

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

4 CHRISTOPHER FAIN, individually
5 and on behalf of all others
6 similarly situation, et al.,

7 Plaintiffs,

8 vs. CIVIL NO. 3:20-cv-000740

9 WILLIAM CROUCH, et al.,

10 Defendants.

11 VIDEOCONFERENCE DEPOSITION OF
12 JENNIFER MYERS

13 30(b)(6) Representative for Defendant
14 West Virginia Department of Health and Human Resources,
15 Bureau for Medical Services
16

17

18 DATE: April 8, 2022

19 TIME: 7:58 a.m.

20 PLACE: Charleston, West Virginia
21 (via videoconference)

22 JOB NO.: MW 5096186

23

24

25 REPORTED BY: Dawn Workman Bounds, CSR

<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES 2 (ALL APPEARANCES VIA VIDEOCONFERENCE) 3 ON BEHALF OF PLAINTIFFS: 4 ANNA P. PRAKASH, ESQUIRE NICOLE J. SCHLADT, ESQUIRE 5 Nichols Kaster, PLLP IDS Center, 80 South 8th Street 6 Suite 4700 Minneapolis, MN 55402 7 612.256.3200 aprakash@nka.com nschladt@nka.com 8 AVATARA SMITH-CARRINGTON, ESQUIRE Lambda Legal Defense and Education Fund, Inc. 10 3500 Oak Lawn Avenue, Suite 500 Dallas, Texas 75219 11 214.219.8585 asmithcarrington@lambdalegal.org 12 TARA L. BORELLI, ESQUIRE 13 Lambda Legal Defense and Education Fund, inc. 158 West Ponce De Leon Avenue, Suite 105 14 Decatur, GA 30030 470.225.5341 tborelli@lambdalegal.org. 15 WALT AUVIL, ESQ. 17 The Employment Law Center, PLLC 1208 Market Street 18 Parkersburg, West Virginia 26101 304.485.3058 19 auvil@theemploymentlawcenter.com 20 21 22 23 24 25 (APPEARANCES CONTINUED ON NEXT PAGE)</p>	<p style="text-align: right;">Page 4</p> <p>1 INDEX 2 WITNESS: JENNIFER MYERS PAGE 3 EXAMINATION BY MS. PRAKASH..... 6 4 OBJECTIONS: 58, 65, 66, 67, 69, 71 5 EXHIBITS MARKED/REFERRED TO 6 No. 1: List of Jennifer Myers' Topics..... 8 7 No. 2: Defendants' Response to Plaintiff's First Set of Interrogatories to Defendants William 8 Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services..... 13 9 10 No. 3: Defendants' First Supplemental Response to Plaintiff's Second Set of Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia Department of 11 Health and Human Resources, Bureau for Medical Services..... 18 12 13 No. 4: Defendants' Second Supplemental Response, 14 to Plaintiff's Second Set of Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia Department of 15 Health and Human Resources, Bureau for Medical Services..... 26 16 17 No. 5: Defendants Response to Plaintiffs Second Set of Interrogatories to Defendants 18 William Crouch, Cynthia Beane, and West Virginia Department of Health and Human 19 Resources, Bureau for Medical Services.... 31 20 No. 6: Defendants' Third Supplemental Response to Plaintiff's Second Set of 21 Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia 22 Department of Health and Human Resources, Bureau for Medical Services..... 35 23 No. 7: H.3d Supp Interrog 11 DHHRBMS016332..... 37 24 25</p>
<p style="text-align: right;">Page 3</p> <p>1 ON BEHALF OF DEFENDANTS WILLIAM CROUCH; CYNTHIA BEANE; and WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN 2 RESOURCES, BUREAU FOR MEDICAL SERVICES: 3 KIMBERLY M. BANDY, ESQUIRE LOU ANN S. CYRUS, ESQUIRE 4 Shuman McCuskey Slicer PLLC 1411 Virginia Street East 5 Suite 200 (25301) P.O. Box 3953 6 Charleston, WV 25339-3953 304.345.1400 7 kbandy@shumanlaw.com lcyrus@shumanlaw.com 8 9 10 11 NOTE: The original deposition transcript will be 12 delivered to Anna P. Prakash, Esq., as the taking attorney. 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 EXHIBITS MARKED/REFERRED TO (CONTINUED) 2 No. 8: Defendants Fifth Supplemental Response to Plaintiff's First Set of Requests 3 for Production to Defendants William Crouch, Cynthia Beane, and West Virginia 4 Department of Health and Human Resources, Bureau for Medical Services..... 39 5 No. 9: J.5th Supp RFP 3 3d Supp RFP 27 6 DHHRBMS016178..... 41 7 No. 10: Defendants' Ninth Supplemental Responses to Plaintiffs' First Set of Requests for 8 Production..... 57 9 No. 11: Defendants' Response to Plaintiff's First Set of Requests for Production to 10 Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health 11 and Human Resources, Bureau for Medical Services..... 59 12 No. 12: Defendants Third Supplemental Response to 13 Plaintiffs First Set of Requests for Production to Defendants William Crouch, 14 Cynthia Beane, and West Virginia Department of Health and Human Resources Bureau for 15 Medical Services..... 60 16 No. 13: Email chain from Myers to Wilkinson 10/21/21 re: [External] now I need 17 any criteria you have DHHRBMS015365..... 62 18 No. 14: Article - Billing and Coding: Gender 19 Reassignment Services for Gender Dysphoria DHHRBMS015416..... 65 20 No. 15: ClaimCheck Single Code Sex Edits Clinical 21 Manual Version 65 DHHRBMS013459..... 66 22 No. 16: Email from Cyrus to Myers 11/4/20 re: CR language with CHIP added 23 DHHRBMS013980..... 71 24 25</p>

