# Exhibit 11

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

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|---|---|
| CHRISTOPHER FAIN, individually and on behalf of all others similarly situated, | |
| Plaintiffs, | Case No. 3:20-cv-00740 |
| vs. | |
| WILLIAM CROUCH, et al., | |
| Defendants. | |

REMOTE 30(b)(6) DEPOSITION OF
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES

by and through their corporate representative

FREDERICK LEWIS

DATE: April 4, 2022
TIME: 9:00 a.m. (Eastern)
PLACE: Veritext Virtual Videoconference

JOB NO.: MW 5129863
PAGES: 1 to 136
REPORTED BY: Merilee Johnson, RDR, CRR, CRC, RSA

A P P E A R A N C E S
(All appearing remotely via videoconference)

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(PROCEEDINGS, 04/04/2022, 9:00 a.m.)

FREDERICK LEWIS,

duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PRAKASH:

Q. Good morning, Mr. Lewis. My name is Anna Prakash. I am one of the lawyers that is representing Christopher Fain and Shauntae Anderson in this lawsuit. I am an attorney with the law firm of Nichols Kaster in Minneapolis. And my pronouns are she/her.

I'm going to be asking you some questions today and the one rule that I want you to really remember is that if you don't understand what I am asking, can you please ask me to clarify?

A. I sure can.

Q. Okay. Great. And if you answer my question, I'm going to assume that you understood it. Does that make sense?

A. Yes.

Q. Okay. Great.

A. Fair enough.

Q. Can you state your full name for the record?

A. Frederick Samuel Lewis.

Q. Great. And do you go by Fred?
A. I go by Fred. Thank you.
Q. And, Fred, do you have -- do you use he/him pronouns?
A. Yes.
Q. Okay. And you understand, Mr. Lewis, that you're designated to testify today on behalf of the West Virginia Bureau for Medical Services, right?
A. I do.
Q. Okay. And you are designated with respect to certain topics. One of them is the relationship with Mountain Health Trust, UniCare, The Health Plan, Aetna, and the Rational Drug Therapy Program. Does that sound right to you?
A. Yes.
Q. Okay. And are you prepared to testify about that today?
A. I believe so.
Q. Okay. And then you are also designated to testify about the decision to stop excluding hormone therapy from coverage in 2017 and the Bureau's experience covering and/or denying coverage for hormone therapy before and after 2017. Does that sound right to you?
A. Yes.

Q. And are you prepared to testify about that today?

A. I believe so, yes.

Q. Great. And then you are also designated to testify about certain discovery responses, written responses, that were submitted on behalf of the Bureau for Medical Services. Do you recall being designated for that?

A. Yes.

Q. Okay. And are you prepared to talk about that today?

A. Yes.

Q. Great. So I understand that you are the deputy commissioner of Plan Management and Integrity at the West Virginia Bureau for Medical Services; is that right?

A. That's correct.

Q. Okay. And the "Plan" in your title refers to the West Virginia State Medicaid Plan?

A. It refers to the MCOs that we contract with.

Q. Okay.

A. Arguably, it could be the state Medicaid Plan too. I have always related it to the MCOs. We called them plans.

Q. I see. And the MCOs are managed care organizations?

A. Yes.

Q. Bureau for Medical Services I'm going to refer to as "BMS" today so if I say that, will you understand what I mean?

A. Yes.

Q. Okay. Great. And how long have you been the deputy commissioner at BMS?

A. Today, I am 10 days shy of four years.

Q. And though you referenced the MCOs in describing what the "Plan" in your title refers to, are you familiar with the operation of the West Virginia Medicaid Plan?

A. I am, for the most part. There's still areas I'm learning. I came from outside of Medicaid, but I think I've learned a lot in the last four years. So I'm going to give you my best and if I don't know, I'll tell you.

Q. Great. And BMS is within the West Virginia Department of Health and Human Resources, correct?

A. Correct.

Q. And that is a state agency, the Department of Health and Human Resources is?

A. Yes.

Q. BMS is responsible for the administration of West Virginia's Medicaid program?

A. Yes.

Q. Mountain Health Trust is the managed care program for West Virginia Medicaid, right?

A. That's correct. It also is the umbrella for CHIP participants.

Q. And you referenced MCOs earlier. Enrollees in West Virginia Medicaid who are also in the managed care program of Mountain Health Trust need to sign up with an MCO; is that right?

A. That's correct.

Q. And there are three of them: Aetna Better Health of West Virginia, The Health Plan, and UniCare; is that right?

A. That's right.

Q. And how would you describe the role of those three MCOs with respect to West Virginia Medicaid?

A. They all are here to manage the Medicaid membership that has been placed in their custody, and that happens through the -- through the members' election to participate with whichever one of those they may choose. And if they don't choose, there's an auto selection criteria.

The MCOs are here to manage the healthcare of their members within the parameters of the state program and consistent with federal and state law and regulations and the contract.

Q. And that's the contract between BMS and the MCOs?

A. Correct.

Q. You mentioned auto selection criteria. If a member doesn't elect one of the MCOs, can you describe what happens with respect to auto selection criteria?

A. It's basically an eeny meeny miny moe. We have an enrollment broker that is a neutral party that will -- they have a computer logic that basically distributes these members evenly around all of these plans, trying to keep family units together.

So that's the reason it's maybe not just strictly, you know, directing each sequential member to a different plan and continuing, you know, in a circular fashion. They try to keep family units together.

Q. Got it. What's the name of the enrollment broker?

A. It's called Maximus.

Q. And are you the person at BMS who is in charge of contracting with the consulting actuaries?

A. I'm one of them. I feel like I share this with Becky Manning, the Deputy of Finance. We have overlap in this area. But, yeah, Becky and I are over this contract. I think I actually signed the SOWs this time around.

Q. And do you know if BMS has ever asked or -- asked for or received from the actuaries any calculations on how much it would cost to provide surgery as a treatment for gender dysphoria?

A. We have not asked for that in my time here.

Q. Are you aware of BMS asking for it at any point in time prior to you coming to the agency?

A. I am not aware. I'm not aware of a lot of things, though, so...

Q. All right. So I understand that the MCOs must follow coverage limitations required by Medicaid and can't use Medicaid dollars to authorize noncovered care. Is that right?

A. I think they could use Medicaid dollars as long as, you know, they're coming from profit or something. But that's right. We're not providing -- we're not providing funding to them

for the purpose of providing anything more than what is basically our -- what we recognize as our base level bene- -- our fee-for-service benefit is sort of the guiding issue.

Q. Okay. And so that -- just so I'm clear, that benefit does not include surgical care for the purpose of treating gender dysphoria, correct?

A. Correct.

Q. Okay. And so the MCOs could not use Medicaid dollars for the purpose of treating gender -- surgical care for the purpose of treating gender dysphoria, correct?

A. They could, as a value-add benefit, which means, you know, they -- it's not our expectation that they will pay for it, but, you know, maybe they have a marketing strategy or something: They want to differentiate their plan from the others by providing a benefit -- a benefit that wouldn't otherwise be covered. They could do that, but it would be from -- it would not be something we have built into that capitation, that budget, as you'd say --

Q. Okay.

A. -- for them to pay for. It would be coming from their managed care savings, for example. When

Q. Okay. And is anybody in the room with you right now?

A. I've been by myself all day.

Q. All right. Thank you.

So I understand that hormone therapy for -- as a treatment for gender dysphoria was not always covered for West Virginia Medicaid participants. Is that right?

A. I have the same understanding, yes.

Q. Okay. And I understand that that changed in November of 2017; is that right?

A. Yes. Well -- yes. I think it was the 7th of 2017. I'm sorry. November 7, 2017, or thereabouts.

Q. So on or around that date, hormone therapy as the treatment for gender dysphoria started being covered for West Virginia Medicaid participants, right?

A. Correct.

Q. Okay. And that was across all three of the MCOs, right?

A. Well, by then, the pharmacy benefit was a fee-for-service benefit, so, yes, correct. And it would have also encompassed the fee-for-service population outside of managed care too.

therapy?

A. No.

Q. But at some point in time, a member's sex was considered or their gender marker was considered when making a determination for hormone therapy with respect to treatment for gender dysphoria, right?

A. Correct. Correct.

Q. Okay. And do you know why that was?

A. I do not.

Q. And do you know who made the determination that that gender marker should be considered for the purpose of hormone therapy as a treatment for gender dysphoria?

