A. No, I have not.

22 Q. Are you aware of any research or analysis within
23 the Department regarding the legality of the exclusion?

24 A. No, I'm not.

25 Q. Okay. I'm going to switch gears here a little

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REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Secretary Bill J. Crouch on the 17th day of March 2022, and that the witness was by me first duly sworn to tell the whole truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

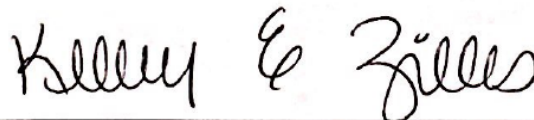
That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was reserved.

WITNESS MY HAND AND SEAL THIS 17th day of March 2022.



Kelley E. Zilles, RPR
Notary Public, Washington County, Minnesota
My commission expires 1-31-2025

Exhibit 9

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

Christopher Fain, individually and on behalf of all
others similarly situated, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 3:20-cv-00740

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF COMMISSIONER CYNTHIA BEANE

DATE: March 29, 2022

TIME: 8:00 a.m. CST

PLACE: Veritext Virtual Videoconference

REPORTED BY: KELLEY E. ZILLES, RPR (Via Videoconference)

JOB NUMBER: 5096149

1 APPEARANCES

2
3 On Behalf of the Plaintiffs (Via Videoconference):

4 CARL CHARLES, ESQ.

5 TARA L. BORELLI, ESQ.

6 Lambda Legal Defense and Education Fund, Inc.

7 158 West Ponce De Leon Ave., Suite 105

8 Decatur, Georgia 30030

9 470.225.5341

10 ccharles@lambdalegal.org

11 tborelli@lambdalegal.org

12
13 AVATARA SMITH-CARRINGTON, ESQ.

14 Lambda Legal Defense and Education Fund, Inc.

15 3500 Oak Lawn Avenue, Suite 500

16 Dallas, Texas 75219

17 214.219.8585

18 asmithcarrington@lambdalegal.org

19
20 NICOLE J. SCHLADT, ESQ.

21 Nichols Kaster PLLP

22 80 South 8th Street, Suite 4700

23 Minneapolis, Minnesota 55402-2224

24 612.256.3291

25 nschladt@nka.com

1 WALT AUVIL, ESQ.
2 The Employment Law Center, PLLC
3 1208 Market Street
4 Parkersburg, West Virginia 26101
5 304.485.3058
6 auvil@theemploymentlawcenter.com

7
8 On Behalf of Defendants William Crouch; Cynthia Beane;
9 and West Virginia Department of Health and Human
10 Resources, Bureau for Medical Services (Via
11 Videoconference):

12 KIMBERLY M. BANDY, ESQ.
13 LOU ANN S. CYRUS, ESQ.
14 Shuman McCuskey Slicer, PLLC
15 1411 Virginia Street East, Suite 200
16 Charleston, West Virginia 25301
17 304.345.1400
18 kbandy@shumanlaw.com
19 lcyrus@shumanlaw.com

20
21
22
23 NOTE: The original deposition transcript will be
24 delivered to Tara Borelli, Esq., as the taking attorney.

25

1 A. Yes.

2 Q. We'll also be discussing managed care
3 organizations today. What is a managed care
4 organization?

5 A. Managed care organization is an insurance
6 organization that Medicaid uses to help manage our
7 population and the clients enroll into the managed care
8 organization to, to administer their benefits.

9 Q. If I refer to a managed care organization by the
10 abbreviation MCO, will you know what I mean?

11 A. Yes.

12 Q. We'll also be talking today about the exclusion
13 of care in the West Virginia Medicaid program for
14 transgender people. Are you familiar with the exclusion
15 being challenged in this case?

16 A. Yes.

17 Q. What's your understanding of that exclusion?

18 A. We only exclude the surgery. We cover other
19 transgender services such as the hormones, the
20 counseling that we do, it excludes the transgender
21 surgery.

22 Q. If I refer to that as exclusion throughout the
23 day today, will you know what I mean?

24 A. Yes, if you say exclusion of transgender
25 services, I'm going to assume you're talking about the

1 surgery.

2 Q. Thank you. I'm also going to ask you questions
3 today about medical treatment that transgender people
4 receive for the purpose of treating gender dysphoria.
5 If I refer to that as gender confirming care or gender
6 affirming care, will you understand what I'm referring
7 to?

8 A. Yes.

9 Q. We're here to take your deposition in two
10 capacities, the first is your deposition as an
11 individually named defendant in this case, do you
12 understand that?

13 A. Yes.

14 Q. Second we're here to take a deposition of an
15 organizational representative for BMS, do you understand
16 that?

17 A. Yes.

18 Q. And you've been designated as the organizational
19 representative to give testimony on certain topics that
20 we're going to discuss today. Do you understand that
21 you've been designated for particular topics?

22 A. I do.

23 Q. I'll do my best to make clear when I'm asking
24 you questions in your individual capacity versus your
25 organizational representative capacity or both. If that

1 distinction is important to your answers, will you agree
2 to clarify that for me?

3 A. Yes.

4 Q. In this next set of questions I'll be asking
5 about your professional background for purposes of your
6 individual testimony and as an organizational
7 representative for BMS. What is your current job title?

8 A. I'm the commissioner for the Bureau of Medical
9 Services.

10 Q. How long have you held that position?

11 A. I've been in this position fully appointed since
12 2017 and before that I was acting commissioner for a
13 couple years.

14 Q. Did you begin serving as acting commissioner in
15 approximately July 2014?

16 A. Yeah, I guess I did.

17 Q. Okay. LinkedIn is a helpful thing. You
18 mentioned being appointed to this role. Let's start
19 with your acting commissioner role beginning in 2014.
20 Were you appointed as acting commissioner?

21 A. At the time the commissioner had left abruptly
22 and I was a deputy commissioner and I was asked to take
23 the acting role and I did so.

24 Q. Who asked you to take that role?

25 A. Deputy Secretary Jeremiah Samples.

1 Q. And then in 2017 you became the commissioner.
2 Were you appointed to the role of commissioner in 2017?

3 A. Appointed probably is not maybe the correct word
4 I should have used. I was asked to take the role fully
5 in 2017 by then Secretary Crouch and to come out of the
6 acting role. And the significance of that was it's
7 whether or not you're covered by Civil Service. And so
8 at the time when the commissioner had left abruptly
9 before we were, we get new governors every four years,
10 and so I was kind of like not sure if I wanted to take
11 it knowing that there was a possibility I would not be
12 the chosen commissioner in a year and a half or so.

13 Q. I see. And so when you were asked to become
14 commissioner by Secretary Crouch you agreed in 2017?

15 A. Yes.

16 Q. And you referred to the prior commissioner
17 leaving abruptly. Can you confirm that that didn't have
18 anything to do with the subject of this case?

19 A. That had nothing to do with the subject of this
20 case.

21 Q. Prior to becoming commissioner have you held
22 other roles within BMS or DHHR?

23 A. Yes. I have been with the Department since
24 2000. Prior to becoming the acting commissioner I was
25 deputy commissioner and then for a number of years prior

1 to that I was what we call a program manager 2 which I
2 was over several programs here in our home and community
3 based areas and different policy areas. And when I
4 first came to Medicaid I managed several grants for
5 Medicaid and before I came to Medicaid I was with the
6 department, but it was the Department of Behavioral
7 Health Services. That's kind of my history at the
8 department.

9 Q. That's helpful. Thank you. I would like to see
10 if we can put approximate time frames, this isn't a
11 memory test, and so just do your best to remember the
12 time frames, but if we can establish just a rough
13 chronology for those roles. Is it most helpful to go
14 backwards in time or is it more --

15 A. Probably backwards since we've already gotten
16 like the commissioner down. So I was acting till 2017,
17 I think I was probably asked to be acting around the
18 2014 area. Prior to that I would have been deputy, so
19 deputy at least probably three years maybe, I think
20 2010, 2011 to 2014 I was deputy. And then, and then I
21 was program manager for about a year, year and a half,
22 so that would have taken us to maybe 2009, 2008. And
23 then I was, like I said, I was over some grants for
24 about a year and then prior to that I was at the Bureau
25 for Behavioral Health from like 2000 to 2007 I think.

1 Q. And have any of the mediations that you've
2 participated in been related to the subject of this
3 lawsuit?

4 A. No, they have not.

5 Q. Let me make one clarification. When I say
6 relating to the subject of this lawsuit, what I mean is
7 relating to care for transgender people. Do your
8 answers remain the same with that clarification?

9 A. My answer would remain the same.

10 Q. I'd like to turn to some additional questions
11 that will relate to both your individual capacity as a
12 named defendant in this case and as an organizational
13 representative for BMS, is that agreeable?

14 A. Yes.

15 Q. What responsibilities fall within your role as
16 commissioner of BMS?

17 A. So as commissioner of BMS I'm over a large
18 number of state employees that administer the Medicaid
19 program and we have to assure that the budgets are
20 adequate, the policies, the services, access to
21 services, and administer our state plan and administer
22 our waiver programs and assure our policies and
23 procedures are meeting federal guidelines. I also have
24 to be able to communicate all of our services with our
25 stakeholders and be available for legislative requests

1 and be the spokesperson for Medicaid services in West
2 Virginia.

3 Q. Is it fair to say that you administer the
4 Medicaid program?

5 A. Yes.

6 Q. Do you recall any other duties or
7 responsibilities in your current role?

8 A. I believe the answer I gave are a very broad
9 brush of all the things that I do here at Medicaid, you
10 know, all the leadership reports to me and there are
11 several different divisions under that and lots of
12 nuances when it comes to Medicaid, but yes, I make sure
13 we're administering the Medicaid program. Medicaid is a
14 state and federal partnership. West Virginia has a very
15 good rate when it comes to what our federal match is,
16 and so I make sure that we are not putting that federal
17 match at risk.

18 Q. How do you perform the function of making sure
19 that the federal match is not being put at risk?

20 A. Pretty much we follow CMS guidelines. If CMS
21 directs us to do something, they mandate us to do
22 something, we make sure that we do it. We update our
23 state plan as needed. If we are to add a service, if
24 the legislature gives us additional monies to add a
25 service, we make sure before we do that that we have

1 CMS's permission to do it before we are collecting the
2 match for the services.

3 Q. Who do you report to?

4 A. I report to Deputy Secretary Samples and
5 Secretary Crouch.

6 Q. Are there any others that you report to?

7 A. Those two gentlemen are it.

8 Q. Let me make sure that I get the name of the,
9 Secretary Crouch, can you repeat the other, the title
10 and the name of the other individual?

11 A. Deputy Secretary Jeremiah Samples and Secretary
12 Crouch, Bill Crouch.

13 Q. Thank you. How often do you report on your work
14 to Secretary Crouch?

15 A. Secretary Crouch has meetings, they've been a
16 little bit different since COVID just because things
17 just got kind of crazy busy with the pandemic, but he
18 has like weekly leadership meetings where all the
19 commissioners are there. But then of course if I need
20 something from Secretary Crouch, for example, yesterday
21 I needed to make sure he signed something and so I, you
22 know, called him and, you know, made sure that he saw
23 that on his desk and signed it. So the formal meetings,
24 about once a week.

25 Q. And how often do you report on your work to

1 Deputy Secretary Samples?

2 A. Deputy Secretary Samples is also in those
3 leadership commissioner meetings as well and then Deputy
4 Secretary Samples is probably a little bit more in the
5 weeds with regards to some of the day-to-day services
6 just because, you know, that's his role to be more in
7 the weeds than the secretary with regards to some of the
8 day-to-day services. And so I would say I talk to
9 Deputy Secretary Samples at least weekly.

10 Q. Thank you. How many people work for BMS?

11 A. So currently we have about 85 positions filled,
12 but we have a number of vacancies right now as well.

13 Q. Do you have an approximate sense of how many
14 vacancies you have?

15 A. Probably about 20.

16 Q. How many BMS employees do you supervise?

17 A. Five direct supervision.

18 Q. Okay. And how many BMS employees report
19 directly to you?

20 A. That's five report directly to me that I have
21 direct supervision over.

22 Q. And what are the titles and names of those five
23 individuals?

24 A. Becky Manning, she's my deputy of finance; Sarah
25 Young, she's my deputy of policy; Fred Lewis, he's my

1 deputy of my managed care units and department of
2 integrity and pharmacy; Riley Romeo is my general
3 counsel; and Kim O'Brien is my assistant to the
4 commissioner, kind of support staff.