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<p>1 PROCEEDINGS</p> <p>2 THE REPORTER: The parties will stipulate</p> <p>3 that the court reporter may swear in the witness over the</p> <p>4 videoconference.</p> <p>5 Agreed, counsel?</p> <p>6 MS. PRAKASH: Yes</p> <p>7 MS. BANDY: Yes.</p> <p>8 JENNIFER MYERS,</p> <p>9 duly sworn via videoconference as stipulated by counsel</p> <p>10 was examined and testified as follows:</p> <p>11 EXAMINATION</p> <p>12 BY MS. PRAKASH:</p> <p>13 Q. Morning. Could you please state your full name</p> <p>14 for the record.</p> <p>15 A. Jennifer Jill Myers.</p> <p>16 Q. Okay. And I see in the Zoom box that you have</p> <p>17 "she/her" next to your name.</p> <p>18 Are those the pronouns that you use?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. My name is Anna Prakash. I represent</p> <p>21 Christopher Fain and Shauntae Anderson in this lawsuit</p> <p>22 against the State, various entities, and people.</p> <p>23 And I'm going to be asking you some</p> <p>24 questions today. I understand that you are testifying</p> <p>25 today on behalf of and as the designee of the Bureau for</p>	<p>1 And that might include hormone therapy, counseling,</p> <p>2 surgery, medical appointments.</p> <p>3 So if I refer to gender-confirming care,</p> <p>4 will you understand what I mean?</p> <p>5 A. Yes.</p> <p>6 (Exhibit No. 1 marked.)</p> <p>7 BY MS. PRAKASH:</p> <p>8 Q. Great. So in the marked exhibits folder, there</p> <p>9 is an exhibit labeled JM1. Could you please open that.</p> <p>10 A. Yes, I have it open.</p> <p>11 Q. Great. This is a list that I received from</p> <p>12 your counsel about the topics that you are able to</p> <p>13 testify to today.</p> <p>14 Are these the written discovery requests</p> <p>15 that you are able to testify to today?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And you're prepared to do that today?</p> <p>18 A. Yes.</p> <p>19 Q. Great. Okay. You can hit the back button to</p> <p>20 exit out of that exhibit.</p> <p>21 Can you start by telling me what your</p> <p>22 current title is?</p> <p>23 A. I'm the director of professional services with</p> <p>24 BMS.</p> <p>25 Q. Okay. And that means you're a BMS employee?</p>
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<p>1 Medical Services.</p> <p>2 Do you understand that?</p> <p>3 A. Yes.</p> <p>4 Q. Great. And if you don't understand one of my</p> <p>5 questions, will you please let me know?</p> <p>6 A. Yes.</p> <p>7 Q. Great. If you answer my question, I'm going to</p> <p>8 assume that you understood it, okay?</p> <p>9 A. Yes.</p> <p>10 Q. Great. So I'm going to be talking about -- I</p> <p>11 mentioned the Bureau for Medical Services so I might</p> <p>12 refer to that as BMS.</p> <p>13 Will you understand what I mean if I do</p> <p>14 that?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And similarly, the Department of Health</p> <p>17 and Human Services, I might refer to as DHHS. Would you</p> <p>18 understand -- sorry. DHHR, Department of Health and</p> <p>19 Human Resources.</p> <p>20 Would you understand that if I made that</p> <p>21 reference?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Great. And I also might talk about</p> <p>24 gender-confirming care which is care that transgender</p> <p>25 people receive for the treatment of gender dysphoria.</p>	<p>1 A. Yes.</p> <p>2 Q. Okay. And what are your current job duties?</p> <p>3 A. I oversee the medical policies unit. We create</p> <p>4 and update the medical policies for BMS.</p> <p>5 Q. Okay. And in your role, do you report to</p> <p>6 anybody?</p> <p>7 A. Yes. I report to Sarah Young.</p> <p>8 Q. Okay. Anybody else?</p> <p>9 A. No.</p> <p>10 Q. And does anybody report to you?</p> <p>11 A. Yes. I have eight staff that report to me.</p> <p>12 Q. Okay. And what roles are those staff members</p> <p>13 in?</p> <p>14 A. Those are ben -- program manager over benefits</p> <p>15 are their titles.</p> <p>16 Q. Okay. And what does a program manager over</p> <p>17 benefits do?</p> <p>18 A. They will research and update policies as</p> <p>19 necessary, review federal guidelines, and state</p> <p>20 legislation that goes through --</p> <p>21 Q. Okay.</p> <p>22 A. -- to see if they affect any of our policies.</p> <p>23 Q. And part of your job is overseeing their work,</p> <p>24 right?</p> <p>25 A. Yes.</p>