A. That would have been the former director, Peggy -- and I may think of her name before we're done here today. I hope I do. I've met her. She's very nice. I just can't think -- I can see her face. I just can't think of her name -- her last name. I apologize. I think it's in the record somewhere -- in the documentation here somewhere.

Q. And in 2017, when the gender edit was removed, who made the decision to remove it?

A. And that was the director at the time,

Vicki Cunningham, in consultation with the medical director, Jim Becker. And I don't know if -- again, that -- all of this predates me and my involvement here.

I don't know if it came up through the leadership structure of BMS or not. I think it was just decided by Vicki, who had some conversations with the medical director, Jim Becker. And I know that from conversations I've had with Vicki concerning this action.

Q. Did those conversations take place in the presence of your counsel?

A. No.

Q. Okay. What did you and Vicki discuss?

A. We talked about why -- I just asked her why -- what was the justification for the decision, you know, what -- I just wanted to know what she could tell me about the history of this whole thing.

Some of the same questions you've asked me about how did we come to the decision to put the edits there and then why did we remove them. And really, the most meaningful thing I got from it was, she related to me her experience before coming to BMS -- which she worked for HealthRight; she was

a pharmacist for HealthRight, which provides charity care here in the Charleston area.

And she worked with some folks that had gender dysphoria and were just distraught and they -- you know, they couldn't get access to hormone therapy, they couldn't get access to surgery.

And she thought that this -- our understanding of how these hormones work and how this therapy can be administered was far enough along that she was comfortable with it. She spoke with Dr. Becker and they both felt like we could do more -- Dr. Becker may be able to tell -- he may not even remember this conversation. This is how it came to me from Vicki.

She felt that there -- we can at least do this much. If we're not going to provide the surgery, we can at least provide access to this therapy and it may help these folks. And so it -- it's a story of compassion, and that's how the edit was turned off for these instances.

Q. Is there something that was a catalyst for the change to happen in November of 2017?

A. She said that we've been fielding -- we've been getting calls about, you know, what's the

criteria? What's the -- you know, why -- you know, why are you -- why is it this way? And she felt like we didn't have good answers.

And so maybe there were some calls at the time, but she indicated that it was always something we were being asked about. And so that was a big part of it.

Q. And were those questions coming from members?

A. Coming from members and maybe providers as well.

Q. Did Vicki handle those calls or did somebody else?

A. I don't know. We didn't get into -- I think she probably handled some, but I don't know for sure.

Q. And so I think you described it as compassion, which I appreciate. Why didn't that compassion extend to surgical care for gender dysphoria?

A. I don't know the answer to that.

Q. Do you know if Vicki ever raised that question with anybody at BMS?

A. I don't.

Q. Have you ever raised that question with

same level of concern to our fee-for-service members if we try to collect it through the enrollment broker.

So that's another challenge for me, is ideally we would ask these questions through the application process so that we would have the answers for all of our members, not just those in managed care.

MS. PRAKASH: Okay. Can we go off the record, please.

(Break: 12:29 p.m. to 12:45 p.m.)

BY MS. PRAKASH:

Q. So, Mr. Lewis, can you describe to me what your job duties are as deputy commissioner of plan management and integrity at BMS?

A. Yeah. I oversee four different areas of -- within Medicaid. One being the Office of Pharmacy Services, as we've been discussing. The other being the Center for Managed Care. And then the Office of Program Integrity is one of my areas. And the Office of Quality Management.

Q. Okay. What does the Office for Program Integrity do?

A. So that office oversees the spending of Medicaid funds to ensure that it's for bona fide

members for bona fide purposes. They look for fraud; they look for overpayments. Broadly, overpayment, it can be a lot of things, but these are -- I mean, any kind of upcoding or a provider -- a scheme, duplicate claims that may have been submitted. These sorts of things. They look for all of that.

Q. Do they oversee any coverage determinations?

A. They don't oversee coverage determinations.

Q. And what does the Office for Quality Management do?

A. That's the office I was telling you about that was originally created to complete certain measures, to maintain the measures. But we are trying to change the focus of that office and get the staffing up to be able to provide for continuous quality improvement to the quality of our care for our members, and then provide for health equity as well.

And I have a vacant -- I have two people there that have been traditionally the staff when they've only been about producing the measures. I have two vacate positions. One for a nurse and one is the director -- going to be the director of the

office, that I'm trying to get filled so that we can move forward with this bigger vision for that office.

Q. Does that office, the Office of Quality Management, deal with coverage determinations at all?

A. A little bit. So one of the things I have been doing is working with the External Quality Review Organization on -- for managed care. And the EQRO is looking at denials a bit and so they're involved in receiving and kind of overseeing that contract work with the EQRO.

Q. What -- are you saying "Kepro"? I'm not sure I totally heard the last part.

A. E-Q-R-O. EQRO. External Quality Review Organization. I'm sorry. We are terrible about using acronyms.

Q. No, that's okay.

A. My apologies.

The External Quality Review Organization is called Qlarant and the Office of Quality Management is engaged with Qlarant in overseeing their contract work in that capacity. But -- you know, one of the things they look at is the -- they call it GAD. It's grievances, appeals, and denials. So

they do some statistical work for us around that and -- that's probably about as close as I can get.

Q. Okay. And when they are looking at grievances and denials, are they looking to make sure that those are consistent with BMS standards?

A. I believe so. And CMS standards as well.

Q. Got it. Are they looking at whether there should be any changes made to the standards?

A. That, I'm not sure.

Q. Who would know that?

A. Tanya Cyrus.

Q. What's --

A. She is -- she is over the Office of Program Integrity and the Office of Quality Management and reports to me.

Q. Who else reports to you?

A. That's basically it. So Brian Thompson, the pharmacy director; Susan Hall, the chief of managed care; and Tanya Cyrus, the chief of quality and integrity.

Q. And --

A. I used to have a secretary. That position is vacate still. I mean, it was a shared position, so I have three people. Direct reports.

Q. Okay. And who do you report to?

REPORTER'S CERTIFICATE

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN )

I hereby certify that I reported the remote deposition of FREDERICK LEWIS, on April 4, 2022, via Veritext Virtual Videoconference, and that the witness was by me first duly affirmed 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 preserved.

WITNESS MY HAND AND SEAL THIS 12th day of April, 2022.

Merilee S. Johnson, RDR, CRR, CRC, RSA
Notary Public, Hennepin County, Minnesota
My commission expires January 31, 2026

# Exhibit 12

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

| | |
|---|---|
| CHRISTOPHER FAIN, individually and on behalf of all others similarly situated, | |
| Plaintiffs, | Case No. 3:20-cv-00740 |
| vs. | |
| WILLIAM CROUCH, et al., | |
| Defendants. | |

REMOTE 30(b)(6) DEPOSITION OF
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES

by and through their corporate representative

BECKY MANNING

DATE: April 12, 2022
TIME: 9:59 a.m. (Eastern)
PLACE: Veritext Virtual Videoconference

JOB NO.: MW MW 5096193
PAGES: 1 to 85
REPORTED BY: Merilee Johnson, RDR, CRR, CRC, RSA

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ALSO APPEARED:
Nicholas Guillory, Law Fellow

A. Yes.
Q. Okay.
A. Those two are interchangeable.
Q. Great. So if I use "BMS," you'll also know what I'm referring to?
A. Yes.
Q. And, Ms. Manning, I know you're the deputy commissioner. Are you, more specifically, the deputy commissioner of Finance?
A. Finance and Administration.
Q. And you've held this position since January of 2021; is that right?
A. That's correct.
Q. What are your job duties as deputy commissioner of Finance and Administration?
A. I report directly to Commissioner Beane. And I'm responsible for overseeing the financial unit, which also includes purchasing, cash management. Our chief financial officer -- I have one direct report, which is our chief financial officer. And then under her is our accounts payable, our accounts receivable, cash management, and purchasing.
Q. And who is the chief financial officer?
A. Mandy Carpenter.

Q. And I understand that you've been with DHHR for over 20 years; is that right?

A. That's correct.

Q. Okay. So we're going to go through a few of your previous roles at the department. So prior to being deputy commissioner, is it true that you were chief financial officer for West Virginia Medicaid?

A. Yes.

Q. And did you hold that position from June 2018 to January 2021?

A. Yes.

Q. What were your job duties as chief financial officer?

A. I oversaw directly the supervision and work of budget preparation, director -- I oversaw the work of the director of purchasing, cash receipts, expenses, accounts payable, and accounts receivable.