5 Q. And what are the responsibilities of Ms.
6 Manning?

7 A. She's my deputy of finance, she's the one who's
8 in charge of our six-year budget, anything financial
9 goes through the finance department. Her department is
10 making sure that, you know, claims are getting paid, the
11 systems are working with regards to that and payments
12 are going out accordingly and anything finance related.

13 Q. And what are the responsibilities of Ms. Young?

14 A. She is my deputy commissioner of policy, she has
15 all the different policy units, whether it be, you know,
16 inpatient to outpatient to home and community based and
17 also is currently over some of our systems information
18 as well, meaning like our claims systems and different
19 systems. And then, and then she also helps assist with
20 the human resources area, even though we have another
21 manager that reports to her and that helps with that as
22 well.

23 Q. And what are the responsibilities of Mr. Lewis?

24 A. He is over our quality units, our department of
25 integrity units, our pharmacy units, and our managed

1 care units.

2 Q. Are you aware that you have an online biography
3 on the BMS Website?

4 A. I'm aware that something is up there, yes.

5 Q. All right. Give me a moment to get our first
6 exhibit marked.

7 A. It's been quite a while since I've read it, so.

8 Q. That tends to happen with biographies.

9 A. Am I supposed to be pulling up something or
10 doing something?

11 Q. No.

12 MS. BORELLI: Actually, let's go off the
13 record briefly.

14 (A break was taken at 8:46 a.m.)

15 (Exhibit 1 marked for identification.)

16 BY MS. BORELLI:

17 Q. All right. Commissioner Beane, please click on
18 the marked exhibits folder in Exhibit Share and open the
19 document that has been marked as Plaintiff's Exhibit 1.
20 Let me know when you're able to open the document.

21 A. So after, my apologies, I'm clicking on the
22 folder that says marked exhibits, it doesn't appear that
23 anything is happening. Should I click this downward
24 button?

25 MS. CYRUS: I'm not seeing anything either,

1 Tara.

2 MS. BORELLI: All right. Let's go off the
3 record again.

4 (A break was taken at 8:48 a.m.)

5 BY MS. BORELLI:

6 Q. Commissioner Beane, please take a moment to
7 review this document.

8 A. Okay.

9 Q. Is this on the BMS Website?

10 A. Yes, I believe it is.

11 Q. I'm going to read from the paragraph at the
12 bottom of the first page. It states that you have, "Led
13 policy implementation or changes under the Affordable
14 Care Act (ACA) which enable approximately 165,000 West
15 Virginians to have healthcare coverage." Did I read
16 that correctly?

17 A. You did.

18 Q. Is that an accurate description of your
19 responsibilities?

20 A. Yes.

21 Q. And if I refer to the ACA, will you understand
22 that I'm referring to the Affordable Care Act?

23 A. Yes.

24 Q. Does the sentence that I read from your
25 biography mean that BMS made policy changes to comply

1 with the ACA?

2 A. Yes.

3 Q. What changes do you recall being implemented to
4 comply with the ACA?

5 A. There was a requirement with the ACA around an
6 alternative benefit plan, what your benefit plan was
7 going to be through your expansion calculation. There
8 was also mandated coverage in the ACA around your
9 tobacco cessation program and to assure that you were
10 offering full coverage of tobacco cessation, both the,
11 the pharmacist from a pharmacy benefit of tobacco
12 cessation as well as the counseling.

13 Q. Apart from the alternative benefits for
14 expansion and the tobacco cessation, were there any
15 other changes that you recall being implemented to
16 comply with the ACA?

17 A. There were lots of systems changes that we had
18 to make to comply with the ACA so we could enroll
19 individuals with the expanded benefit of enrolling
20 individuals at a different poverty level, up to 165
21 percent of the poverty level versus where we were prior,
22 that's what has caused the major expansion. Those are
23 the broader brush areas in expanding for the ACA.

24 Q. And as we discussed, your biography states that
25 you led policy implementation for changes under the

1 Affordable Care Act, ACA. What kind of work did you do
2 to lead policy implementation for changes under the ACA?

3 A. One of the key areas that I was in charge of was
4 getting our alternative benefit plan approved by CMS.
5 So in your alternative benefit plan you had to decide
6 whether your benefit plan was going to mirror your state
7 plan for your expansion adults or look a little bit
8 differently, and still make the requirements that CMS
9 required for the alternative benefit plan. So and then
10 our state did use some co-pays for alternative benefit
11 in our expansion and we added some co-pays as well.

12 Q. And what was your role in implementing the
13 changes you just described?

14 A. So I along with consultants that we use, Cole
15 Barry Dunn and myself had weekly calls with CMS and went
16 over our alternative benefit state plan and to assure
17 what we were submitting was meeting all the requirements
18 of the ACA. And then after having several weekly calls
19 around the alternative benefit plan, we did a formal
20 submission and received approval from CMS around our
21 benefits.

22 Q. And did you have any kind of unique role in the
23 work that you just described?

24 A. Unique in meaning how, like I'm not sure if I
25 understand your question.

1 Q. Let me rephrase. Were you ultimately
2 responsible for the work that you just described,
3 implementing those policy changes under the ACA?

4 A. Yes.

5 Q. Your biography also refers to enabling
6 approximately 165,000 West Virginians to have healthcare
7 coverage through Medicaid. Are those West Virginians
8 covered by Medicaid expansion under the ACA?

9 A. Correct.

10 Q. Can you explain what Medicaid expansion is?

11 A. So expansion is what I was talking about and
12 these are the individuals that would have the
13 alternative benefit plan. These are adults 19 through
14 64 and your financial eligibility is raised prior to
15 that. Adults are, I don't know recall our exact federal
16 poverty level that we had, you know, after expansion. I
17 believe, and I might have this wrong, I think it's
18 165 percent now the federal poverty level, it's been a
19 long time since I looked at it, but I believe it's 165,
20 we go up to 165 percent of the federal poverty level for
21 expansion adults.

22 Q. So is it fair to say then that prior to the ACA
23 there were certain poverty level requirements to qualify
24 for Medicaid and after the ACA, the poverty level
25 requirements were raised so that individuals or families

1 could have more income and still qualify for Medicaid,
2 is that a fair description?

3 A. Fair description.

4 Q. Okay. How many total participants are there in
5 West Virginia Medicaid?

6 A. Currently our totals are continuing to go up.
7 Because we are under the pandemic requirements we are
8 not able to, during the pandemic you're not allowed to
9 dis-enroll anybody off the Medicaid rolls. And
10 typically on Medicaid you have turn where people turn
11 off yearly, you know, they don't turn in their paperwork
12 or they might, you know, seek employment and no longer
13 meet that federal poverty level guideline or for a
14 number of reasons they might fall off our rolls. During
15 the pandemic you are not allowed to take anybody off
16 your rolls, even if they no longer qualify. So last
17 time I looked our numbers are up to around 615,000.
18 Typically we're around, prior to the pandemic around
19 520,000, 525,000, there's always some fluctuation.

20 Q. And the 615,000 figure that you just mentioned,
21 does that include the 165,000 current participants
22 covered through Medicaid expansion under the ACA?

23 A. That would include our expansion of adults as
24 well. So when you say 165,000, it's always a rolling
25 kind of number, you know, people come on, they come off.

1 example, we don't cover hearing aids, we make sure that
2 those codes are not covered. And we also, the MCO's
3 know that that is not a covered benefit as well, so they
4 will not cover it. However, the MCO's have the
5 authority to cover additional services that are not in
6 our benefit if they choose to cover them as a value
7 added service.

8 Q. If Medicaid began covering gender affirming care
9 in the future, would you oversee in any capacity the
10 implementation of that policy?

11 MS. CYRUS: Object to the extent it calls
12 for speculation. But if you know, you can answer.

13 A. So we do cover gender affirming care with
14 regards to counseling and hormone therapy, we just don't
15 cover the surgery.

16 Q. And if the West Virginia Medicaid program were
17 to begin covering gender affirming surgery in the
18 future, would you have any oversight over that policy
19 change?

20 MS. CYRUS: Same objection. But you can
21 answer if you know.

22 A. If we would cover in the future then I would
23 review the policy before it went up for public comment
24 and then, and then, you know, approve the policy and
25 then confirm with CMS whether or not it would require a

1 state plan change before we began the coverage.

2 Q. Thank you. This paragraph also states that you
3 ensure compliance with federal regulations. Do your
4 responsibilities in that capacity include ensuring
5 compliance with the Affordable Care Act?

6 A. Yes.

7 Q. Do your responsibilities also include ensuring
8 compliance with the Medicaid Act?

9 A. Yes.

10 Q. Okay. I'm at a potential breaking point, but
11 would be happy to keep going if you would like to
12 continue. Commissioner Beane, would you like a break or
13 would you like to press on for a while?

14 A. I'm fine for a little while. Probably in about
15 a half hour my coffee will start calling, so I can
16 probably go for a little while longer.

17 Q. Great, let's do that. I'd now like to turn to
18 your testimony in your capacity as the organizational
19 representative for BMS. At what point were you notified
20 that you would be giving testimony as BMS's
21 organizational representative?

22 A. I can't remember the day that, I mean, I
23 honestly don't remember the date that we were notified
24 of the suit, whenever the suit came up and I was
25 notified, I don't remember the date.

1 Q. Great. And we will deal with them again as they
2 come up today. Let's go back to the same exhibit,
3 Plaintiff's Exhibit 2, and please scroll to Page 3 for
4 me, and in particular look for Topic 3 at the top of the
5 page.

6 A. Yes.

7 Q. Thank you. Topic 3 is, "Your choice to
8 participate in the Medicaid program." Did I read that
9 correctly?

10 A. You did.

11 Q. Are you prepared to testify about this topic?

12 A. Yes.

13 Q. With respect to Topic 3 specifically, what did
14 you do to prepare to testify today?

15 A. I just recognize the history of the Medicaid
16 program and then my work experience and knowledge helps
17 me prepare for Topic 3.

18 Q. Thank you. When was BMS originally formed as an
19 agency?

20 A. West Virginia has participated in the Medicaid
21 program since its inception, and that was a little over
22 50 years ago. So Medicaid has been in West Virginia
23 since Medicaid was offered as a federal/state
24 partnership.

25 Q. And when was BMS formed as an agency, was it

1 formed when West Virginia began participating in
2 Medicaid approximately 50 years ago?

3 A. I do not know the exact year that the Bureau for
4 Medical Services was called a bureau on its own. My
5 assumption might be that it was soon after they started
6 participating in the Medicaid program.

7 Q. And you said that West Virginia has been
8 participating since the inception of the Medicaid
9 program. My understanding is that the Social Security
10 Act title authorizing Medicaid was enacted in 1965.
11 Does 1965 sound like the approximate year or time frame
12 that West Virginia began participating in Medicaid?

13 A. Yes.

14 Q. Do you know why West Virginia initially decided
15 to participate in the Medicaid program?

16 A. To serve our most vulnerable citizens and be a
17 part of the federal/state partnership with regards to
18 covering healthcare.

19 Q. Why does West Virginia currently participate in
20 the Medicaid program?

21 A. To serve our most vulnerable citizens and to
22 take advantage of the federal/state partnership of
23 assuring healthcare access to the most vulnerable West
24 Virginians.

25 Q. And do those reasons also apply to transgender

1 people?

2 A. Yes.

3 Q. I'd like to go ahead and introduce our next
4 exhibit. I'll let you know when to click on the folder
5 to pull it up.

6 (Exhibit 3 marked for identification.)

7 Q. All right. Commissioner Beane, if you click on
8 the marked exhibits folder you should be able to open
9 the document that has been marked now as Plaintiff's
10 Exhibit 3. Let me know when you've had an opportunity
11 to open that document.