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1 Q. Okay. And can you give a recent example of the
 2 type of work that they do?
 3 A. Yes. Recently the legislation -- West Virginia
 4 legislation passed a new rule that said that --
 5 out-of-state telehealth providers are -- BMS, which
 6 previously the employees --
 7 THE REPORTER: Excuse me, I'm not able to
 8 hear. She's cutting out.
 9 MS. PRAKASH: Could you start that answer
 10 again, Ms. Myers. I think the court reporter didn't
 11 catch all of it because of the internet connection.
 12 A. Yes. The employee will listen to and review
 13 state legislation as it's passed, and then will review
 14 the policy that it could apply to. And if it changes a
 15 policy -- a procedure that it goes through for approval.
 16 MS. PRAKASH: Ms. Myers, in the middle of
 17 that, you cut out again.
 18 THE WITNESS: Okay.
 19 MS. PRAKASH: Kim, are you having that
 20 same issue?
 21 MS. BANDY: Yes.
 22 MS. PRAKASH: So I don't think it's any of
 23 us, I think it's probably your --
 24 THE WITNESS: It's probably me.
 25 MS. PRAKASH: Yeah.

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1 THE REPORTER: Off the record for this
 2 part?
 3 MS. PRAKASH: Yeah.
 4 (Discussion off the record.)
 5 THE WITNESS: Can you repeat the question
 6 for me, just to make sure I'm staying on topic?
 7 BY MS. PRAKASH:
 8 Q. Yeah. I asked whether you could give a recent
 9 example of the type of work that your direct reports do?
 10 A. So an employee will review the state
 11 legislation as it's being reviewed and approved. If a
 12 new statute is approved, they will review that and go
 13 through their assigned policy to see if it affects the
 14 policy. And if so, they will update that policy.
 15 Q. Okay. And you oversee that; you said that's
 16 one of your job duties, correct?
 17 A. Yes.
 18 Q. Okay. And do you have any other job duties?
 19 A. Yes. I also help with the PERM audit. It's a
 20 federal audit that's done every three years. And I
 21 oversee the policy portion of that, which would be the
 22 review of claims to make sure that they are processed
 23 according to the policy.
 24 Q. What --
 25 A. I'm sorry. Go ahead.