Q. And prior to being chief financial officer for West Virginia Medicaid, is it true that you were the deputy director of Office of Human Resource Management?

A. That's correct.

Q. And did you hold that job position from

June 2015 to June 2018?

A. That's correct.

Q. What were your job duties in that role?

A. There were five units within the -- like the division of Human Resource Management. It's more like an office or support service for the DHHR. And so I -- it was my responsibility to oversee those five sections.

Q. Okay. And prior to being deputy director of the Office of Human Resource Management, were you the director of Budgets for DHHR?

A. That's correct.

Q. And did you hold that position from November 2013 to June 2015?

A. That's correct.

Q. What were your job duties as the director of Budgets for DHHR?

A. I helped support each of the bureaus under DHHR prepare their budget, monitor their budget and their expenses. I helped prepare fiscal notes from, like, proposed legislation and worked with the legislature. I also worked with our chief budget officer to finalize budgets, six-year projections, and any reconciliations that might be needed.

Q. And prior to being director of Budgets, were you the director of Financial Services for the Bureau for Public Health?

A. Yes.

Q. And did you hold that job from October 2007 to November 2013?

A. Yes.

Q. What were your job duties in that role?

A. To support all of the offices within the Bureau for Public Health as related to their financial means: budgeting, grant support, financial reports, p-card, travel, accounts payable, accounts receivable.

Q. Prior to that, were you the director of Financial Services for the Bureau for Behavioral Health and Health Facilities?

A. Correct.

Q. And did you hold that role from August 2004 to October 2007?

A. That's correct.

Q. Were your job duties similar to the ones you were just describing as director of Financial Services for the Bureau for Public Health?

A. Yes.

Q. Okay. And then prior to that, were you an

accountant in the Office of Behavioral Health?

A. Yes, that's correct.

Q. And were you an accountant from March 2002 to August 2004?

A. That's correct.

Q. What were your job duties as an accountant in the Office of Behavioral Health?

A. Behavioral Health has a lot of grants, so it was my responsibility to prepare those grant agreements and work with DHHR Finance.

Q. Have you ever held any other positions, other than the ones we just went through, within the Department?

A. No.

Q. Is your highest degree a master of business administration from Marshall University?

A. It is.

Q. And you graduated in 2003?

A. That's correct.

Q. Do you also have a bachelor of science and accounting from Concord University?

A. That's correct.

Q. And you graduated from there in 2000?

A. That's correct.

Q. Okay. Ms. Manning, we're going to shift

A. Yes, ma'am.

Q. Now, Ms. Manning, you're here today to -- excuse me. Let me start that over.

I'm here today to take a deposition of an organizational representative for BMS. Do you understand that?

A. Yes, ma'am.

Q. And you've been designated as the organizational representative to give testimony on certain topics that we're going to discuss today.

Do you understand that you've been designated for particular topics?

A. Yes, ma'am.

Q. I believe you just answered this, but were you notified that you would be giving testimony as BMS's organizational representative in October 2021?

A. Yes, ma'am.

Q. Was that the first time you were notified that you would be giving testimony?

A. Yes, ma'am.

Q. Now we're going to use Exhibit Share for the first time so it always takes a little bit longer the first time.

A. Okay.

following that.

Do you see that?

A. Yes, ma'am.

Q. Ms. Manning, you've been designated to testify about Topic 2. And Topic 2 reads, "Your receipt of federal and/or state funds, including funds from the U.S. Department of Health and Human Services, and all representations made to the federal and/or state government in the course of securing such funds."

Did I read that correctly?

A. Yes, ma'am.

Q. Can you confirm that you're prepared to discuss this topic as the organizational representative for BMS?

A. Yes, ma'am, I am.

Q. How is West Virginia Medicaid funded?

A. We were funded in partnership with the Centers for Medicare and Medicaid Services, which is a federal agency. We are funded through general revenue appropriated from the state legislature and we are funded through -- like tax dollars, directly given to Medicaid from provider taxes and managed care tax.

Q. And what percentage of West Virginia

Medicaid's funding comes from the federal government?

A. The percentages are based upon expenditures. So overall, it's an average of about 80 percent.

Q. And from which agencies within the federal government does that funding come?

A. The funding comes from the Centers for Medicare and Medicaid Services, also known as CMS. So if I just say "CMS" in the future, that's what I'm referring to.

Q. Great. And that's exactly what I was going to ask you next so you read my mind.

Do you receive any money or does West Virginia Medicaid receive any funding from the U.S. Department of Health and Human Services?

A. CMS falls under Department of Health and Human Services.

Q. Are there any other federal agencies from which West Virginia Medicaid receives funds other than HHS and CMS underneath that?

A. No.

Q. What percentage of West Virginia Medicaid's funding comes from the State of West Virginia?

A. Approximately 20 percent.

A. Yes.
Q. What services were those?
A. Substance use disorder and the other one has the acronym of the MOM model, maternal opioid misuse.
Q. Does the West Virginia Medicaid program have an annual budget?
A. Yes, ma'am.
Q. What is its annual budget?
A. It fluctuates between years, but it can range anywhere from $4.5 to $5.1 billion.
Q. What does that number reflect exactly?
A. It reflects state and federal dollars of expenditures for medical expenses for Medicaid members that are both in fee-for-service population and managed care.
Q. Can you summarize how the budget is determined each year?
A. It's based upon how much, working with the actuaries, BMS Finance thinks we will need for the current services that we are required to provide based upon utilization, number of members, and any trend applied to that by our actuaries were changes for economic factors.
Q. So of that fluctuating $4.5 to $5.1 billion

A. That's correct.
Q. So I'm going to pull up what I believe to be the six-year projection to see if it's the document you're talking about. So I will do that now. Give me a moment to mark it.
(Exhibit 2 was marked for identification.)
Q. I'm marking this Exhibit as BM0002. It should be in your folder.
A. Okay.
Q. Is this the document that you were referring to, Ms. Manning, that would be helpful to look at?
A. This one starts with 2002. So if you wanted the budget for 2002, we can -- we can start with this one. If you wanted 2001, we might want to start with maybe one of the CMS quarterly reports.
Q. Ms. Manning, do you mean 2022?
A. Yeah. I think you wanted 2022, the total budget, I can give you that from this one. I can give you that from this six-year projection.
Q. Sure. Can you tell me what the projected budget or what you're referring to as total budget is for 2022?

A. Sure. The total projected budget for 2022 is the first line that has an "E" -- I keep wanting to point. I don't know if you can see my mouse when I hover over the screen. But it has an estimated expenditures of $5,490,588,806.

Q. Okay. And that 5 billion number, that is the projected budget for 2022?

A. Correct. When this document was published, '22 was not updated with final numbers yet. Because we have what is called run-out. So it usually takes six months or more for claims to run out and for us to update these projections.

Q. Okay. So is there a more recent projection for 2022's budget than this one?

A. No. This is the most up-to-date version we have.

Q. Okay. And I understand that by looking at this projection, you're not able to tell what the annual budget was in 2020 or 2021; is that correct?

A. Correct.

Q. Okay. We may come back to 2020 and 2021. I'm going to try to avoid pulling up documents and the pause that that creates until --

A. Okay.

Q. -- a little bit later in the day, so I may

purposes.

Because, as you can see for 2022 and 2023, the very last line shows that Medicaid has a surplus for those years, the $343 million, the very last line, and the $117 million. Those funds are used to save -- to save money for future years when things don't look as positive.

For example, if you look at 2024, we are set to hit our first -- what we term as our Medicaid cliff, when we will be in the negative situation. Meaning if we still cover the services that we are required to cover at the current rates that we cover them, with the current membership enrollment, we will be at a negative situation of $128.3 million.

Q. And to be clear, that $128 million number under 2024 on the spreadsheet we're looking at, that is the bottom line of where the budget would look if everything is as the estimates are entered here?

A. This would assume that we do not receive any future funding cuts or future funding cash injections for Medicaid. We have also made assumptions within our budget about utilization membership trend.

the state doesn't have it, we wouldn't get it.

Q. What happens if West Virginia Medicaid doesn't receive all of the money it requests from the state.

A. We will have to make decisions about what will be cut and where.

Q. Has that had to happen during your tenure at DHHR?

A. Not during my tenure, no. And one of the things to keep in mind is that we received an additional 6.2 in FMAP from the federal government with the public health emergency, so that was able to provide some additional relief to states who were currently struggling and to cover those members that we cannot take off the Medicaid roles and so that people would have healthcare during the public health emergency.