12 A. I have it open.

13 Q. You can see the title on the first page that
14 says, "Medicaid 101"?

15 A. Yes.

16 Q. Do you recognize this document?

17 A. Yes, I do.

18 Q. Is this a publication of BMS?

19 A. Yes.

20 Q. Please turn to Page 3 as indicated in the lower
21 left-hand corner of the document.

22 A. I'm there.

23 Q. I'm going to read the first paragraph on that
24 page, please read along with me, "State Medicaid
25 programs are often seen as low-hanging fruit when

1 financially strapped states are forced to make budget
2 cuts, however, thanks to the FMAP" --

3 A. Wait, hold on, I'm sorry, I don't know where
4 you're at. Okay, I'm sorry, I was at a different part
5 of the page. I'm with you now.

6 Q. Okay. Perfect. I'm going to start again just
7 for clarity, "State Medicaid programs are often seen as
8 low-hanging fruit when financially strapped states are
9 forced to make budget cuts, however, thanks to the
10 FMAP" --

11 MS. BORELLI: And for the court reporter,
12 that's an abbreviation, an acronym that is F-M-A-P.

13 Q. "However, thanks to the FMAP, Medicaid spending
14 acts as a tremendous financial boom for the state. The
15 Kaiser Commission on Medicaid and the uninsured recently
16 compiled findings from 20 million different studies
17 examining the economic impact of Medicaid spending and
18 found that in all studies examined Medicaid spending had
19 a positive impact on local economies. These studies
20 also found that Medicaid spending generates economic
21 activity within the state by providing jobs, personal
22 income and state tax revenues. While most state
23 government expenditures reallocate spending from one
24 sector to another, Medicaid is one of the few state
25 government spending opportunities that guarantee to pull

1 in money from outside the state and directly benefit the
2 local economy." Did I read that correctly?

3 A. Yes, you did.

4 Q. Does that accurately describe the benefits of
5 participating in Medicaid?

6 A. That is one of the benefits of participating in
7 the Medicaid program.

8 Q. What are the other benefits of participating in
9 the Medicaid program?

10 A. It provides access to healthcare to individuals
11 who otherwise would have no healthcare.

12 Q. Are there any other benefits you can think of?

13 A. Those are the two big ones.

14 Q. Does West Virginia decide on an annual basis to
15 continue participating in Medicaid?

16 A. There is no annual attestation or anything to
17 CMS around participating, we just continue our
18 participation.

19 Q. Does West Virginia have to take any steps on an
20 annual basis to continue its participation?

21 A. We have to consistently report and do all the
22 things that CMS requests us to do in order to continue
23 our participation in the Medicaid program, and
24 accounting for funds is one of the big reports that we
25 do.

1 Q. And does the Medicaid plan outline policies to
2 ensure the state Medicaid program receives matching
3 federal funds through CMS?

4 A. Yes. So the state plan not only has the policy
5 pages, but it also has like the financial pages with
6 each state plan as well that kind of outlines what the
7 predicted costs will be and sometimes, sometimes it will
8 have actually the rates or sometimes it will just be a
9 rate methodology.

10 Q. Just to make sure I clarify one more
11 abbreviation for the record because I can't recall if we
12 have previously, does the abbreviation CMS refer to the
13 United States Centers for Medicare and Medicaid
14 Services?

15 A. Yes.

16 Q. Does the Medicaid plan outline how the Medicaid
17 program is implemented in West Virginia?

18 A. Yes, it gives you a broad outline of
19 implementation, but then we also have policy manuals
20 that give you a more detailed view. If you're a
21 provider, more than likely you're going to look at the
22 policy manual and be able to see versus the state plan
23 just because how it's laid out, the policy being more
24 directed towards what providers need to know with
25 regards to, you know, how to bill, you know, what codes

1 are covered and some more of the details are in the
2 policy manuals. The state plan gives you the authority
3 to be able to publish those details.

4 Q. And are those policy manuals considered to be
5 part of the state plan or are they considered to be
6 separate documents?

7 A. They're separate, but they have to follow your
8 state plan, meaning I can't have a policy manual for us
9 to cover acupuncture because I don't have a state plan
10 saying that I'm approved to cover acupuncture.

11 Q. Does BMS prepare the Medicaid plan?

12 A. Yes, we prepare the state plans.

13 Q. And did you approve the Medicaid plan?

14 A. I have not approved every state plan because, as
15 I said, they're historical. So, for example, before I
16 came to BMS, inpatient hospitalization is a state plan
17 that has been there for years and so, but as we update
18 or make changes, those would be the things that I would
19 be approving.

20 Q. And does Secretary Crouch also approve those
21 updates or changes to the Medicaid plan?

22 A. Once we do a state plan, which would require a
23 public notice, public comment, we also go through our
24 medical advisory council, they are advisory in nature,
25 but we give the state plans to them and they take a

1 Q. When the Medicaid program began covering hormone
2 therapy for gender confirming care, did that require a
3 change to the Medicaid plan?

4 A. That did not require a change because we already
5 covered those drugs. This removed the gender edit.

6 Q. I see. So because hormone therapy was already
7 covered for non-transgender people, allowing coverage
8 for gender confirming care didn't require a change to
9 the Medicaid plan, is that correct?

10 MS. CYRUS: Object to the form of the
11 question. But you can answer, go ahead.

12 A. We have a pharmacy benefit and so we already
13 cover, you know, all those medications in our pharmacy
14 benefit, it was just a simple removing an edit based on
15 gender, and the pharmacy benefit is already approved by
16 CMS.

17 Q. And when the gender edit was removed so that, so
18 that hormone therapy could be received for gender
19 affirming care, did that require approval from CMS?

20 A. No, because we were already approving, we
21 already had approval to cover that medication, we just
22 removed the gender edit.

23 Q. And a follow-up question to our discussion a
24 little bit earlier. What happens when West Virginia
25 Medicaid wants to initiate a plan, a change to the

1 for West Virginia Medicaid participants, your
2 organizational structure, including its units, divisions
3 and departments." Did I read that correctly?

4 A. Yes.

5 Q. Are you prepared to testify about this topic?

6 A. Yes.

7 Q. With respect to Topic 15 specifically, what did
8 you do to prepare to testify today?

9 A. I just went over in my head the organizational
10 chart.

11 Q. And you testified that Medicaid is a joint
12 federal and state program, correct?

13 A. Correct.

14 Q. Can you explain what that means?

15 A. Meaning that all of our dollars are matched by
16 the federal match. And so right now our match due to
17 the pandemic is around 81 percent, so, you know, you can
18 look at it for every \$0.19 that the state of West
19 Virginia puts in, the federal government puts in \$0.81.
20 Typically our match is around this, you know, 74, 75, so
21 it's like a 3 to 1 match.

22 Q. That's helpful. Is BMS a single state agency
23 authorized to administer the Medicaid program in West
24 Virginia?

25 A. Yes.

1 Q. Does BMS serve any other purpose?

2 A. Other than to enact the Medicaid program, no.

3 Q. And would you describe BMS as having a mission?

4 A. Yes.

5 Q. And how would you describe the mission of BMS?

6 A. The mission of BMS, and this is probably not
7 going to totally match the mission statement that's
8 online if you're going to pull it up later, but the
9 mission of BMS is to assure quality healthcare and
10 access to healthcare to West Virginians and to be good
11 stewards of the state dollar and be good stake, and be a
12 good partner with all our stakeholders.

13 Q. Does West Virginia Medicaid offer coverage on a
14 fee for service basis?

15 A. We do.

16 Q. What does that mean?

17 A. So the Medicaid program right now, about
18 85 percent of all of our members are with a managed care
19 organization, meaning that managed care organization
20 that they sign up for and they get to choose which one
21 they want will help them with their benefits, will help
22 assist them, will pay their claims and will make sure
23 that they have access to all the Medicaid services and
24 help them with access if they have problems like finding
25 a doctor or something like that.

1 And then our long-term care services and some of
2 our other services, our pharmacy services, is carved out
3 in a fee for service environment. A fee for service
4 environment is an environment of Medicaid where you go
5 to the doctor and Medicaid simply pays that claim on a
6 fee for service basis. If you're in managed care what a
7 Medicaid agency does is we have actuarially sound rates
8 that we pay the managed care companies, like a per
9 member per month rate in order to manage all your care
10 and then they have to pay the claim on more of the fee
11 for service basis or whatever arrangement they have made
12 with that provider.

13 Q. Is it fair to say then that fee for service care
14 results in the medical provider being paid directly by
15 the state?

16 A. Yes. The fee for service care, your contract is
17 directly with the Medicaid agency and your claim is
18 being paid through our fiscal agent right now is
19 Gainwell.

20 Q. Whereas for members who are enrolled in an MCO,
21 their medical providers get paid through the MCO, is
22 that correct?

23 A. Correct.

24 Q. And does the state enter contracts with those
25 MCO's to provide Medicaid benefits to participants

1 enrolled through the MCO?

2 A. We do.

3 Q. And are those contracts entered annually?

4 A. Yes.

5 Q. Is Mountain Health Trust the name of West
6 Virginia's, a West Virginia Medicaid's managed care
7 program?

8 A. Yes.

9 Q. So Mountain Health Trust is distinct from fee
10 for service, correct?

11 A. Yes.

12 Q. And the MCO's within the managed care program
13 include UniCare, The Health Plan of West Virginia, and
14 Aetna Better Health of West Virginia, correct?

15 A. Yes.

16 Q. Are there any other MCO's besides the three that
17 I've just named?

18 A. We only have the three MCO's currently.

19 Q. You testified that BMS enters into contracts
20 with the MCO's to provide care to Medicaid participants,
21 correct?

22 A. Correct.

23 Q. Do those contracts require the MCO's to exclude
24 gender affirming care?

25 MS. CYRUS: Object to the form of the

1 question. But you can answer.

2 A. I do not believe that it requires them to
3 exclude it, however, it would not be considered in their
4 rate. And so one of the things with managed care is a
5 managed care company can choose to cover things that are
6 not necessarily in the Medicaid benefit, meaning managed
7 care companies can cover things that we don't cover.

8 So, for example, at one time one of the managed
9 care companies, and they might still be doing this, I
10 honestly can't remember, was covering eyeglasses. We
11 currently don't cover eyeglasses for people with like
12 farsighted, nearsighted, we refer them to, you know,
13 other areas like a Lions Club or something like that for
14 coverage. And so one of the MCO's at one time was
15 advertising that that was like one of their value added
16 services, so, you know, choose us as your managed care
17 company and here's an additional service that we might
18 be able to provide you.

19 Q. Are you aware of any MCO's offering as
20 additional services outside of their Medicaid
21 reimbursable care gender affirming surgery?

22 A. I do not believe so.

23 Q. I'm going to have us take a moment now to look
24 at our next exhibit. So if you can click on the marked
25 exhibits folder and open the document that has been

1 surgery would not be considered in that rate, but once I
2 give that money over to the MCO and they have that \$400
3 a month, they have to cover all the benefits that are
4 required, but if they want to cover additional benefits
5 that we don't cover here, they wouldn't be penalized
6 other than it's not in their current rate, they would
7 have to say they're going to do it based on their
8 management of the program.

9 Q. So in other words, BMS will not cover what this
10 document refers to as sex transformation procedures,
11 correct?

12 MS. CYRUS: Object to the question. But go
13 ahead.

14 A. Correct.

15 Q. And if the MCO's did want to cover that care,
16 specifically gender affirming surgery, they would have
17 to come up with their own money to do so, is that
18 correct?

19 A. Yes. It would, it would be within the rates
20 that we give them, but it would not constitute what,
21 what the actuaries use to bill their rate.

22 Q. Let me make sure I'm understanding what you're
23 saying. So let me go back to first principles. I think
24 I heard you say gender affirming surgery is a noncovered
25 service for BMS, correct?

1 A. Correct.

2 Q. And so when BMS negotiates with the MCO's for
3 the amount of money that they will receive from BMS to
4 cover all of the required care, that calculation does
5 not include any money to cover gender affirming
6 surgeries, correct?

7 A. Correct.

8 Q. And if the MCO's wanted to cover gender
9 affirming surgeries, they would need to come up with
10 their own money, correct?