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1 Q. What does PERM stand for?
 2 A. Payment error rate management.
 3 Q. Got it. Okay.
 4 And then you were going to describe
 5 additional job duties?
 6 A. I also go to meetings with -- different CMS
 7 meetings that have to do with any type of policies or
 8 claims processing. My unit also had been in charge of
 9 any of the COVID-related items, such as vaccines and
 10 testing.
 11 Q. Anything else?
 12 A. That's it.
 13 Q. Okay. How long have you been in this role?
 14 A. I took this position in December 2018.
 15 Q. Okay. And prior to that, were you still
 16 employed by BMS?
 17 A. No. I was actually employed with West Virginia
 18 CHIP, which is a division under DHHR but not BMS.
 19 Q. And what did you do with West Virginia CHIP?
 20 A. I was the benefits manager.
 21 Q. Okay. Can you tell us what CHIP stands for?
 22 A. Children's health insurance program.
 23 Q. Thanks. And what did you do as benefits
 24 manager?
 25 A. For CHIP I wrote and updated all of the

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1 policies.
 2 Q. And how long were you in that role?
 3 A. I took that position in May of 2013.
 4 Q. Okay. Do you have any medical training?
 5 A. No.
 6 Q. Okay. What is the highest degree that you
 7 have?
 8 A. I have a bachelor's degree in biology as an
 9 emphasis.
 10 Q. Okay. Do you have any other degrees or
 11 professional certifications?
 12 A. No.
 13 Q. And when did you get your bachelor's?
 14 A. 1996.
 15 Q. Okay. Thank you.
 16 (Exhibit No. 2 marked.)
 17 BY MS. PRAKASH:
 18 Q. So I'm going to enter another exhibit. It will
 19 appear in just a minute.
 20 Okay. If you refresh the marked exhibits
 21 folder, you should see JM2.
 22 A. Yes.
 23 Q. Okay. Great. Could you open that and let me
 24 know when you have it open?
 25 A. I have it open.

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<p>1 Q. Great. And on this first page, the title is</p> <p>2 Defendants' Response to Plaintiff's First Set of</p> <p>3 Interrogatories to Defendants William Crouch, Cynthia</p> <p>4 Beane, and West Virginia Department of Health and Human</p> <p>5 Resources, Bureau for Medical Services.</p> <p>6 Did I read that right?</p> <p>7 A. Yes.</p> <p>8 Q. What do you understand this document to be?</p> <p>9 A. The document I understand to be is a response</p> <p>10 to the questions that have been asked.</p> <p>11 Q. Great. Can you scroll down, please, to page 4,</p> <p>12 which is where Interrogatory 5 starts.</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And this question asks about coverage</p> <p>15 for mastectomy, breast reduction, and chest</p> <p>16 reconstruction surgery and asks for diagnostic codes,</p> <p>17 procedure codes, and medical necessity criteria, correct?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And in response, BMS refers us to the</p> <p>20 MCOs as well as to the BMS provider manual chapter on</p> <p>21 surgical services, right?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. As part of this same exhibit, I've</p> <p>24 attached that referenced document. So if you could</p> <p>25 scroll down, I think it's page 21 of the pdf.</p>	<p>1 Q. Any other way that you know of?</p> <p>2 A. There is a list that a provider can sign up for</p> <p>3 to be personally -- personal e-mail to their e-mail</p> <p>4 address if an update is done.</p> <p>5 Q. Okay. And at the bottom of that page that</p> <p>6 we're on, which is 199, there's a date. It says revised</p> <p>7 1-15-2016.</p> <p>8 Do you know if there have been revisions</p> <p>9 since that date?</p> <p>10 A. There have not.</p> <p>11 Q. Okay. Could you scroll down to the next page</p> <p>12 on covered services, and because there have not been</p> <p>13 updates, I assume that that section is still accurate.</p> <p>14 Is it?</p> <p>15 A. Yes.</p> <p>16 Q. And then the same for the prior authorization</p> <p>17 section that starts at the bottom of that page and goes</p> <p>18 into the next page, that is still accurate, right?</p> <p>19 A. Yes.</p> <p>20 Q. And then finally the noncovered services, which</p> <p>21 are at the bottom of page 201, that is still accurate,</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. On page 201, in the middle, there's a</p> <p>25 note that says, "Mastectomy or related covered</p>
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<p>1 So when you get there, the number that you</p> <p>2 will see at the bottom is DHHRBMS000199, and that</p> <p>3 continues with pages through 202.</p> <p>4 Can you let me know when you are on page</p> <p>5 199?</p> <p>6 A. I am.</p> <p>7 Q. Okay. Great. Is this the BMS provider manual</p> <p>8 Chapter 519.16 on surgical services?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And what's the purpose of this document?</p> <p>11 A. The purpose is to -- at a high level, to state</p> <p>12 what the policy is for covered and noncovered services</p> <p>13 that are surgical in nature.</p> <p>14 Q. Okay. And who is the intended reader of this?</p> <p>15 A. Providers.</p> <p>16 Q. Okay. And those are -- is that at the MCO</p> <p>17 level or the providers within each MCO?</p> <p>18 Well, let me ask you the question this</p> <p>19 way.</p> <p>20 A. Okay.</p> <p>21 Q. Can you define provider for me?</p> <p>22 A. Provider would be an M.D., O.D. or other health</p> <p>23 care professional that provides services to our members.</p> <p>24 Q. And how is this distributed to providers?</p> <p>25 A. It is on our website.</p>	<p>1 reconstructive procedures will not require prior</p> <p>2 authorization for individuals diagnosed with breast</p> <p>3 cancer."</p> <p>4 Do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Are there -- what are the other covered</p> <p>7 reconstructive procedures that it is referring to here?</p> <p>8 A. I can't answer that.</p> <p>9 Q. Okay. Do you know --</p> <p>10 A. That would be -- that would be a medical</p> <p>11 decision, a medical, and that's just not within my</p> <p>12 purview.</p> <p>13 Q. Okay. And do you know whether mastectomy or</p> <p>14 related covered procedures are covered for any reason</p> <p>15 other than breast cancer?</p> <p>16 A. Not -- no, I do not know.</p> <p>17 Q. Okay. Who would know that?</p> <p>18 A. Can you restate the question one more time?</p> <p>19 Q. Sure. My question was whether mastectomy or</p> <p>20 related reconstructive procedures are covered for any</p> <p>21 reason other than breast cancer?</p> <p>22 A. It would -- a request would have to go through</p> <p>23 the UM vendor, which is the utilization management vendor</p> <p>24 which is Kepro. They have a list they could review for</p> <p>25 medical necessity to determine if that would be covered</p>