Q. And what does FMAP stand for?

A. Federal Matching Participation. It's the amount we get from the federal government that -- when we put up against state funds, that we get in return for our state dollar.

Q. And you mentioned you received an additional 6.2.

A. Mm-hmm.

reasons for covering or not covering a service that West Virginia Medicaid could cover?

A. From a financial standpoint.

Q. So you're -- oh, go ahead.

A. The reason that I might look at those reasons and the reasons that someone else might look at that are different. I'll look at that from, Can we afford it? I think it's other people's responsibility to determine: Is that within the scope? Is that within policy? Is that within CMS guidelines?

It is my responsibility to say, if we do this, can we afford this? Is it something that we can support in an ongoing basis? What does this do to our budget as a Medicaid agency?

Q. Okay. So --

A. Because --

Q. Oh, go ahead.

A. One of the things that you have to contend when you ask CMS for a service, to cover a service, is that you have the funding.

Q. Okay. I'm going to pull up another document so give me just a second to do that. I'm going to mark this document as Exhibit BM0003.

A. Okay.

Q. And it should be popping up in your folder shortly.

(Exhibit 3 was marked for identification.)

A. Okay. I have it.

Q. This document is titled 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.

Did I read that correctly?

A. Yes.

Q. Please take a moment to review this document and let me know when you're ready to move on. I've got a couple questions about it.

A. (Reviewing document.)

Q. Also, I'm realizing now it's a fairly long document and so to the extent we'll be talking about it, I'm going to direct your attention to page 2 and number 2. So I'm not sure if you were reviewing the full thing because that's what I asked or not.

A. (Reviewing document.) Okay. I'm ready.

Q. Do you recognize this document?

A. I do.

Q. Is this document a copy of Defendants' Responses to Plaintiff's First Set of Interrogatories?

A. It is.

Q. So I directed your attention to page 2 where you'll see text that reads as follows: Number 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."

Did I read that text accurately?

A. Yes.

Q. So the second sentence there states that BMS is constrained by budgetary/cost considerations. Does that response describe what you were just explaining to me?

A. Yes, ma'am.

Q. Okay. Do you agree with that response?

A. I do.

Q. As the organizational representative, can

equivalent, the Department of Personnel puts out the cost that we'll use for each pay grade type so that's not a sub- -- you know, it's not a subjective cost. It wouldn't be what I wanted to pay them.

So they give us the -- like the type of position and then the market salary that we would use for the purpose of fiscal notes and then the benefit percentages. So that way each agency within state government is using apples-to-apples comparisons.

Q. Has BMS priced out the cost of providing gender affirming care?

A. I have not. In order to do that, I would need a list of codes that I would be pricing.

Q. So are you saying that you personally haven't researched the cost of providing gender affirming care?

A. Correct.

Q. Do you know of anybody else at BMS who has researched the cost of providing gender affirming care?

A. I do not.

Q. If you wanted to get a list of codes related to gender affirming care, could you do

Q. Are you aware of Dr. Becker pricing out codes related to gender affirming care?

A. I can't speak for Dr. Becker and what Dr. Becker has done. I can only speak for, like, what projects I know, that when I have a question, that he has a team of people that work on that sort of stuff.

Q. So sitting here today as the organizational representative, you are not aware or have knowledge of Dr. Becker looking at codes related to gender affirming care and pricing them out; is that correct?

A. Correct. And I can't -- I mean, I can't speak for Dr. Becker.

Q. Okay. I want to turn your attention briefly to the exhibit we had up marked BM0003.

A. Okay.

Q. And we were looking at page 2, the response to number 2. Do you have that up?

A. I do.

Q. As the organizational representative for BMS, are you aware of any other governmental interest supporting the exclusion that were not identified in defendants' discovery responses here on this exhibit?

A. (Reviewing document.) I'm not aware. No.

Q. Okay. Let's turn back to the very first exhibit, BM0001, or Plaintiffs' Second Amended Notice of 30(b)(6) Deposition, and I'm going to ask you to turn to page 4, please.

You've been designated to testify about Requests for Production 7 and 27 under Topic 18. Do you see Topic 18 at the bottom of page 4?

A. Yes, ma'am.

Q. And Topic 18 reads, "All interrogatory requests, requests for admission, and requests for production of documents directed to defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services, and any discovery responses, responsive documents, filings, or productions, by or on behalf of defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services."

Did I read that correctly?

A. Yes, ma'am.

Q. Are you aware that as part of testifying about the discovery responses in Topic 18, Counsel for BMS designated you as the organizational

REPORTER'S CERTIFICATE

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN )

I hereby certify that I reported the remote deposition of BECKY MANNING, on April 12, 2022, via Veritext Virtual Videoconference, and that the witness was by me first duly affirmed 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 preserved.

WITNESS MY HAND AND SEAL THIS 20th day of April, 2022.

Merilee S. Johnson, RDR, CRR, CRC, RSA
Notary Public, Hennepin County, Minnesota
My commission expires January 31, 2026

# Exhibit 13

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 BRIAN THOMPSON

DATE: April 13, 2022

TIME: 8:00 a.m. CST

PLACE: Veritext Virtual Videoconference

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

JOB NUMBER: 5128144

APPEARANCES

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NOTE: The original deposition transcript will be delivered to Attorney Smith, Esq., as the taking attorney.

being challenged?

A. I believe so, yes.

Q. Okay. And what is your understanding of that exclusion?

A. My understanding is that we, we do not pay for, we do not cover the medical part of this, the surgeries, but we do cover hormone therapy.

Q. Okay. So if I refer to the exclusion throughout today you'll understand what I mean?

A. Yes, from a broad standpoint, yes.

Q. Okay. So, Mr. Thompson, you are the director of pharmacy services of BMS at the West Virginia Department of Health and Human Resources, correct?

A. Correct.

Q. All right. And what responsibilities fall under your role within BMS?

A. So I'm expected to make policy regarding pharmaceutical coverage, I manage the budget for the pharmacy department and I have staff that configure benefits for certain drugs and I also make policy around exceptions to our criteria. In those cases a lot of times things are used off label, which we are given some leeway as to how, how to choose to cover as a state.

Q. Got it. And who is your direct supervisor?

A. Fred Lewis.

list and I remember seeing, you know, there was a lot of exhibits.

Q. Okay.

A. I think I have seen this one, yes.

Q. Okay. And have you been told that you've been designated to speak as the organizational representative of BMS in response to certain topics contained in this deposition notice?

A. Yes, yeah.

Q. Okay, great. So we'll come back to this document throughout the day as we get through each topic, but I just wanted to show it to you, okay?

A. Okay. I thought the one I saw had my name on it too.

Q. Let's see. So this is interesting, this is the one that doesn't actually have your name on it. Okay. All right. I'm going to pull up the right one that has your name on it. Actually, if it's okay, can we take a quick five-minute break.

A. Sure.

Q. Great. Thank you very much, I'll be right back.

ATTORNEY SMITH: Kelley, can we go off the record.

(A break was taken at 8:20 a.m.)

ATTORNEY SMITH: All right. So I am going

to introduce another exhibit.

(Exhibit 2 marked for identification.)

BY ATTORNEY SMITH:

Q. Okay. Mr. Thompson, if you refresh your page for Exhibit Share you should see a new exhibit, it will have the Exhibit Number BT0002.

A. Yep, I see it.

Q. Great, okay. I have just introduced plaintiffs' second amended notice of 30(b)(6) deposition, Exhibit Number BT0002. If you want to take a minute to review this document as well, Mr. Thompson, please feel free to do so.

A. Okay.

Q. Okay. So do you recognize this document?

A. Yes.

Q. And do you see your name at No. 10?

A. I do.

Q. Okay, great. So this is the document that we will come back to throughout the rest of the day and specifically as we discuss each topic, okay?

A. Okay.

Q. All right. As an organizational representative did you meet with any Medicaid participants who are transgender to prepare for today?

A. No, I have several acquaintances that are

prior authorization forms is there a field that collects information regarding diagnosis?

A. Yeah, yes. So some drugs have specific prior authorization forms designed to help the flow of questions for that drug, but we have a general PA form which can be used for any drug, anything that you're using off label or whatever and there is a little spot where you put in what it's being used for and also what you previously used for treatment of whatever you're asking it for.

Q. Okay. And just to confirm what I think I heard you say earlier, if a patient required hormone replacement therapy for treatment of gender dysphoria only, they would receive treatment for that hormone replacement therapy, correct?