11 A. Yes, they would use their own money. So can I
12 give like an example --

13 Q. Sure.

14 A. -- what this would be? So I'm going to use like
15 two examples. So we don't cover acupuncture, it's not a
16 benefit in our state plan that we cover, it would not be
17 in the rates. But let's say the MCO saw a benefit and
18 covered acupuncture, that if we cover acupuncture we're
19 not going to have to do as many back surgeries and in
20 the long run it's going to be a cost-saving to us, which
21 in the end a managed care company is going to look at
22 that financial obligation in their businesses, so
23 they're going to try to make as much money as they can
24 with regards to still providing the services they have
25 to provide, but also any cost savings that they have up

1 to a certain point then they can use as profit. So if
2 they determine that by covering acupuncture, even though
3 it's not something that is in our rate, will benefit us
4 and actually save us money, they can do that.

5 So for gender affirming care the assumption
6 would be, perhaps, I don't know, if they wanted to cover
7 the surgery and maybe this person wouldn't require as
8 much counseling later, then they might decide to do
9 that. I do not believe any of them have.

10 Q. Correct. So to your knowledge none of the MCO's
11 are in fact covering gender affirming surgery using
12 their own funds?

13 A. Correct.

14 Q. Okay. Why does the exclusion that we reviewed
15 together refer to hormone therapy when West Virginia
16 Medicaid provides access to that care?

17 A. I believe that that was a historical thing that
18 was in there at one time. Our MCO's did cover the
19 pharmacy benefit, they have not covered our pharmacy
20 benefit for a number of years now, and so I just believe
21 it's something in the, it's a very long contract that
22 just wasn't caught when we were renewing the contracts
23 and had them signed off year after year.

24 Q. That's helpful. What I'd like to do is really
25 quickly see if we can establish that there are similar

1 once you've familiarized yourself with what it is?

2 A. It appears to be the contract with The Health
3 Plan.

4 Q. So this is the 2021 BMS contract with The Health
5 Plan, correct?

6 A. Correct.

7 Q. Sorry, was that a yes?

8 A. Yes. I'm sorry, I said correct. Can you all
9 hear me again, am I mumbling?

10 Q. Every once in a while the volume gets lower,
11 which I do as well, so we'll both try and speak up. But
12 thank you, Commissioner Beane. So we just reviewed
13 three contracts I believe all dated 2021. Are there
14 contracts in place right now for the year 2022 with
15 Aetna, UniCare and The Health Plan?

16 A. I'm sure there are. There's usually a delay in
17 signatures, so, but of course we have contracts.

18 Q. And would those contracts contain the same
19 provisions that we reviewed in the 2021 Aetna contract
20 providing that BMS will not cover gender affirming
21 surgery?

22 A. I believe so.

23 Q. Apart from the fee for service option, the
24 managed care option, those are two -- let me say that
25 again more clearly. Apart from the fee for service

1 through the EPSDT request?

2 A. Correct.

3 Q. We talked I think earlier about FMAP, and let's
4 just review that again briefly to make sure that we
5 understand what it is. What is the Federal Medical
6 Assistance Percentage?

7 A. It is the match rate, meaning the percentage of
8 federal dollar that we get with regards to what the
9 state rate is. So when we talked earlier, and I'm
10 rounding, but we're usually around this percentage, it's
11 usually like a 3 to 1. But it does vary, you know,
12 sometimes it's 74.19 one year, sometimes it might be
13 75.20, you know, so it's around that usually for West
14 Virginia Medicaid.

15 There are times when the FMAP is different. The
16 FMAP for the expansion population is a 90/10 FMAP
17 according to -- and that was in the ACA. So when we
18 first expanded that was actually at 100 percent and it
19 went down at 30 years and it levels out at a 90/10 match
20 for your expansion population. But right now because of
21 the pandemic in general I'm around an 81 percent of FMAP
22 because there's an enhanced FMAP right now due to the
23 pandemic and the inability, it's to help pay for all the
24 extra people that are on the Medicaid rolls that are not
25 screened off.

1 the document has the Bates stamp DHHRBMS020685. Do you
2 see that?

3 A. Yes.

4 Q. And do you recognize this document?

5 A. Yes.

6 Q. Does it appear to be a table showing the monthly
7 number of Medicaid members for 2022?

8 A. Yes.

9 Q. And does this appear to be formatted in a
10 similar table to the one that we just reviewed?

11 A. Yes.

12 Q. And does this table indicate that in March of
13 2022 there were a total number of 628,825 Medicaid
14 members?

15 A. Yes.

16 Q. And based on the numbers that you just reviewed,
17 your best estimate of the current number of Medicaid
18 participants is still 615,000 approximately, is that
19 correct?

20 A. It looks like I was a little off, it's 628.

21 Q. So 628. And I recognize we're still in the
22 month of March, I'm not sure if there's much fluctuation
23 within a month or not, but is the number in this chart
24 for March of 2022, to your knowledge does that remain
25 accurate for the approximate number of total Medicaid

1 Q. Okay. Let me pause just a moment. Okay. And
2 do you see below that a request No. 1 that reads,
3 "Identify all persons with involvement in or knowledge
4 of the creation, review and maintenance of the exclusion
5 of coverage for gender confirming care in the health
6 plans offered through West Virginia's Medicaid program"?

7 MS. CYRUS: Let me state an objection on
8 the record to the extent that she has not been
9 designated to testify to that interrogatory as a 30(b)
10 witness, but of course you can ask her as a fact
11 witness.

12 MS. BORELLI: Thank you, Lou Ann.

13 Q. Did I read that correctly?

14 A. Yes.

15 Q. And if you scroll to Page 2, do you see that
16 you've been identified as somebody knowledgeable on that
17 topic?

18 A. Yes.

19 Q. When was the exclusion first created?

20 A. I do not know when it was first created. I know
21 that it has been here ever since I've been at Medicaid
22 and I believe in researching all this I think the
23 earliest we found it was maybe in a policy back in 2004.

24 Q. Okay. Do you know why the exclusion was
25 created?

1 A. I do not know, I wasn't here. I think it's, I
2 think it's in a policy manual listed with a bunch of
3 different exclusions.

4 Q. Are you aware of anyone who would know why the
5 exclusion was created?

6 A. There is no one here that would know. Our
7 turnover in staff does not allow for people to have been
8 here that long pretty much, but no, I don't know anybody
9 that would know.

10 Q. So you aren't familiar with the process that led
11 to the creation of the exclusion?

12 A. I'm not.

13 Q. And are you familiar with what might have been
14 considered at the time the exclusion was created?

15 A. I don't know. It would just be speculation that
16 they were just going down a list of services that were
17 not covered at the time.

18 Q. And has BMS reviewed whether to maintain the
19 exclusion since it was created?

20 A. I'm sorry, I can't hear your question.

21 Q. Has BMS reviewed whether to maintain the
22 exclusion since it was created?

23 A. We have not reviewed that particular policy.

24 Q. So can you then tell me a little bit about how
25 exclusions work. Do exclusions remain in the Medicaid

1 Q. So just before a break we were having a
2 technical issue with the document that was introduced as
3 Plaintiff's Exhibit 15. We think we have resolved the
4 issue by uploading a duplicate of the same document,
5 which should now be in your exhibits folder as
6 Plaintiff's 16. So the record will reflect that the
7 documents are the same and that exhibit appears twice as
8 15 and 16 because of this technical issue.

9 Commissioner Beane, are you now able to open up
10 what's marked as Plaintiff's Exhibit 16?

11 A. I have opened it.

12 Q. Please take a moment to review the document and
13 let me know when you are done.

14 A. I've looked at it.

15 Q. Have you seen this document before?

16 A. I have.

17 Q. Did you review it in connection with your
18 testimony as BMS's organizational representative today?

19 A. I did.

20 Q. You've been designated to testify about the
21 response to interrogatory No. 2. Please turn to Page 2
22 of the document. In approximately the middle of the
23 page you'll see text that reads, "No. 2, describe in
24 detail the factual basis for each governmental interest
25 that defendants contend supports the exclusion." Did I

1 read that correctly?

2 A. You did.

3 Q. And the response reads, "These defendants state
4 that they provide coverage that is mandated for coverage
5 by the Centers of Medicare and Medicaid Services (CMS).
6 These defendants are constrained by budgetary/cost
7 considerations." Did I read that correctly?

8 A. You did.

9 Q. And are you prepared to testify about this
10 interrogatory as the organizational representative for
11 BMS?

12 A. I am.

13 Q. With respect to interrogatory 2 specifically,
14 what did you do to prepare to testify today?

15 A. I went back and made sure we didn't have a SHO
16 letter, a State Health Officer letter, mandating us to
17 cover the service and, and reviewed our budget to make
18 sure that, well, to make sure that I was aware of when
19 we were going into our budget deficient.

20 Q. So referring to the response to interrogatory 2
21 that I read a moment ago, is that an accurate
22 description of the governmental interest in the
23 exclusion?

24 A. I'm sorry, what?

25 Q. Were you having trouble hearing me or is it that

1 you would --

2 A. Can you say the question again, I was having
3 trouble hearing you.

4 Q. No problem. I'll repeat. Referring again to
5 the response to interrogatory 2 that I read a moment
6 ago, is that an accurate description of the governmental
7 interest in the exclusion?

8 A. Yes, we have no mandate from CMS to provide the
9 coverage.

10 Q. And does that response to interrogatory 2
11 constitute a complete description of all of the
12 governmental interest being claimed in the exclusion, it
13 does, correct?

14 A. Correct.

15 Q. What is the factual basis for the statement in
16 response to interrogatory 2 that defendants, "Provide
17 coverage that is mandated for coverage by the Centers
18 for Medicare and Medicaid Services"? Let me repeat,
19 what is the factual basis for that assertion?

20 A. So Medicaid has mandated coverages that CMS
21 assured that we have state plans for and that we are
22 covering those services. And so if there's a service
23 that they are mandating all 50 states and territories to
24 cover that not all 50 states and territories are
25 covering, they will send out what's called the State

1 Health Officer letter and it will direct us to add that
2 coverage.

3 Q. I think you said a moment ago that you looked to
4 see if there was a SHO letter, I assume that's the
5 abbreviation S-H-O, correct?

6 A. Correct.

7 Q. And that abbreviation refers to State Health
8 Officer letter?

9 A. Correct.

10 Q. And a SHO letter is a letter that's sent by CMS,
11 is that correct?

12 A. Correct.

13 Q. And you said a SHO letter might be sent if
14 there's a mandated service that a state Medicaid program
15 is not covering, correct?

16 A. Correct. So the most recent example that we
17 have of that, which is fairly recent because sometimes
18 you can go quite a while without having it, is the
19 medication assisted treatment services. Every state is
20 mandated to cover all forms of MAT services, and so if
21 your state was not previously covering all those
22 services, you had to do a state plan. Or if you were
23 covering these services but they were not outlined
24 correctly in your state plan, you had to revise your
25 state plan to assure CMS that you were covering those

1 services without any kind of restrictions that would not
2 allow individuals to receive those MAT services.

3 Q. And did you just use the abbreviation MAT?

4 A. Yeah, that's medication assisted treatment
5 services, it's services for persons who are with
6 substance use disorder.

7 Q. Understood. So you said in connection with
8 preparing to testify as the organizational
9 representative today you looked to see if CMS had sent a
10 SHO letter to BMS about gender affirming surgery, is
11 that correct?

12 A. Correct.

13 Q. And did you find any such letter?

14 A. I did not.

15 Q. Are there any other facts that you're aware of
16 that support the governmental interest, which is again,
17 to quote, "Defendants state that they provide coverage
18 that's mandated for coverage by CMS," are there any
19 other facts that support that governmental interest?

20 A. I cannot find any directive from CMS telling me
21 I have to cover this service. If there was, we would
22 have to cover the service or lose billions of dollars,
23 and we would not be able to put that at risk.

24 Q. Understood. And are there any other facts that
25 you're aware of that are related to that interest?

1 A. Not that I'm aware of.

2 Q. So I think you testified earlier that counseling
3 is covered for treatment of gender dysphoria through the
4 Medicaid program, is that right?

5 A. Correct.

6 Q. Do you have knowledge of why counseling is
7 covered for gender dysphoria?

8 A. We do not have a restriction on the diagnosis
9 code of why you might seek counseling, it might be for
10 situational depression, it might be for schizophrenia,
11 it could be for gender dysphoria, it could be for a
12 variety of reasons.