<p style="text-align: right;">Page 18</p> <p>1 or not under our policy.</p> <p>2 Q. And does Kepro utilize guidelines from</p> <p>3 InterQual?</p> <p>4 A. Yes.</p> <p>5 Q. So to the extent there are InterQual guidelines</p> <p>6 that allow for mastectomy or other reconstructive</p> <p>7 procedures, Kepro would be following those to determine</p> <p>8 medical necessity?</p> <p>9 A. Yes.</p> <p>10 Q. But I understand that -- that surgical care for</p> <p>11 the treatment of gender dysphoria is a noncovered</p> <p>12 service; is that right?</p> <p>13 A. Yes, that's right.</p> <p>14 Q. Okay. All right. You can exit out of that</p> <p>15 document.</p> <p>16 (Exhibit No. 3 marked.)</p> <p>17 BY MS. PRAKASH:</p> <p>18 Q. And I'm going to introduce another one, since</p> <p>19 you're designated to talk about written responses, so</p> <p>20 we're going to have a lot of exhibits to look through.</p> <p>21 Sometimes it takes a little while for the</p> <p>22 documents to load. Thanks for your patience. Okay.</p> <p>23 So in the marked exhibits folder, you</p> <p>24 should see Exhibit JM3. Could you let me know when you</p> <p>25 have that open, please?</p>	<p style="text-align: right;">Page 20</p> <p>1 DHHRBMS001009.</p> <p>2 A. I'm there.</p> <p>3 Q. Okay. Great.</p> <p>4 So is this an example of the InterQual</p> <p>5 guidelines that Kepro would use to determine medical</p> <p>6 necessity?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. I want to walk through this first one</p> <p>9 just to better understand it.</p> <p>10 So at the top it has a trademark that says</p> <p>11 InterQual. Can you tell me what InterQual is?</p> <p>12 A. InterQual is a nationally recognized UM</p> <p>13 software, which is utilization management software, that</p> <p>14 is -- can be purchased/leased to be used to determine</p> <p>15 medical necessity.</p> <p>16 Q. And does BMS purchase that software?</p> <p>17 A. No. It's purchased by the UM vendor Kepro.</p> <p>18 Q. Okay. And Kepro has a contract with BMS,</p> <p>19 correct?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. And then it says, "October 2021 Release</p> <p>22 CP: Procedures" at the top.</p> <p>23 I understand that to mean that these</p> <p>24 guidelines were issued in October of 2021; is that</p> <p>25 right?</p>
<p style="text-align: right;">Page 19</p> <p>1 A. I have it open.</p> <p>2 Q. Okay. And so these are BMS and William Crouch</p> <p>3 and Cynthia Beane's First Supplemental Response to</p> <p>4 Plaintiff's Second Set of Interrogatories; is that right?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. And Interrogatory 8 which starts on that</p> <p>7 first page asks about conditions, diagnostic codes, or</p> <p>8 instances where coverage for hysterectomies or</p> <p>9 oophorectomies are available through Medicaid, including</p> <p>10 diagnostic codes, procedure codes, and medical necessity.</p> <p>11 Is that your understanding?</p> <p>12 A. Yes.</p> <p>13 Q. Then if you scroll to the second page, the</p> <p>14 supplemental response says: Without waiving any</p> <p>15 objection, see Exhibits 10 through 26, Bates Numbered</p> <p>16 DHHRBMS001009 through DHHRBMS001112, which are used as</p> <p>17 part of the review process.</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. So if you scroll down, I have attached</p> <p>21 the documents that correspond with those Bates numbers.</p> <p>22 And I believe they start on page 6 of the pdf or -- 6 or</p> <p>23 7 of the pdf.</p> <p>24 So let me know when you're there. The</p> <p>25 top, just so -- well, actually the bottom number says</p>	<p style="text-align: right;">Page 21</p> <p>1 A. Yes.</p> <p>2 Q. Okay. And do you know what CP procedures</p> <p>3 means?</p> <p>4 A. No.</p> <p>5 Q. Okay. And then the requested service lists</p> <p>6 hysterectomy and a few other procedures, correct?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Do you know how Kepro -- well, do you</p> <p>9 know whether Kepro, fills out forms like this, whether in</p> <p>10 paper or online or just refers to them?</p> <p>11 A. I do not know that.</p> <p>12 Q. Okay. And then halfway down the page, it</p> <p>13 references ICD-10 and CPT.</p> <p>14 Do you know what those references are to?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And what are they references to?</p> <p>17 A. ICD-10 is a diagnosis code and CPT is the</p> <p>18 procedure code.</p> <p>19 Q. Okay. And does BMS utilize those specific</p> <p>20 codes with respect to insurance coverage determinations?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And then a little further down the page</p> <p>23 there are instructions. And it looks like it's basically</p> <p>24 asking the reader to choose which -- to answer those</p> <p>25 questions to determine medical necessity; is that right?</p>