A. Oh, definitely, yes.

Q. Okay. BMS sometimes covers puberty delaying care for the treatment of gender dysphoria, correct?

A. Yes, we have. It's a little bit more, there's a little bit more safety concern when you're dealing with children because there are long-term effects from delaying puberty. So every case with something like this is always going to be reviewed by the medical director for safety.

Q. Okay. And who is the medical director?

Q. But you said that puberty delaying coverage could conceivably be covered through EPSDT, is that correct?

A. I say that only because I've always been told that anything could get approved through EPSDT if you could defend why it was medically necessary.

Q. Okay.

A. But the other thing you have to remember is with EPSDT it's not really necessary if they have full Medicaid and it's already something we cover, it's generally used for those things that we don't already cover or for children that don't have full Medicaid.

Q. You testified earlier that requests for puberty delaying treatment are subject to a review process, correct?

A. Yeah. Well, every drug is subject to some sort of drug utilization review, whether it's automatic or electronic edits or because it requires a prior authorization. And in those cases they would require prior authorization just because a lot of those are injectable if you're talking about the delaying, they're typically injectable, long-acting injectable agents.

Q. Does that mean that under the right circumstances puberty delaying treatment could be approved to treat gender dysphoria?

A. Yes, I would say so.
Q. I'm going to introduce another exhibit.
(Exhibit 4 marked for identification.)
Q. All right. Do you see what has been marked as Exhibit BT0004?
A. Let me refresh. Yep, I have it.
Q. Okay. I'm showing you what has been marked as Exhibit BT0004, it is an email with a subject, "Gender dysphoria." In the lower right-hand corner of the document is Bates stamped DHHRBMS012665. Do you see that?
A. I do.
Q. Okay. Please take a moment to review this email.
A. Yes.
Q. Okay.
A. This is the one I was referring to, yes.
Q. So you recognize this email, correct?
A. Yes.
Q. Okay. So please scroll down to the page with the Bates stamp DHHRBMS012666.
A. Okay.
Q. All right. I am going to read a portion of that email, it says, "Unfortunately Jim and I discussed this case today before I saw your email. I did determine

Please take a moment to review this email. And just so you know, it's pretty much the first three pages.

A. Yeah, I recall seeing this.

Q. Okay. So you recognize this email?

A. I do.

Q. Okay. I'm going to direct your attention to the message in the middle of the chain on Page 2, you'll see the Bates number at the bottom DHHRBMS021583.

A. Okay.

Q. Okay. So it reads, "Thank you. It is fine to override the edit when hormones are prescribed for transgender members." Did I read that correctly?

A. You did, yes.

Q. Okay. Who's the email from?

A. That is from Vickie Cunningham who was the director of pharmacy at the time and it's sent to the director of Rational Drug Therapy Program at the time to Stephen Small.

Q. Okay. Is the edit being discussed in the email the gender edit that we've discussed?

A. That's what I was about to say, I can't say from the text that they're talking about a gender edit, but that would be my assumption that that's what they're talking about.

Q. Okay. And the removal of the gender edit allows

for the coverage of pharmaceuticals for treatment of gender dysphoria, correct?

A. Yes. So there are, as I said before, there are reasons to have gender edits for safety purposes. You would typically not want to give testosterone to say a woman of child bearing age because it could cause harm to the pregnancy, so there is a reason to have a gender edit. This looks to me that Vickie was telling them that in cases where there was gender dysphoria that she is approving the general coverage of gender dysphoria with hormone therapy.

Q. You testified a little bit earlier that there can be gender edits and specifically that they can vary in terms of what state and federal policies I believe, do you remember that?

A. I think I misspoke when I said federal. I meant the national database that we use, First Databank, sometimes sends I believe, and I don't know which drugs they put gender edits on, but I believe they do send information saying this drug should not be used in females, this one should not be used in males because there are, there are differences.

Sometimes inherently if you're using a drug that say affects testosterone, like I said, you can affect pregnancies, so that would not be considered safe. But

REPORTER'S CERTIFICATE

STATE OF MINNESOTA )
) ss.
COUNTY OF WASHINGTON )

I hereby certify that I reported the Zoom deposition of Brian Thompson on the 13th day of April 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 13th day of April 2022.

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

# Exhibit 14

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 SARAH YOUNG

DATE: March 11, 2022

TIME: 8:00 a.m. CST

PLACE: Veritext Virtual Videoconference

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

JOB NUMBER: 5096099

APPEARANCES

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NOTE: The original deposition transcript will be delivered to Carl Charles, Esq., as the taking attorney.

(Exhibit 1 marked for identification.)

Q. Okay. So hopefully you can see there in the marked exhibits folder what has been marked as Exhibit PL0001. Do you see that there?

A. I do, yes.

Q. Okay.

MR. CHARLES: Kelley, I'm showing the witness what has been marked as Exhibit 0001, it's a copy of a document entitled, "Bureau for Medical Services policy manual, Chapter 100."

Q. Please take as much time as you need to look at the document and I will wait until you tell me you've sufficiently reviewed it.

A. I am familiar with the document.

Q. Okay. Thank you, thank you. I just don't want to, throughout the day I will say take a moment, but what I mean by that is take the sufficient moments you need to review it.

A. Thank you.

Q. Okay. Do you recognize this document?

A. I do, yes.

Q. And what is this document?

A. This is a chapter of our provider manual, it's available on our Website, and it is a guiding document for services that we cover and billing instructions for

providers. It is not all inclusive and I believe there's a disclaimer at the bottom that says to that effect, but this is our general information chapter.

Q. Thank you. Do you have any reason to believe this is not a true and correct copy of that document?

A. It appears to be the same one that we have on our Website.

Q. Thank you. Okay. So now if you would, please, turn to Page 10 of this document. The page numbers are in blue at the bottom right-hand corner, the text is a little bit, it's kind of small there in the bottom right-hand corner.

A. Okay, sorry.

Q. No, no, take your time.

MS. BANDY: Is there a Bates number on that? That might be helpful.

MR. CHARLES: Yes, sorry. So it's CFAIN001661.

MS. BANDY: Okay, we got it.

BY MR. CHARLES:

Q. Okay. Ms. Young, do you see in the middle of the page the numbers 1661?

A. Yes.

Q. And the title, "General noncovered services"?

A. Yes.

Q. Okay. So if you would just read along with me, I'm going to read aloud, but if you'll just follow along, please. Underneath that heading, "The West Virginia Medicaid program does not cover certain services and items regardless of medical necessity." Did I read that correctly?

A. Yes.

Q. Okay. And then some examples are identified below. I'm not going to read all of those examples, I'm going to continue to the next page where that list continues. Just let me know when you're on the next page.

A. I am.

Q. Okay. And then the third bullet from the top, do you see what that bullet is?

A. I do.

Q. And could you just read that out loud for me?

A. "Transsexual surgery."

Q. Okay. Thank you very much. So I'm going to put that document away for a moment and introduce another document.

(Exhibit 2 marked for identification.)

Q. Okay. Do you see what has been marked as Exhibit PL0002?

A. Yes.

Q. Okay. Can you just tell me what it -- well, sorry. Take a minute to look at it, please, first.

A. Okay.

Q. Thank you. And then can you just tell me what this document is?

A. It appears to be the Aetna Better Health of West Virginia member handbook.

Q. And for which plan year, please?

A. 2020 to 2021.

Q. Okay. And can you tell me what, to the extent you know, what Mountain Health Trust - Medicaid means there at the bottom?

A. Mountain Health Trust is the name of our managed care program.

Q. Okay. So the managed care program oversees the managed care organizations, is that right?

A. Yeah, it's an all encompassing term. You'll hear it referred to as the Mountain Health Trust plan or, it's to differentiate between fee for service and managed care.

Q. Oh, that's helpful. Okay. So fee for service does not fall under the Mountain Health Trust?

A. Correct.

Q. Okay. Thank you for that.

MR. CHARLES: Again, Kim, turning to

organization, Ms. Young. Can you tell me what your job title is, please?

A. Deputy commissioner of policy and operations.

Q. Okay. And what responsibilities fall under your role within BMS?

A. Under the policy side I have staff who oversee all of the coverage policies that we have, that also includes our eligibility policy. And on the operation side I have oversight of all of the technical systems that we use to manage the program.

Q. Can you tell me what technical systems you oversee, that seems like a big bucket of work, can you just say a little bit more of what you mean by that?