13 Q. And who made the decision to allow coverage for
14 counseling even if the only diagnosis code for the
15 counseling is gender dysphoria, was it BMS that decided
16 to do that?

17 A. BMS has decided not to edit based on diagnosis
18 for counseling, meaning if your doctor, your therapist
19 thinks you need some counseling because of whatever
20 reason, we don't have an edit that says you can only get
21 counseling for these five diagnoses. You can receive
22 counseling initially for any diagnosis.

23 What will come into play is if you're going to
24 counseling and you've been going for a few months and
25 there's no progress and you want to continue to go to

1 A. No, because our state plan is written for
2 counseling. I'd have to go back to review it, but I
3 think it's any kind of behavioral health diagnosis. We
4 don't have it specified out with regard to what kind of
5 behavioral health diagnosis you might have.

6 Q. And are there any restrictions ongoing using the
7 federal funding that West Virginia Medicaid receives to
8 pay for counseling received for a diagnosis of gender
9 dysphoria?

10 A. No, we receive FMAP for that.

11 Q. So you can use those matching federal dollars to
12 provide counseling for gender dysphoria, correct?

13 A. Yes. All of our counseling is a behavioral
14 health service that is matched by the federal
15 government.

16 Q. And as we discussed earlier, hormone therapy for
17 the treatment of gender dysphoria is covered through the
18 Medicaid program, correct?

19 A. Correct.

20 Q. BMS previously excluded coverage of hormone
21 therapy for gender dysphoria, is that right?

22 A. You are correct.

23 Q. And when did BMS first exclude coverage for
24 hormone therapy?

25 A. I do not know when we first did it. I believe

1 we took the edit off in 2017.

2 Q. Does it ring a bell if I ask whether BMS would
3 have first started excluding coverage in 2011?

4 A. Is that when the MCO's had the pharmacy benefit?

5 Q. I'm not sure of the answer to that, and it
6 sounds like that doesn't ring a bell. So I think your
7 testimony is you are unsure when the edit first, or when
8 hormone therapy was first excluded for gender dysphoria,
9 but a decision was made in 2017 to allow coverage for
10 hormone therapy for gender dysphoria, correct?

11 A. Correct.

12 Q. And do you have knowledge of why hormone therapy
13 is covered for gender dysphoria?

14 A. I believe the pharmacy director at the time, I
15 think then it was Vicki Cunningham, recognized some of
16 the denial of the claims and, and worked with the team
17 to remove the edit.

18 Q. And who was the decision-maker about providing
19 that coverage?

20 A. She would have asked me like is it okay if I do
21 this.

22 Q. And did you approve when she asked that
23 question?

24 A. I did.

25 Q. Did BMS have to approve the change to begin

1 covering hormone therapy for gender dysphoria?

2 A. We did not have to do a state plan for that.

3 Q. And why did you not have to get BMS approval to
4 do a state plan for coverage of hormone therapy for
5 gender dysphoria?

6 MS. CYRUS: Objection, asked and answered.
7 But you can answer again.

8 A. We were already covering hormones, so it was
9 just resubmitting the edit.

10 Q. And are there any restrictions on using the
11 federal funding that West Virginia Medicaid receives to
12 pay for hormone therapy for gender dysphoria?

13 A. No.

14 Q. So BMS can use the federal funding it receives
15 to help pay for hormone therapy for gender dysphoria,
16 correct?

17 A. Yes.

18 Q. We're going to go ahead and introduce our next
19 exhibit and I will tell you when it's loaded.

20 (Exhibit 17 marked for identification.)

21 Q. Okay. Go ahead and click on that folder and I
22 believe you should see what's been marked as Plaintiff's
23 Exhibit 17.

24 A. I see it.

25 Q. Great. Please take a moment to review this

1 MS. CYRUS: Object, calls for speculation.
2 If you know, you can answer.

3 A. I mean, people get hysterectomies all the time
4 and so, you know, if it's a female requesting a
5 hysterectomy, depending on what the doctor put on the
6 prior authorization, there could be a number of reasons,
7 and that might be one of the reasons in addition to
8 other reasons that they are getting a hysterectomy.

9 Q. And has BMS ever had any communication with CMS
10 about gender affirming surgeries?

11 A. Not that I'm aware of.

12 Q. So BMS has never inquired whether expanding
13 access to surgeries that are already covered for other
14 diagnoses would be approved for purposes of treating
15 gender dysphoria?

16 MS. CYRUS: Object to the form of the
17 question. But you can answer.

18 A. Not that I'm aware of.

19 Q. Is puberty delaying treatment for gender
20 dysphoria ever covered through the Medicaid program?

21 A. I don't believe we've ever covered it, but I
22 can't tell you 100 percent. I mean, I do not think
23 we've covered it.

24 Q. But it might be covered through the EPSDT
25 process, correct?

1 A. Maybe.

2 Q. And just to clarify, so have you ever covered
3 puberty delaying treatment or the treatment for
4 precocious puberty?

5 A. I'm sorry, what?

6 Q. Have you ever covered puberty delaying treatment
7 for precocious puberty?

8 MS. CYRUS: Object to the form of the
9 question. If you know, you can answer.

10 A. I don't know if I know that answer, I don't know
11 if I know what that even means.

12 Q. Okay. Give me just one moment to look over my
13 notes. All right. We're going to introduce our next
14 exhibit. I will let you know when it's loaded.

15 (Exhibit 18 marked for identification.)

16 Q. All right. Go ahead and click on the exhibits
17 folder and you should see a document marked as
18 Plaintiff's Exhibit 18. Let me know when you've had a
19 moment to open the document and familiarize yourself
20 with it.

21 A. I have familiarized myself with it.

22 Q. In the lower right-hand corner the first page of
23 the document has a Bates stamp DHHRBMS012319. Do you
24 see that?

25 A. It's 319, did you say 311?

1 Q. If I did, I misspoke, it should be
2 DHHRBMS012319, is that correct?

3 A. Yes.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. And what is it?

7 A. It's an email trail around a specific case of a
8 request for I believe it was an 11-year-old who wanted
9 to delay puberty.

10 Q. Okay. Please go to Page 2 of the pdf, and that
11 should be Bates stamped DHHRBMS012320. Do you see that?

12 A. Yes.

13 Q. And do you see an email from Dr. James Becker
14 dated October 7, 2020?

15 A. Yes.

16 Q. He states, "Cindy, I'm still considering the
17 appeal that is on my desk today. I was able to review
18 the recommendations of the American Academy of
19 Pediatrics in regard to treatment of TGD. They do
20 support the use of medication to delay pubertal
21 development. The guidelines is filled with precautions
22 about side effects and possible future consequences.
23 They make the point that the effect of these medications
24 is reversible if the medication is stopped. They argue
25 that this approach may give providers and counselors a

1 chance to ensure that the patient is fully committed to
2 this change and understands what they are choosing. I
3 think on the basis of that information, I am inclined to
4 approve the treatment with a host of warnings about
5 provider responsibility for monitoring safety and
6 efficacy." Did I read that correctly?

7 A. Yes.

8 Q. Referring again to that page, did you respond
9 the same day to say, "Please hold on the approval and
10 let me discuss with leadership"?

11 A. Correct.

12 Q. Who were you referring to when you referenced
13 leadership in that email?

14 A. My guess is I probably ran this by Deputy
15 Secretary Samples.

16 Q. Do you think you might have conferred with
17 anyone else or likely just Deputy Secretary Samples?

18 A. I remember this case being discussed with Deputy
19 Secretary Samples and then we also had a call on this
20 case with Dr. Becker and internal individuals here at
21 BMS, I believe Jennifer Myers was on the call, and then
22 I also think we discussed it in our leadership team
23 which consisted of the people on this email along with
24 Brad is not on the email, but he would have been on the
25 leadership team when Dr. Becker brought it up.

1 Q. So it sounds like one of the consultations that
2 you would have done was with Deputy Secretary Samples,
3 is that correct?

4 A. Correct.

5 Q. And do you recall what he said when you
6 consulted with him?

7 A. I don't recall. I'm pretty sure I outreached
8 and just asked him his thoughts and I don't recall that
9 he gave an answer either way. He probably pushed it
10 back in our court as to make the decision.

11 Q. And then it sounds like it was also discussed
12 with what you described as the leadership team, is that
13 correct?

14 A. Correct.

15 Q. And that included the people that are on this
16 email chain.

17 A. So Dr. Becker would bring issues like this to
18 the leadership team, and so it would be the three
19 deputies, Dr. Becker and Riley Romeo who is my general
20 counsel who makes up the BMS leadership team, and
21 myself.

22 Q. And who are the three deputies?

23 A. Fred Lewis, Sarah Young and Becky Manning.

24 Q. And do you recall what the discussion was with
25 the leadership team about this particular case?

1 MS. CYRUS: I'm going to object to the
2 extent that if Riley Romeo was involved, and he's
3 general counsel for BMS and if he gave legal advice, I'm
4 going to object to attorney-client privilege. But
5 beyond that, you can answer.

6 A. Honestly, I don't recall what was all discussed
7 other than Dr. Becker probably brought it up as an issue
8 that we need to be figuring out what we're going to do
9 with this individual case that was laid on his desk.

10 Q. And was a decision eventually made about this
11 individual case?

12 A. Yes.

13 Q. And do you recall who made the decision about
14 this case?

15 A. I did.

16 Q. And what was the, what was your decision about
17 this case?

18 A. We did not cover -- I believe it ended up not
19 being a pharmaceutical, but a device perhaps, and we did
20 not cover, we did not cover the request to delay
21 puberty.

22 Q. And when you made that decision, what was the
23 basis for your decision?

24 A. Just the discussions with Dr. Becker and the
25 nurses and the concern about the age of the individual

1 A. It's all about how we, how we do the eligibility
2 based on MAGI income, but different components of MAGI
3 income of what you can exclude and include in order for
4 individuals to be eligible for the expansion.

5 Q. Thank you. That's helpful. Please scroll down
6 to Page 42 out of 45 of the pdf.

7 A. My apologies, I didn't scroll down enough on the
8 first one, and so this is another, it starts another
9 letter here. What page am I on here? Sorry. It's on
10 Page 19 started another letter.

11 Q. That's helpful. Thank you for the
12 clarification. And scroll with me, if you will, to
13 Page 42 of the pdf. And in case the system doesn't tell
14 you what page you're on as you scroll, you'll be looking
15 for a page that has a Bates ending with the numbers 220.

16 A. Okay, I'm there.

17 Q. And do you see a title at the -- actually, for
18 clarity, let me make sure I've got the complete Bates
19 stamp. The complete Bates stamp on this page is
20 DHHRBMS016220. Do you see a title at the top of the
21 page that says, "Mandatory and optional Medicaid
22 benefits"?

23 A. I do.

24 Q. Is that followed by a listing of mandatory
25 benefits?

1 A. It is.

2 Q. And can you describe again what mandatory
3 benefits are?

4 A. Those are benefits that CMS says you have to
5 cover this benefit in order to participate in the
6 Medicaid program.

7 Q. And does this look to you like an accurate and
8 complete list of the mandatory benefits required by CMS?

9 MS. CYRUS: Object to the form of the
10 question. If you know, you can answer.

11 A. It does, it looks like what's probably on CMS's
12 Website.

13 Q. And then below that list do you see a list of
14 optional benefits?

15 A. I do.

16 Q. And these are optional benefits provided by BMS,
17 correct?

18 A. By BMS?

19 Q. Yes.

20 A. No. These are just optional benefits that the
21 state can choose to provide, these are not necessarily
22 West Virginia BMS optional benefits.

23 Q. And you testified that BMS does provide a number
24 of optional benefits, correct?

25 A. We do.

1 Q. Which benefits on this list do you recognize as
2 optional benefits that BMS provides?

3 A. Well, we definitely provide prescription drugs.
4 The clinic services, I would have to look at how they're
5 defining that because we have a number of clinics, but I
6 would like to make sure that it's not a clinic that we
7 wouldn't cover, I'm not sure what the definition of that
8 is on this particular Website.

9 We do physical therapy, occupational therapy,
10 speech and hearing. We do have respiratory care, we do
11 have a number of screening and preventative services, we
12 do cover podiatry. We have a limited optometry benefit,
13 we have a limited adult dental benefit, we do not cover
14 eyeglasses, we do have a chiropractic service, we do
15 have private duty nursing, we do have personal care, we
16 do have hospice.

17 I would have to see the definition of this case
18 management, but we do have a targeted case management
19 service. We do have ID services, we do have ICF, IMD
20 services. We do not have 1915(i) services, we do not
21 have 1915(j) services, we do not have 1915(k) services.
22 I do not believe we have TB related services, I'm not
23 sure what those, I mean, I know what it is, but I'm not
24 sure of what services they're talking about there. We
25 do cover inpatient psychiatric care for individuals that

1 are 21, and we do have health home services.

2 Q. And are you aware of any other optional services
3 that BMS provides that you haven't just listed?

4 A. They do not have -- we have 1915(c) home and
5 community based waivers and I don't believe they have
6 the 1915(c) services on this list, and we also have a
7 1115 demonstration waiver for SUD, substance use
8 disorder services as well, and neither of those are on
9 this list.

10 Q. Is counseling including counseling for gender
11 dysphoria, would that follow one of the services under
12 the mandatory list or under the optional list of
13 benefits?

14 A. It would be both. So our, under your mandatory
15 list you'll see federally qualified health centers. Our
16 FQHC's also provide behavioral health and they receive a
17 separate encounter for behavioral health, so they could
18 be receiving those services under, the counseling under
19 the mandatory there.

20 And then under optional benefits, let's see,
21 where was that. They would receive it mainly through
22 our diagnostic screening, preventative and rehab
23 services. And so rehab services, a lot of your
24 behavioral health services are considered rehabilitative
25 in nature and they're under the rehab part of your state

1 many years ago, and we were sued and then after that we
2 did a state plan. I don't recall, I wasn't in the
3 position I'm in now and so when that happened I don't
4 recall if it was a settlement or if we lost or, but I do
5 know we did a state plan to cover those surgeries.

6 Q. And that meant that state plan had to be
7 approved by CMS, correct?

8 A. Correct.

9 Q. All right. So just to clarify one more thing.
10 You said in preparing for your testimony today you were
11 looking at various documents by CMS and that were
12 transmitted to BMS, and you didn't see any documents
13 prohibiting or requiring coverage for gender confirming
14 care, correct?

15 A. I do not believe there are any documents that
16 prohibit it, but I do not believe there are any
17 documents that mandate it either.

18 Q. Okay. So the decision to not cover the care
19 resides with BMS, correct?

20 MS. CYRUS: Object to the form of the
21 question.

22 A. Yes.

23 Q. Was that correct?

24 A. Correct.

25 Q. All right. I think we're going to turn now to

1 Q. Towards the bottom of the page you'll see text
2 that reads, "No. 7, admit that the Medicaid plan only
3 covers care that is medically necessary." Did I read
4 that correctly?

5 A. Correct.

6 Q. And the response reads, "Response. Admitted,
7 however, these defendants deny any suggestion that
8 Medicaid covers all care as medically necessary." Did I
9 read that correctly?

10 A. You are correct.

11 Q. Are you prepared to testify about this request?

12 A. Yes.

13 Q. With respect to your request for admission
14 specifically, what did you do to prepare to testify
15 today?

16 A. I'm familiar with what services we cover and do
17 not cover.

18 Q. To make sure that I understand this response,
19 can you confirm that in order for care to be covered by
20 Medicaid it must be medically necessary?

21 A. Yes, we cover medically necessary services.

22 Q. In other words, if coverage is covered by
23 Medicaid, the care has been deemed medically necessary,
24 correct?

25 A. Correct.

1 Q. And if the care is not medically necessary it
2 would not qualify for coverage under Medicaid, correct?

3 A. Correct. The one exception to that would be an
4 EPSDT 4-4 plus over on ameliorating the condition,
5 that's a little bit broader term of medically necessary.
6 But in the end it's still medically necessary to
7 ameliorate the condition, it's just a little bit
8 broader.

9 Q. That's helpful. Based on the exclusion for
10 gender affirming surgery from the Medicaid plan, is
11 gender affirming surgery excluded regardless of whether
12 it's medically necessary for a specific member?

13 MS. CYRUS: Object to the form of the
14 question. If you know, you can answer.

15 A. We do not cover that surgery regardless of
16 whether or not there's a physician or a review team
17 saying it's medically necessary.

18 Q. We can move on now to another exhibit. So we'll
19 go ahead and look at it when it's ready.

20 (Exhibit 22 marked for identification.)

21 Q. Okay. Go ahead and click on the exhibit folder
22 and you should be able to open what's been marked as
23 Plaintiff's Exhibit 22.

24 A. I have it open.

25 Q. Please take a moment to review the document and

1 Q. You said the legislature rejected an opportunity
2 to provide blood pressure cuffs this session that would
3 have cost around \$500,000?

4 A. It was a little over 500,000, I can't remember
5 the exact number, Lou Ann, but it was 500 and change,
6 maybe 520, something like that.

7 Q. Okay. And what is the status of Medicaid's
8 budget, you made reference to it earlier?

9 A. We currently have actually -- sorry, it's late
10 in the day. We currently have a surplus, but we are
11 predicting that we will be in the red in two years from
12 now.

13 Q. Okay. And what does that mean that you will be
14 in the red in two years?

15 A. We will have a budget deficit.

16 Q. Would that indicate that BMS would have to cut
17 existing services?

18 MS. BORELLI: Object to form.

19 A. We would either have to cut existing services or
20 receive additional appropriations from the legislature
21 to continue services of this.

22 Q. Based on the existing budget, would Medicaid
23 have to add funds to cover transgender surgeries?

24 MS. BORELLI: Object to form.

25 A. We would have to add dollars in order to cover

1 surgery was funded?

2 MS. CYRUS: Object to the form of the
3 question. If you know, you can answer.

4 A. I'm sure once the SPA was approved, then it's
5 funded like our other medical services with the state
6 and federal match.

7 Q. Have you ever performed research about the cost
8 of gender affirming surgery?

9 A. I have not.

10 Q. Have you ever reviewed research about the cost
11 of gender affirming surgery?

12 A. I at one time asked Dr. Becker if he could look
13 into like how much the states that are covering this,
14 how much their spend was, but I don't recall ever
15 receiving anything from him with regards to it.

16 Q. Are you aware of anyone else within BMS who has
17 researched the cost of gender affirming surgery?

18 A. Not that I'm aware of.

19 Q. And is there anything you considered related to
20 the cost of gender affirming surgery that we haven't
21 discussed?

22 A. I don't believe so.

23 Q. All right. I think those are all the questions
24 we have for the moment, preserving our right to ask
25 further questions if Lou Ann has additional questions

1 for you now.

2 MS. CYRUS: I don't have any further
3 questions and we will have her read.

4 (Proceedings concluded for the day at
5 2:21 p.m., 03-29-2022)

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REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Commissioner Cynthia Beane on the 29th day of March 2022, and that the witness was by me first duly sworn to tell the whole truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

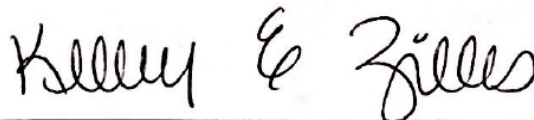
That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was reserved.

WITNESS MY HAND AND SEAL THIS 29th day of March 2022.



Kelley E. Zilles, RPR
Notary Public, Washington County, Minnesota
My commission expires 1-31-2025

Exhibit 10

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

Christopher Fain, individually and on behalf of all
others similarly situated, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 3:20-cv-00740

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF DR. JAMES BECKER

DATE: March 30, 2022

TIME: 7:00 a.m. CST

PLACE: Veritext Virtual Videoconference

REPORTED BY: KELLEY E. ZILLES, RPR (Via Videoconference)

JOB NUMBER: 5096167

1 APPEARANCES

2
3 On Behalf of the Plaintiffs (Via Videoconference):

4 CARL CHARLES, ESQ.

5 TARA L. BORELLI, ESQ.

6 Lambda Legal Defense and Education Fund, Inc.

7 158 West Ponce De Leon Ave., Suite 105

8 Decatur, Georgia 30030

9 470.225.5341

10 ccharles@lambdalegal.org

11 tborelli@lambdalegal.org

12
13 AVATARA SMITH-CARRINGTON, ESQ.

14 Lambda Legal Defense and Education Fund, Inc.

15 3500 Oak Lawn Avenue, Suite 500

16 Dallas, Texas 75219

17 214.219.8585

18 asmithcarrington@lambdalegal.org

19
20 NICOLE J. SCHLADT, ESQ.

21 Nichols Kaster PLLP

22 80 South 8th Street, Suite 4700

23 Minneapolis, Minnesota 55402-2224

24 612.256.3291

25 nschladt@nka.com

1 On Behalf of Defendants William Crouch; Cynthia Beane;
2 and West Virginia Department of Health and Human
3 Resources, Bureau for Medical Services (Via
4 Videoconference):

5 KIMBERLY M. BANDY, ESQ.

6 LOU ANN S. CYRUS, ESQ.

7 Shuman McCuskey Slicer, PLLC

8 1411 Virginia Street East, Suite 200

9 Charleston, West Virginia 25301

10 304.345.1400

11 kbandy@shumanlaw.com

12 lcyrus@shumanlaw.com

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18 NOTE: The original deposition transcript will be
19 delivered to Attorney Smith, Esq., as the taking
20 attorney.

21

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25

1 Q. Okay. So, Dr. Becker, we're going to talk a
2 little bit about your background, okay?

3 A. Yes.

4 Q. Dr. Becker, you are the medical director of BMS
5 at the West Virginia Department of Health and Human
6 Resources, correct?

7 A. That's correct.

8 Q. All right. And what responsibilities fall under
9 your role within BMS?

10 A. It's quite a long list, but I'll try to tell you
11 the things that I concentrate on predominantly.

12 Q. Okay.

13 A. So I've been there for 14 years and over the
14 14 years my obligations and responsibilities have
15 evolved a little. Part of my work involves review of
16 coverage decisions for any number of medical treatments
17 or diagnostics. And so I spend quite a bit of my time
18 actually reviewing coverage codes and talking about
19 medical evidence as it relates to these codes.

20 I also have responsibility for interaction with
21 the medical providers who are enrolled in our system. I
22 spend a fair amount of time on the phone talking to
23 them, explaining our policies, trying to get their
24 participation and get them involved in some of our
25 special projects that we do.

1 I also review pharmacy and pharmacy cases.
2 Pharmacy appeals come to me with great regularity. We
3 cover about a million prescriptions each month and so
4 there will be some that need to be reviewed, so they do
5 come to me. I have interaction with other agencies like
6 CMS, I have interaction with various support groups that
7 state Medicaid programs rely on, things like the
8 Medicaid Medical Director Network, ASTHO, which is the
9 State Health Officers Organization, a variety of those
10 kind of agencies. So as you can tell, it's highly
11 variable.

12 Q. Okay.

13 A. And it's grown. When I first began the only
14 obligation I had when I first began working for Medicaid
15 was to, was to look at files regarding surgical
16 procedures that didn't match normal codes, and that's
17 still a part of my job, but it's not much of a job.

18 Q. I understand that. And so just a quick
19 follow-up on that. So you said that you've been with
20 BMS for 14 years, am I correct?

21 A. That's correct.

22 Q. And have you been with BMS in your capacity now,
23 so as the medical director for 14 years?

24 A. Yes.

25 Q. Okay. Dr. Becker, who is your direct

1 supervisor?

2 A. My direct supervisor would be Commissioner
3 Beane.

4 Q. Okay. And how often do you report to her on
5 your work?

6 A. At least weekly.

7 Q. Okay.

8 A. And often more than that. I am onsite in the
9 office, officially I'm there two days a week, and then I
10 do some work by telehealth or, you know, on the
11 computer. And so when I'm there my office is two doors
12 down from her office and it's very easy for me to walk
13 by and talk to her or see her when I get a cup of coffee
14 or something like that, so we regularly converse.