A. It is. We have the Medicaid managed information system, you may see it referred to as MMIS, that is our claims processing system. Within that we have our provider enrollment documents or files as well. I do not see the, oversee the member eligibility system, but our staff do have input into the Medicaid portion of that system. There are various other systems that we oversee that touch on member eligibility as well.

Q. So there's another individual who specifically oversees eligibility, right, that formally falls under someone else, is that correct?

A. The policy for member eligibility falls under?

Q. No, I'm sorry, not the policy. I'm looking at -- sorry. There's a director of Medicaid eligibility, so I guess what I'm asking is like what is the difference between what you just said and that person's role?

A. So the employee at BMS who is the director of member eligibility, she reports to me.

Q. Oh, I see. Okay. And can you just tell me who that is so I don't have to keep referring to them by their title?

A. Anita Hayes.

Q. Thank you. Okay. So she reports to you?

A. Correct.

Q. Are there, can you tell me the other directors that you oversee?

A. Sure. Do you want names and titles?

Q. Yeah, please.

A. Okay. Anita is my director of Member Eligibility; Jennifer Myers is the director of Provider Services -- oh, I'm sorry, we change our titles often.

Q. I think she's Professional Services, right?

A. Thank you, yes, yes. And I have Brandon Lewis is our Medicaid Enterprise Systems director; I have Marcus Canaday who is the director of our Money Follows the Person program; Randall Hill who is director of our

Home and Community Services Based program, and Cynthia Parsons who was director of our Behavioral Health and Long-Term Care Services. I believe that is everyone.

Q. That's quite the list. Okay. Thank you very much for that. So then who do you directly report to?

A. Commissioner Cindy Beane.

Q. Okay. And just in a sort of general way, do you have a formal structure for how often you report to Commissioner Beane, you know, I'm not referring here to informal communications you might have with her, I'm just speaking, you know, do you have a monthly, you know, formal reporting structure or a quarterly structure, something of that nature?

A. We have a weekly leadership team meeting to which we escalate issues that the commissioner or the other deputies are not already aware of, but there is a lot of informal escalation of issues.

Q. That makes sense. Thank you. How long have you been in your role as deputy commissioner for policy and operations?

A. Officially I was interim for a number of years, I believe official was 2016 or 2017.

Q. If you had to ballpark your interim years, could you give me just a rough estimate?

A. I believe it started in 2014.

Q. That works. Thank you. And were you employed with BMS before you started as the interim director?

A. Yes, I was.

Q. And what was your position within BMS before that?

A. I came to BMS in 2012 and at that time I was in the position of assistant to the commissioner, and then at some point I was promoted to a director position before becoming interim deputy.

Q. Okay. So you were assistant to the commissioner beginning in 2012. Can you just tell me briefly what that, what your duties were therein?

A. Sure. I ensured that the commissioner was aware of issues that were not escalated to her in other ways. And at that time I also oversaw the Medicaid expansion duties, the state plan amendments and the policies around that.

Q. And before your position as assistant to the commissioner, were you also employed in some capacity with BMS or were you with a different organization?

A. I was still with DHHR, but not with BMS, I was with a different Bureau.

Q. And what Bureau was that?

A. At the time it was called Bureau For Children & Families.

additional schooling beyond your bachelor degree?

A. I do have hours towards a master degree, but I have not completed the master's.

Q. And when you complete those hours do you have to do it through a particular institution or how is that credentialed, if you can just say briefly?

A. It's not through my employment, but I was taking hours remotely through West Virginia University.

Q. Okay, I see. And at some point it could be that you'll acquire sufficient hours to confer a master's degree, is that how that would work?

A. Generally, yes.

Q. Okay. So as you sort of likely put together, because I just jumped right into things, your deposition is that of an organizational representative for BMS. Do you understand that?

A. I do, yes.

Q. Okay. So I'm, you know, not asking you the person, Ms. Young, I'm asking you the BMS representative questions today. And so your counsel has designated you to give testimony as the organizational representative for BMS on certain topics, do you understand that?

A. Yes.

Q. Okay. Do you recall when you were notified that you'd be giving this testimony today as an

A. That's my understanding, yes.

Q. Okay. Thank you. And are you aware of, as of right now of any managed care organizations doing that for gender confirming care, so using a bucket not, not West Virginia Medicaid designated funds for the coverage of gender confirming care?

A. Not that I'm aware of, no.

Q. Okay. Will providers who are contracted and eligible within the requirements we talked about for West Virginia Medicaid receive reimbursement for gender confirming care that they provide to West Virginia Medicaid recipients who are transgender?

A. Let me make sure I understand. They will be reimbursed for covered services. If they are billing for a gender confirming procedure that is not covered, they will not be reimbursed for that procedure.

Q. Okay. So as a specific example, would a provider who submits for reimbursement be reimbursed for billing for counseling, for example, for gender dysphoria for someone who receives West Virginia Medicaid coverage?

A. Yes, they would, that is a covered service.

Q. Okay. And what about gender confirming hormones?

A. Hormone therapy is a covered service.

Q. Okay. And what about gender confirming surgical procedures?

A. That is not a covered service.

Q. Okay. So then just backing up a little bit, Ms. Young. So on the provider side of determining benefits, how does BMS or West Virginia Medicaid, I guess I can, sorry, I can just say BMS, how does BMS determine benefits on the provider side year-to-year?

A. So big picture speaking, it's based on the covered services for members. And then based on the covered service we drill down to the codes that are specific to those individual services, and then further drill down to the type of practitioner or provider that is eligible to provide that in West Virginia. Or based on, I'm sorry, based on our West Virginia policies, we do have out of state providers, but we do drill down to that specific type of provider. And then there are, so there's different codes that come out each year and they're evaluated to see if it falls within that process that I explained.

Q. Okay. And do those determinations reflect consideration of Center for Medicare and Medicaid Services requirements?

A. Yes. So the Center for Medicare, Medicaid Services dictates, which are mandatory services, and we

A. Yeah, it's a big question because I think we were aware on a personal and a professional level as to what was going on and we were approached by a number of state providers, members, different advocacy groups or different interested parties. There was specific funding that was made available around that time as well, so it was getting a lot of attention and obviously we were being asked to do what we could to address it as well.

Q. Thank you for that. So for a change like that which, I mean, tell me if this is right, you said that was a larger system change in the benefit structure for both enrollees and providers. Do you recall that CMS had to be consulted about that change?

A. Yes.

Q. Okay.

A. Yeah, specifically this type of authorization. We were aware of at least one other state at the time that had requested for the authority to do something like this. This demonstration waiver is a very lengthy process and CMS was involved from the very beginning of conceptualizing it through public comment and approving the actual application for the waiver.

Q. I see. And so thinking about CMS's role specifically as it relates to gender confirming care, to

your knowledge does CMS require that gender confirming care be excluded from any state Medicaid plan?

A. Not that I'm aware of.

Q. Okay. And are you aware of any other state Medicaid plans that include or provide coverage for gender confirming care? And I should say, I know this is tricky, but you the representative of BMS, not you, Ms. Sarah Young, in your personal capacity.

A. And I apologize, I don't, I have not done research on what other states cover and the degree to which they do cover.

Q. Okay. And have you seen any discussion of that specific nature come through emails from other members in the leadership team?

A. Regarding other states?

Q. Other states, yes, yes, mm-hmm.

A. Not that I recall.

Q. Okay. And then when the Bureau for Medical Services undertook the change to cover hormone therapy, do you know if CMS was consulted in that change?

A. My understanding of that is that we had always covered the hormone therapy until a change was made at some point, and I don't know when that was, that change was made that we didn't cover it. So then when the change was made it was basically reverting back to the

regardless.

Q. Got it. Okay. Thank you. And then sort of zooming out again, if BMS excludes a particular service, are the MCO's required to abide by that exclusion?

A. Yes, if they are reimbursing out of their Medicaid money.

Q. Okay. Sorry, Ms. Young, give me just a second. How are you doing, Ms. Young, would you like a break now or would you like to continue for about another 20 minutes and then we break for lunch?

A. I can continue.

Q. Okay. Thank you. So if you would look back again at the marked exhibits, the most recent one that we had open there, the second amended notice of deposition. We're still on Page 2. Oh, no, I'm sorry, we're on Page 3, if you would, and I'm looking at topic No. 5. Do you see it up there?