15 Q. I understand. Do you have standing meetings
16 with Commissioner Beane?

17 A. I do, every, every Monday afternoon would be the
18 typical schedule and it would be a meeting for about an
19 hour, hour and a half to go over any issues that we
20 have.

21 Q. Got it. Thank you for that. Dr. Becker, does
22 anyone report to you?

23 A. Because the way that my position is structured
24 there, I don't have real responsibility for overseeing a
25 lot of people. I don't have anyone who directly reports

1 to me whose time sheet I sign off on or anything like
2 that, but there is a group that is a policy team that
3 meets with me every Wednesday morning. And so while I
4 don't have direct responsibility for any of them, they
5 all work in their own units, they do report to me every
6 Wednesday morning on issues that we need to make
7 decisions about.

8 Q. Okay. Who's part of the, I guess who makes up
9 the policy team that indirectly reports or has those
10 meetings with you?

11 A. Well, Jennifer Myers is probably one of the key
12 people, Carrie Mallory is a key person, Stacy Hanshaw,
13 Virginia Evans, Richard Ernest, Garland Holley. Do you
14 want me to do an exhaustive list? It's about 12 or 13
15 people.

16 Q. That's helpful. Thank you for that, Dr. Becker.
17 Who are the other team members in your specific
18 department?

19 A. Excuse me, I think I missed the question, did
20 you say who are?

21 Q. Yes.

22 A. Depends. I had a nurse practitioner until
23 recently and she has resigned, retired, and we had a
24 psychologist and he has resigned. So I think I would
25 have to report today, I don't have anyone.

1 Q. Okay. So is it fair to say then that there were
2 nurse practitioners and at least a psychologist within
3 BMS who regularly met with you?

4 A. Yes, definitely.

5 Q. Thank you. And who were those people?

6 A. They would have been Paula Hamady, she's a nurse
7 practitioner, Ken Devlin, who's a psychologist.

8 Q. Okay.

9 A. They specifically met with me. And on the
10 periphery I have a psychiatrist whom we've contracted
11 with to deal with adult, to deal with child and
12 adolescent psychiatric issues, his name is Kelly Melvin,
13 Dr. Melvin. And we have a family practitioner who helps
14 with our pharmacy reviews, her name is Hyla Harvey. Dr.
15 Harvey does most of the difficult pharmacy reviews now.

16 Q. Okay. I do not think I caught the last name
17 of -- you said Dr. Harvey? I mean the first name of Dr.
18 Harvey.

19 A. Hyla, H-Y-L-A.

20 Q. Dr. Becker, have you held a previous job with
21 BMS other than medical director?

22 A. No, I have not.

23 Q. Okay. Dr. Becker, we're going to talk about
24 some of your other current positions, okay?

25 A. Sounds fine to me.

1 seminar there, no. I've had, I've had some of these
2 workshops that I've attended, but as far as just formal
3 enroll, pay tuition, take a class, get a grade, have a
4 transcript, no, I can't really identify anything.

5 Q. Okay. Dr. Becker, we're here to take a
6 deposition of an organizational representative for BMS,
7 do you understand that?

8 A. Say that again, you broke up there.

9 Q. Sure, no problem. We're here to take a
10 deposition of an organizational representative for BMS,
11 do you understand that?

12 A. Yes, I do understand.

13 Q. And you have been designated to give testimony
14 as the organizational representative for BMS on certain
15 topics that we'll discuss today, do you understand that?

16 A. Yes, I do.

17 Q. When were you notified that you would be giving
18 testimony as the organizational representative for BMS
19 on some of the topics plaintiffs have identified?

20 A. I was probably notified four or five months ago
21 when there was a question in a request that had come to
22 our legal unit and I was, I was told that they might ask
23 me to testify to one or two of the questions.

24 Q. Okay. What did you do to prepare to testify
25 today as the organizational representative?

1 Q. Okay.

2 A. So I agree with her, it probably was 2004.

3 Q. Okay. Why was it, to the best of your
4 knowledge, why was the exclusion created?

5 A. I don't know that I can speak to that, but my
6 personal impression is that it arose principally out of
7 the pharmacy questions about administering medications
8 that seemed like they were not aligned with the person's
9 gender. So we had some restrictions on what medications
10 we allow people to receive and we put some edits in
11 place to try to regulate that.

12 For instance, we don't expect, we don't expect
13 men to fill prescriptions for birth control pills, and
14 so a gender edit gets in place for that. Or if there's
15 a mismatch between hormones that we expect to see in use
16 or, you know, drugs that might be unsafe, we have edits
17 to try to restrict the exposure of a potentially unsafe
18 situation. So I think that was the real reason that
19 things were developed in that respect.

20 Q. What was considered when the exclusion was
21 originally adopted?

22 A. I did not have a part in that, so I can't
23 answer.

24 Q. Okay. Dr. Becker, as the organizational
25 representative for BMS are you aware of whether the

1 decision to maintain the exclusion was ever revisited?

2 A. I'm not aware.

3 Q. Okay. Dr. Becker, BMS continues to maintain the
4 exclusion today, correct?

5 A. You're referring to the surgical exclusion?

6 Q. Mm-hmm, yes.

7 A. Yes, we do.

8 Q. Dr. Becker, as the organizational representative
9 for BMS can you explain why BMS has decided to maintain
10 the exclusion today?

11 MS. BANDY: I just want to place an
12 objection that some of the designated topics were
13 addressed by Sarah Young. I mean, to the extent that
14 it's encompassed within Exhibit 1 of the
15 interrogatories, he can answer, but I just want to place
16 that objection.

17 ATTORNEY SMITH: Noted.

18 Q. You can answer.

19 A. So the way that coverage decisions are made is
20 based on medical necessity. And CMS identifies medical
21 necessity as, it's a difficult, it's a difficult
22 definition, but it's a legal construct that guides the
23 decision for coverage based on evidence of effectiveness
24 and safety for the procedures requested. And so in the
25 sense that surgical procedures have not been included as

1 A. I do or would, I don't recall having reviewed
2 any.

3 Q. Because BMS does not cover surgical care for
4 treatment of gender dysphoria, the appeal would be
5 denied or claim not paid, correct?

6 A. That's correct.

7 Q. And the appeal would be denied regardless of
8 medical necessity, correct?

9 A. Well, that is not necessarily true. If the case
10 involves medical necessity for the surgery, it would get
11 reviewed, but it will probably get an initial denial
12 from the contractor who handles those requests for prior
13 authorization. There is a process in place for cases to
14 come to a higher level of appeal. And so the provider
15 who is, who has determined that this is a necessary
16 procedure can come back around with another request and
17 ask for a higher level appeal and consideration.

18 Q. So to confirm, you never reviewed, you never
19 reviewed an appeal regarding surgical appeal?

20 A. I don't recall ever reviewing an appeal for
21 surgical care.

22 Q. And to go back to your last answer for the
23 question before, that higher level appeal would need to
24 be denied, correct?

25 A. It would likely be denied.

1 may have been a typo. GD refers to gender dysphoria.

2 Q. You state that you would be inclined to approve
3 the treatment, correct?

4 A. I do, I said I do support the use of medication,
5 or they do, referring to the Academy of Pediatrics, they
6 do. And then later I said I think on the basis of the
7 information that I'm inclined to approve the treatment
8 with a host of warnings to the provider about provider
9 responsibility for monitoring safety and efficacy.

10 Q. Why did you review the recommendations of the
11 American Academy of Pediatrics?

12 A. It was one of the, it was one of the guidelines
13 that seemed to take on the subject of delaying the onset
14 of puberty reliably. The Academy of Pediatrics is
15 highly respected and it was my feeling that that was a
16 good place to start in getting advice about using a
17 medication of this type off label.

18 Q. This research was undertaken by you to aid in
19 determining whether to approve the treatment, correct?

20 A. That's correct.

21 Q. Dr. Becker, it was later determined that this
22 care would not be covered for this participant, correct?

23 A. That's correct.

24 Q. Who ultimately made that decision?

25 A. The medication that was requested is delivered

1 care approved?

2 A. I don't know because they have, the MCO's have
3 their own medical directors and when it comes to the
4 medical questions, medical coverage questions, they,
5 they make the decisions. So it came in as a pharmacy
6 appeal incorrectly, and even though I was in favor of
7 it, the decision would be made by the MCO.

8 Q. Let's return to the American Academy of
9 Pediatrics recommendation that you reviewed.

10 A. Yes.

11 Q. What do you recall about that recommendation?

12 A. I just, I don't have it in front of me and I
13 wouldn't have memorized it. So I do remember that it
14 seemed to have a good and clear description of gender
15 dysphoria and the challenge of treating gender dysphoria
16 in young patients, and I do remember that it had a
17 fairly clear statement about the potential benefit of
18 halting the development of pubertal changes and the use
19 of GnRH agents as a possible option for that.

20 I do recall also that it cautioned that they
21 likely should not be used for more than a few years and
22 that, and that led me to assume that we would be talking
23 about coverage for potentially two years for this
24 individual and then some decision has to be made about
25 other lines of treatment. And it was a well documented

1 publication, it was clear to me and, you know, that was
2 the basis for my decision.

3 Q. Did the American Academy of Pediatrics recommend
4 coverage of puberty delaying treatment be available in
5 at least some cases?

6 A. I think they did, yes.

7 Q. Dr. Becker, if a participant has a diagnosis of
8 precocious puberty would BMS approve the use of Vantas
9 for that condition?

10 A. Yes, we would.

11 Q. Just not for the treatment of gender dysphoria,
12 correct?

13 A. Correct. At least it would be approved for
14 gender dysphoria. If the patient -- well, let's put it
15 this way. If this patient had been traditional Medicaid
16 and we were making the decision about coverage of
17 medical cost, my recommendation would have been this is
18 appropriate with proper precautions and we'll go ahead
19 and cover, that would be my recommendation. You can see
20 that in the subsequent trail here of the email.

21 Q. All right.

22 A. And that's, it's available, hormone therapy is
23 available with proper indication.

24 Q. I'm going to introduce another exhibit.

25 (Exhibit 4 marked for identification.)

1 Q. Okay. I believe you should see what has been
2 marked as Exhibit 0004.

3 A. Yes, I do.

4 Q. Okay. I'm showing Dr. Becker what has been
5 marked as Exhibit 0004 titled, "Defendants' ninth
6 supplemental response to plaintiffs' first set of
7 requests for production to Defendants William Crouch,
8 Cynthia Beane and West Virginia Department of Health and
9 Human Resources, Bureau for Medical Services." Dr.
10 Becker, you have been designated to testify about the
11 response to request for production 6. Please take a
12 moment to review this document, specifically Page 3. Do
13 you recognize this document?

14 A. Yes, I do.

15 Q. Did you review this document in connection with
16 your testimony as the organizational representative for
17 BMS today?

18 A. I have.

19 Q. On Page 3 you'll see text that reads, "All
20 documents and communications relating to the exclusion
21 and/or gender confirming care considered by the
22 individuals responsible for adopting and/or maintaining
23 the exclusion in the health plans. Please identify the
24 responsive documents by Bates number, this includes but
25 is not limited to, A, documents and communications

1 regarding the safety or efficacy of gender confirming
2 care; B, documents and communications regarding the
3 medical necessity of gender confirming care; and C,
4 documents and communications regarding the costs of
5 gender confirming care." Did I read that correctly?

6 A. Yes, you did.

7 Q. And are you aware that counsel identified you as
8 the organizational representative to testify about
9 documents produced by BMS in response to request for
10 production 6?

11 A. Yes.

12 Q. Are you prepared to testify about this response?

13 A. Yes, I think so.

14 Q. With respect to request for production 6
15 specifically, what did you do to prepare to testify
16 today?

17 A. I have reviewed the various documents and
18 research relationships that we had established asking
19 for information to help guide us on the issues of gender
20 dysphoria, gender transitions and the way we apply and
21 other states apply policies.

22 Q. Please look at that page again while I read the
23 response to request for production 6, "Supplemental
24 response. Upon information and belief seen in the
25 following documents that have previously been produced

1 as part of Exhibit 86, DHHRBMS012313 through 012314;
2 DHHRBMS012318; DHHRBMS012322 through 012323;
3 DHHRBMS012333; DHHRBMS012338; DHHRBMS012434 through
4 012447; DHHRBMS012483 through 012501; DHHRBMS012648
5 through 012653; DHHRBMS012665 through 012668;
6 DHHRBMS012711 through 012823; DHHRBMS013523 through
7 013524; DHHRBMS015304; and DHHRBMS015453 through 1589.

8 The following documents are designated confidential,
9 DHHRBMS012649 through 012653; and DHHRBMS012714 through
10 12823." Did I read that correctly?

11 A. I think you did. That was really pretty good
12 that you got through that, that's quite a list.

13 Q. Yeah, it's a long list. To your knowledge is
14 this list of documents and communications considered by
15 the individuals responsible for adopting and maintaining
16 the exclusion correct?

17 A. To my knowledge it is.

18 Q. To your knowledge is this list of documents and
19 communications considered by the individuals responsible
20 for adopting and maintaining the exclusion complete?

21 A. To my knowledge, it is.

22 Q. Okay. I am going to introduce another exhibit.

23 (Exhibit 5 marked for identification.)

24 ATTORNEY SMITH: Unfortunately, Kelley, I
25 think I mistakenly must have just pressed introduce

1 Q. I will represent to you this corresponds to the
2 third range of Bates numbers identified in response to
3 RFP6. Do you recall that we discussed this document
4 earlier today?

5 A. Yes, I do.

6 Q. This email chain was written in connection with
7 puberty delaying treatment, correct?

8 A. Yes, that is correct.

9 Q. And no other forms of gender affirming care such
10 as surgery, correct?

11 A. That is right.

12 Q. This email chain was created with reference to
13 review of an appeal of a denial of coverage, correct?

14 A. Yes, that is correct.

15 Q. This email chain was not part of a process of
16 considering whether to remove the exclusion from the
17 Medicaid program, correct?

18 A. When you say remove the exclusion, you're
19 suggesting remove exclusion for surgical?

20 Q. Yes.

21 A. No, it was not.

22 Q. Did BMS review the Endocrine Society guidelines
23 in connection with this email chain?

24 A. Yes, ultimately we did.

25 Q. In your review of the Endocrine Society

1 guidelines in connection with this email chain, what do
2 you recall?

3 A. All I recall is that the Endocrine Society also
4 considered delaying the onset of puberty as an
5 appropriate form of treatment for individuals in the
6 diagnosis of gender identity disorder.

7 Q. Okay. I am going to introduce another exhibit.

8 (Exhibit 6 marked for identification.)

9 Q. Dr. Becker, do you see what has been marked as
10 Exhibit 0006?

11 A. Yes, I do.

12 Q. I am showing Dr. Becker what has been marked as
13 Exhibit 0006, it is an email with the subject, "Gender
14 dysphoria." In the lower right-hand corner the document
15 is Bates stamped DHHRBMS012333. Do you see that?

16 A. Yes, I've got it.

17 Q. Okay. I will represent to you that this
18 corresponds to the fourth range of Bates numbers
19 identified in response to RFP6. Please take a moment to
20 review this email. Do you recognize this email?

21 A. Yes, I do, that's the further discussion of the
22 case that we had been discussing regarding Vantas.

23 Q. Please turn to the first full paragraph where it
24 reads, "That is why it's such a difficult decision. The
25 provider quotes guidelines from the Endocrine Society

1 the ninth Bates range identified in RFP6. Please take a
2 moment to review this email. Do you recognize this
3 email?

4 A. Yes, I do. I think I was involved in the
5 beginning of the discussion and then it got away from me
6 a little bit, but yes.

7 Q. Okay. Please scroll down to the page with the
8 Bates stamp DHHRBMS012666 where it reads, "Unfortunately
9 Jim and I discussed this case today before I saw your
10 email. I did determine that this isn't coverable
11 through pharmacy services because Vantas is a medical
12 claim, it requires surgical implementation. We were in
13 favor of approving their request, however." Did I read
14 that correctly?

15 A. You did. I'm having a little difficulty moving
16 the page up here, for some reason my computer doesn't
17 want to do that.

18 Q. Okay.

19 A. There we go.

20 Q. Okay.

21 A. Okay, now I got back to it. So let me make
22 sure. "Unfortunately Jim and I discussed the case today
23 before I saw your email." Yes, okay, I've seen it and
24 reviewed it a couple of times.

25 Q. Okay. I will read it again just to make sure

1 that I conveyed the portion correctly.

2 A. Okay.

3 Q. "Unfortunately Jim and I discussed this case
4 today before I saw your email. I did determine that
5 this isn't coverable through pharmacy services because
6 Vantas is a medical claim that requires surgical
7 implementation. We were in favor of approving their
8 request, however." Did I read that correctly?

9 A. Yes, you did.

10 Q. If Vantas was coverable through pharmacy
11 services would it have been approved?

12 A. It would have.

13 Q. And you were in favor of approving this care,
14 correct?

15 A. Yes, I thought it was appropriate care based on
16 what I saw in the guidelines.

17 Q. I'm going to introduce another exhibit.

18 (Exhibit 8 marked for identification.)

19 Q. Do you see what has been marked as Exhibit 0008?

20 A. Let me refresh the page here. For some reason
21 when I go to refresh it switches pages. Okay. I'm
22 getting some kind of error on this Veritext. Instead of
23 giving me a little arrow that I can move around with,
24 it's giving me a line and -- there's the arrow. Okay, I
25 just got it back. Whatever it was, it's fixed.

1 Q. Okay.

2 A. We won't question it. Okay, now I have 8.

3 Q. Okay. I am showing Dr. Becker what has been
4 marked as Exhibit 0008, it is an email with the subject,
5 "Gender dysphoria question." In the lower right-hand
6 corner the document is Bates stamped DHHRBMS012318. Do
7 you see that?

8 A. I do.

9 Q. I will represent to you that this corresponds to
10 the second Bates range identified in response to RFP6.
11 Please take a moment to review this email.

12 A. So I've reviewed it.

13 Q. Do you recognize this email?

14 A. I do.

15 Q. Please look at the paragraph where it reads,
16 "We've held off on approving the Vantas implant for this
17 child getting treated at UPMC. Based on conversations
18 with several experts, it is a standard of care." Did I
19 read that correctly?

20 A. Yes, you did.

21 Q. Who are the experts you referred to in this
22 email?

23 A. Well, Dr. Yoost, and I don't think I can recall,
24 I spoke to somebody in endocrine at West Virginia
25 University, but I don't have the name and I didn't put

1 the name in there. I don't think I, I don't really
2 recall it, but I probably could resurrect it if needed.

3 Q. Okay. And just to confirm, those were the only
4 two experts you spoke with?

5 A. Those are the two, yes.

6 Q. Turning back to the body of your email, what did
7 you mean by a standard of care?

8 A. Standard of care is a designation of certain
9 medical care as meeting the criteria to be considered
10 excellent healthcare and appropriate healthcare. If
11 something falls under the standard we rarely recognize
12 it because the person doesn't do as well or doesn't
13 respond. But the standard of care is kind of a broad
14 definition, we know it when we see it and we all strive
15 to deliver care that meets the standard of care.

16 Q. Please look at the last line in the paragraph
17 that says, "If this child had a diagnosis of precocious
18 puberty, we would allow use of this medicine for that
19 condition." Did I read that correctly?

20 A. Yes, you did.

21 Q. And I believe you stated this earlier, but just
22 to confirm, West Virginia Medicaid covers treatment for
23 precocious puberty?

24 A. That's correct.

25 Q. What is the average age of a patient who might

1 admission 1 accurately describes the position of BMS on
2 the medical necessity of treatment for gender dysphoria,
3 correct?

4 A. That's correct.

5 Q. The last sentence of the response to request for
6 admission 1 states, "This request is admitted with the
7 understanding that this area of treatment continues to
8 evolve." Please scroll down to Page 4. Are you on
9 Page 4?

10 A. I'm getting there.

11 Q. Okay.

12 A. Page 4.

13 Q. Okay. Do you see the date August 27, 2021 on
14 that page?

15 A. Oh, okay. There it is on the text, yes, on the
16 27th day of August 2021.

17 Q. Okay. Since this response was served on
18 August 27, 2021 has anything about the science evolved?

19 A. None that I'm aware of.

20 Q. I'm going to introduce another exhibit.

21 (Exhibit 18 marked for identification.)

22 Q. Doctor, are you familiar with InterQual?

23 A. Yes, I am.

24 Q. Okay. Do you see Exhibit 0018? And it also
25 might be at the top again of the marked exhibits folder.

1 A. Yeah, I've got the document.

2 Q. Okay. So this is an InterQual sheet with the
3 subset, "Gender affirmation surgery and requested
4 service vaginoplasty for gender affirmation surgery."
5 InterQual criteria is nationally accredited criteria for
6 determining medical necessity for procedures, correct?

7 MS. BANDY: Object to the form.

8 A. Yes, it is.

9 Q. I'm sorry, I didn't catch your answer, Dr.
10 Becker?

11 A. Yes, it is, that's what we use it for.

12 Q. Okay. What is the importance of using
13 nationally accredited criteria?

14 A. Well, it creates consistency in standard.

15 Q. Does BMS use InterQual?

16 A. BMS does use InterQual and InterQual is used by
17 our contractor for reviewing requests for surgery.

18 Q. And who is your contractor for reviewing
19 requests for surgery?

20 MS. BANDY: Object to form.

21 A. The contractor would be Kepro.

22 Q. Okay. How does BMS use InterQual criteria?

23 MS. BANDY: Object to form.

24 A. InterQual criteria is one of the documents, one
25 of the standards that we review against in determining

1 necessity for prior authorization.

2 Q. InterQual is used on the fee for service side of
3 Medicaid, correct?

4 MS. BANDY: Object to form and object to
5 the line of questioning, that it's not within the topic
6 areas designated.

7 Q. You can answer.

8 A. Yes, it does get used on the fee for service
9 side.

10 Q. How is InterQual criteria factored into decision
11 making regarding whether care is medically necessary?

12 MS. BANDY: Object to form.

13 A. In my experience with it, it's used as one of
14 the indicators that the requested service has been
15 reviewed and meets some standards. My role sometimes is
16 in deciding where InterQual doesn't really apply. So I
17 do get, I do get cases in which there are disputes based
18 on incorrect application of InterQual, just for your
19 information is one, one of the things that we subscribe
20 to and rely on.

21 Q. What are some cases where InterQual criteria
22 would not apply?

23 MS. BANDY: Object to form.

24 A. Typically InterQual criteria don't apply when
25 the diagnosis is wrong. And so cases that come to me at

1 Q. And hormone replacement therapy can be treatment
2 for gender dysphoria, correct?

3 A. Yes, it can.

4 Q. Is it fair to say then that BMS recognizes that
5 at least some forms of gender confirming care, which can
6 include hormone replacement therapy, can be medically
7 necessary care for treatment of gender dysphoria?

8 A. Yes, that's true.

9 Q. Okay. I would like to take a break, but while
10 we're on a break, Dr. Becker, could you start gathering
11 the materials that you said you reviewed?

12 A. I will, I will make a call. Like I say, I'm not
13 in the office, I'll call and try to get my folks to
14 gather that.

15 MS. BANDY: And can I just ask for a
16 clarification of the request that prompted the, the
17 request that you are trying to look at those documents,
18 just so I know what the request was?

19 ATTORNEY SMITH: Okay. It was in
20 connection to Topic 12 and Dr. Becker essentially stated
21 that there were materials that he reviewed, but couldn't
22 remember what exactly the names or titles of those
23 materials were. So that's the reason for this request.

24 MS. BANDY: Was there a specific question
25 that he was responding to at the time, do you know?

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REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Dr. James Becker on the 30th day of March 2022, and that the witness was by me first duly sworn to tell the whole truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

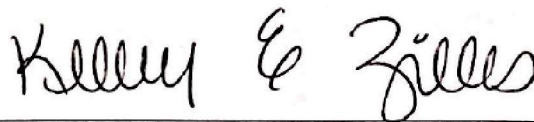
That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was reserved.

WITNESS MY HAND AND SEAL THIS 30th day of March 2022.



Kelley E. Zilles, RPR
Notary Public, Washington County, Minnesota
My commission expires 1-31-2025