A. Yes, it begins with, "Your efforts to administer."

Q. It does. Could you just finish reading the rest of that topic for me, please.

A. "Your efforts to administer the Medicaid program in West Virginia and/or affirm your compliance with the Medicaid Act and the Patient Protection and Affordable Care Act."

that reimbursement is available to providers who provide those services to our members. We provide member education, provider education, we have a number of documents on our Website to guide those policies and procedures, and we contract with a number of systems and vendors that help us operationalize those policies.

Q. That was a nice succinct job for what I understand to be a very large undertaking. So it's fair to say then that BMS oversees all matters pertaining to Medicaid recipients' access to West Virginia Medicaid services?

A. Yes.

Q. Okay. Does BMS establish a process for individuals to apply for West Virginia Medicaid eligibility?

A. We do in partnership with a sister Bureau who actually does the application processing.

Q. Oh, I think you mentioned that earlier. What is the name of that Bureau?

A. The original name was Bureau For Children & Families, I believe their current name is Bureau for Family Assistance.

Q. Okay. And that is not housed within BMS?

A. No, it is under the umbrella of DHHR, it is separate and distinct from BMS.

interrogatories to Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, Bureau for Medical Services interrogatories." Did I read that correctly?

A. Yes.

Q. Okay. So if you'll scroll down to what is numbered Page 3, please.

A. Okay.

Q. I'm looking at No. 11 there. If you'll just follow along, I'll read this one, although I suspect you're going to be better at knowing codes than I am, but I'll give it a shot. "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 diagnoses: 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)." Did I read that mostly correctly?

A. You did, yes.

Q. I'm sorry, I need to technically ask you, did I read that completely correctly?

A. Yes.

Q. Okay. Thank you. So the response begins on Page 3 and says there, "Upon information and belief," and then continues to Page 4 there at the top. Can you just read to me the years and the corresponding number of members, please.

A. 2016, 30 members; 2017, 50 members; 2018, 243 members; 2019, 439 members; 2020, 602 members; 2021 through 9/30, 686 members."

Q. Thank you. So quickly, let me go back to this request here. I just want to make sure we have a shared understanding. So this is, plaintiffs asked defendants to identify the number of health plan participants who have submitted one or more claims with a diagnosis code for gender dysphoria or gender incongruence, do you understand that part of the request?

A. I do, yes.

Q. Good, thank you. So then let's just look at the number for 2021, please, and that's through September, I understand that to be September 30th of 2021. Is that how you understand that date reference there?

A. Yes, I would too, yes.

Technologies.

Q. Okay. And does BMS have, does BMS have access to Gainwell and Kepro? I guess what I mean is, the way you described the MCO's is that they have their own similar process, but it's separate and run through their systems. Is it accurate then to say that fee for service is under BMS and BMS does sort of provide oversight and management and can access both Gainwell and Kepro as necessary?

A. Yes, that's correct.

Q. Okay. All right. As far as you're aware, are there other vendors that BMS works with to understand and utilize accurate criteria in evaluating costs for reimbursement?

A. I believe that there are other vendors on the pharmacy side.

Q. Okay.

A. And they may have another person to speak to that. On the medical side we do engage consultants from time to time, we have a project management contract, so they might do research for us and help us with researching various topics. But offhand, I can't think of another contracted entity that helps with the medical evaluation.

Q. Sure. Let me just ask you about the one I'm

aware of. Are you familiar with InterQual?

A. Yes.

Q. And is that, what is InterQual, as you understand it?

A. As I understand at a very high level, InterQual criteria is a nationally accredited criteria for determining medical necessity for procedures and that is the criteria that our contractor Kepro uses.

Q. Oh, okay. And do you know if the MCO's use InterQual as well for those criteria for assessing medical necessity?

A. I don't know which specific criteria they use. I would believe that their contract states that they must use a nationally accredited criteria.

Q. Okay. What's the importance of using a nationally accredited criteria for those indicia?

A. I think it speaks to the validity and the quality of the product that it is nationally accredited. It's not a homegrown made-up process, it's something that is readily available and has been peer reviewed and all the things that might go into their accreditation.

Q. Thank you. Do you know how long, again, estimate, ballpark is fine, do you have a sense of how long Kepro has been using InterQual? And let's focus, I'm sorry, just on your tenure, I don't expect you to

answer beyond that.

A. Sure. I'm not aware of them using another criteria.

Q. Okay.

A. I've only ever heard of the InterQual criteria.

Q. Okay. Let me, I'm just going to introduce another exhibit here, if you'll give me just one moment.

(Exhibit 12 marked for identification.)

Q. So, Ms. Young, there should be an exhibit now in the marked exhibits folder labeled PL0012.

A. I can see it.

Q. Okay. I'm guessing not, but have you seen this document before?

A. No, I don't believe so.

Q. Okay. If you would please just take a, it's only, it's basically three pages, if you'll take just a quick minute and just review it to your satisfaction and then I've just got a couple of questions.

MS. CYRUS: Are there Bates numbers on that?

MR. CHARLES: No. I think it was in the production that came -- it is not Bates stamped, no.

MS. CYRUS: Okay. Thank you.

A. Okay.

Q. Okay. So what is this document?

a couple parts of this last paragraph, so bear with me. "InterQual procedures criteria," do you see that there?

A. Yes.

Q. Okay. "InterQual procedures criteria are derived from the systematic continuous review and critical appraisal of the most current evidence based literature and include input from our independent panel of clinical experts. To generate the most appropriate recommendations, a comprehensive literature review of the clinical evidence was conducted." Did I read those two sentences accurately?

A. Yes.

Q. Okay. Thank you. I'm going to introduce a couple more exhibits here related to InterQual, if you'd just give me one moment. Okay. So looking at this information from InterQual and in the context of what you shared about what Kepro contracts with InterQual for, did BMS consider the recommendations included in InterQual's medical necessity criteria when determining that coverage for transsexual surgery or for sex transformation were not included in West Virginia Medicaid?

A. I can't speak to the practice when the decision was put in policy in 2004, but I can say that since then we would have not, we would have not reviewed the

criteria for noncovered services.

Q. Okay.

A. So I would imagine InterQual criteria includes every single possible procedure that could be performed and we would only have contracted with Kepro to review the criteria for covered services.

Q. Okay. So in terms of the scope of this topic as it refers to denials of coverage, I know we've talked a number of times about what coverage isn't provided under the West Virginia Medicaid plan. Do you know or are you aware of any instances where BMS has ever communicated with a managed care organization regarding denials for surgical procedures for the treatment of gender dysphoria when it's otherwise medically indicated? Let me rephrase, I'm sorry, I made that a little complicated.

So are you aware of a time where an MCO or, I mean, obviously a person working for the managed care organization has reached out to BMS to say, you know, we have this person, this procedure is medically indicated for them, we understand this limitation in the coverage, what should we do, are you aware of any instances of that kind of request coming from an MCO?

A. Not off the top of my head. I mean, we do receive a number of inquiries, you know, to confirm what

A. Again, I considered everything that we have written on the topic and I was aware that other individuals on the leadership team were aware of this and, you know, in the absence of anyone saying that this is illegal or against regulations, I believe it to be legal.

Q. Okay. So were you able to find any research that was done by BMS about the legality of the exclusion of gender confirming care in West Virginia Medicaid?

A. No, nothing specific to this.

Q. So are you aware of any research that was undertaken to support the particular coverage decision?

A. No, it was honestly more the absence of any guidance or notification from CMS that I found to speak to the legality of it.

Q. Okay. Let me back up just a little bit. From the previous topic that we were discussing, you were not able to find, don't know of any reasons why the exclusion was developed?

A. Correct.

Q. Okay. And you also were not able to find and are not aware of any, what was considered I guess in making the decision to include that exclusion in the Medicaid manuals we were discussing?

A. Correct.

over 600,000 individuals, and so as I spoke, the limited budget that we have, we have to ensure that it will cover the benefits that we have promised and outlined in our policies that we do cover. So the addition of anything extra or anything on top of that is what limits us, you know, we have to be able to do what we said we were going to do.

Q. Sure. And has BMS done research about the cost of providing gender affirming service in West Virginia Medicaid?

A. Not that I'm aware of.

Q. Sorry, can we go back. You said there was a match that happened. Can you just, as you've been doing such a generous job of today, explain generally to me what that refers to?

A. Sure. So each state is allocated a federal match based on a bunch of factors, but basically the economics of the state. So states that are the poorer states get a greater match. I believe the bottom is 50/50, so prosperous states get a 50 percent match on the state dollars. So our budget, the amount of claims that we have to reimburse or capitation that we have to pay on a monthly basis we are required, generally speaking let's say our match is 75 percent, so we would be required to pay 25 percent of that and we can draw

for the treatment of gender dysphoria, that claim would not be denied by BMS solely on the basis that it was for the treatment of gender confirming care?

A. Correct.

Q. Okay. So for those, for that particular coding, the gender dysphoria coding of those visits is accepted, not rejected by BMS West Virginia Medicaid?

A. Correct.

Q. Okay. And as far as you know, does BMS cover office visits related to gender confirming care?

A. Can you be specific as to the type of office.

Q. Sure. So, for example, I know this is tricky, but I'm asking about the office visits to an endocrinologist, not for the purpose of prescribing hormones, but for the purpose of monitoring, blood work, kidney, kidney and liver testing, thyroid. Would those kind of medical visits, again, I'm trying not to get into what the other witness is going to talk about, would those visits be covered under the existing policy?

A. Yes.

Q. Okay. And as far as you're aware, Ms. Young, has BMS in its administration of West Virginia Medicaid provided any partial or total coverage for any surgical procedure for the treatment of gender dysphoria?

A. Not that I'm aware of.

Q. Okay. But as you said earlier today, if the diagnostic code was something different, given other variables we've discussed, it has the potential to be covered?

A. Correct, yes.

Q. Okay.

(Exhibit 19 marked for identification.)

Q. I'm going to introduce a couple of documents. There should be another exhibit there in the shared folder.

MR. CHARLES: And this will be marked, Kelley, as Plaintiff's Exhibit 0019.

Q. So as a part of your testimony in topic 18, you have been designated to testify in regard to BMS's response to request for production No. 2, and that is included on this document that I'm showing you right now. Do you have it in front of you?

A. I do, yes.

Q. Okay. And do you have that same understanding -- sorry, I should be asking you. Do you understand that you've been designated to testify about request for production No. 2?

A. Yes.

Q. Okay. So I'll just read this, "Defendants' seventh supplemental response to plaintiffs' first set

REPORTER'S CERTIFICATE

STATE OF MINNESOTA )
) ss.
COUNTY OF WASHINGTON )

I hereby certify that I reported the Zoom deposition of Sarah Young on the 11th 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 11th day of March 2022.

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

# Exhibit 15

**In the Matter of:**

CHRISTOPHER FAIN

vs

WILLIAM CROUCH, et al.

DR. DAN KARASIC

*April 15, 2022*




5010 Dempsey Drive
Cross Lanes WV 25313
304-415-1122

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,

vs. Civil Action No. 3:20-cv-00740

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.

"CONFIDENTIAL"
VIDEOTAPED DEPOSITION OF DR. DAN KARASIC
BY VIDEO CONFERENCE

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The videotaped deposition of Dr. Dan Karasic was taken on April 15, 2022, at 12:02 p.m., at 5010 Dempsey Drive, Cross Lanes, West Virginia.

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gender-related conditions?

ATTORNEY SMITH: Object to form.

A. So I just was -- I thought about that and looked at patients that I saw over a couple of days, and about two-thirds of my private practice patients are transgender.

Q. Do all of those patients who are transgender treat with you for gender dysphoria or gender incongruence?

ATTORNEY SMITH: Object to form.

A. No. Many of them are transgender but are seeing me for -- for example, mood and anxiety disorders or other psychiatric conditions.

Q. And I think that from reading your report there is a difference between someone having a transgender identity and someone having gender dysphoria; is that correct?

ATTORNEY SMITH: Object to form.

A. Yes.

Q. Can you explain what that difference is?

A. Sure. So being transgender is an identity. It's how someone identifies. And

gender dysphoria is used both to describe a symptom, but also to describe a DSM-5 disorder of gender dysphoria.

Q. Is there a difference between gender dysphoria as a symptom and gender dysphoria as a diagnosis?

ATTORNEY SMITH: Object to form.

A. Yes. The DSM diagnosis requires that the person be -- the distress that somebody is experiencing from gender dysphoria be clinically significant or affecting social or occupational -- causing social or occupational impairment.

Q. Does clinical significance mean that it's causing those social or occupational impairments?

A. So it can be social or occupational impairment, or it can be so much distress that you go to the doctor. So that's what's clinically significant.

Q. So there are patients who experience gender dysphoria as a symptom, but do not have the clinical significance that rises to the level of a DSM-5 diagnosis; is that correct?

M.D. Do you have Exhibit 1 in front of you?

A. Yes.

Q. I'm looking at page 5, paragraph 21. And I'll read the first sentence, Gender identity is a person's deeply felt, inherent sense of being a girl, woman or female, a man or male, a blend of male or female or an alternative gender.

And that is citing to the American Psychological Association, 2015.

A. Yes.

Q. And the next sentence says, Gender identity does not always align with sex assigned at birth. Gender identity, which has biological bases, is not a product of external influence and not subject to voluntary change.

First, did I read that correctly?

A. Yes.

Q. Okay. So when you were talking about cultural psychiatry and taking into consideration the experience of individuals with transgender identities, you talked about some external things, such as rejection from family, peers, school, health experiences.

And I'm asking if you can explain to me the difference between those external influences and the internal sense of self that you have stated as the definition of a gender identity?

ATTORNEY SMITH: Object to form.

A. Sure. So as described in this definition from the American Psychological Association, gender identity is an internal sense of self. Societal discrimination is -- or rejection is people's reactions to someone's perceived identity. So, you know, there is an internal experience that a transgender person has as well as, you know, an experience in society.

Q. And I think that I'm understanding you correctly. What my real question here is, is I guess about the reasons that gender identity exists at all. Can you explain what actually forms gender identity?

ATTORNEY SMITH: Object to form.

A. So the -- there isn't a simple answer in terms of what forms a gender identity. You know, people know that there are biological

underpinnings. And there have been sometimes interesting differences that illuminate what forms gender identity. Somebody with complete androgen insensitivity for example is XY in terms of their chromosome, but assigned female at birth. And they may not even know that their chromosomally XY until they go to a fertility doctor in adulthood.

So what we have -- I'd say we have ideas of components, but it certainly -- part of our ongoing learning experience of all the different factors that lead to someone's particular gender identity.

Q. What percentage of transgender individuals have that androgen -- is it -- instability, was that the word you used?

ATTORNEY SMITH: Object to form.

A. Complete androgen insensitivity. Most of those people do not identify as transgender. Most people with complete androgen insensitivity identify as female. And it -- so that's a case where somebody is chromosomally XY, but their cells don't have androgen receptors. And so the presence of androgens

bipolar disorder.

So those are examples certainly where, you know, mental disorder would preclude gender-affirming care at least until it was -- until or unless it could be treated so they were able to give informed consent.

Q. Again, if I'm understanding correctly, it's not that someone with bipolar disorder, that means that they can't have gender-affirming care? It's that their bipolar disorder has to be stable before they're provided gender-affirming care?

ATTORNEY SMITH: Object to form.

A. Yes. And in Standards of Care 7, it's listed as being, you know -- well controlled is the adjective that they use. But the importance is that they -- that they're able to give informed consent, that they're able to participate in care in terms of aspects of what is well controlled.

Q. And since you just mentioned it, I'll ask you a question. The Standards of Care, that's a bit of a misnomer, isn't it?

ATTORNEY SMITH: Object to form.

A. Was that a question?
Q. Yes.
A. Well --
ATTORNEY SMITH: Object to form.
A. -- I think if we look historically that WPATH and its predecessor organization established the Standards of Care as standards of care for the field. I think that they've also been described as practice guidelines.
Q. I don't think anyone will disagree that they're practice guidelines. But just saying we publish the Standards of Care probably doesn't mean that it is the standard of care and that if someone does not comply with that that they're committing malpractice, right?
ATTORNEY SMITH: Object to form.
A. So I think there is still -- there's still a belief that they are trying to set standards of care as well as practice guidelines. And within the standards of care, there certainly is a flexibility and deference to clinical judgment.
So it's not something that is -- well, I don't remember exactly how you put it. But I

I, Martha Fourney, Certified Court Reporter and Notary Public, do hereby certify that the foregoing deposition of the above-named witness, was duly taken by me in machine shorthand, was recorded via Zoom, and that the same were accurately written out in full and reduced to computer transcription.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, nor do I have a financial interest in the action.

My commission expires May 27, 2022

Martha Fourney
Certified Court Reporter/Notary Public