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1 A. That's my understanding.
 2 Q. Okay. And does anybody at BMS go over these
 3 with Kepro, or is it entirely left to Kepro?
 4 A. It's entirely left to Kepro.
 5 Q. Okay. And is there somebody at BMS that's in
 6 charge of overseeing Kepro to make sure that they're
 7 following these guidelines correctly?
 8 A. Yes, that would be all of the supervisors at
 9 BMS.
 10 Q. And which department are those supervisors in?
 11 A. We -- medical would fall under Sarah Young.
 12 Q. Okay. And how many supervisors are there that
 13 fall into that category?
 14 A. Approximately seven.
 15 Q. Okay. And do you know their names?
 16 A. Yes.
 17 Q. Could you list them out, please?
 18 A. Okay. Jennifer Myers, Cynthia Parsons, Randy
 19 Hill, Brian Thompson, Brandon Lewis.
 20 Q. Is that seven? I wasn't keeping track.
 21 A. No, I think that's five.
 22 Q. Okay. If you remember the others, will you
 23 tell me when they come to you?
 24 A. Yes.
 25 Q. Okay. And you listed yourself, right?

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1 A. Yes.
 2 Q. So can you tell me what you do to oversee Kepro
 3 to make sure they're following these guidelines
 4 correctly?
 5 A. I review monthly reports that are -- they're
 6 actually summary reports. And then if requested, I will
 7 request -- I will request additional information from
 8 them to dig down deeper into reviews.
 9 Q. And when you say "if requested," who makes the
 10 request?
 11 A. I request through Kepro.
 12 Q. I see. And what would cause you to make a
 13 request?
 14 A. Usually it would be led by either a provider
 15 inquiry that would make me question something, or an
 16 inquiry from our fiscal processor which is at this time
 17 Gainwell. If they see -- sometimes they may bring
 18 something to my attention that they think is possibly
 19 incorrect.
 20 Q. And has that ever happened in either of those
 21 instances with respect to insurance cover -- coverage for
 22 gender-confirming care?
 23 A. No.
 24 Q. Okay. Can you keep scrolling, please, to the
 25 next page. At the top it says notes and then there's a

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1 numbered list of paragraphs?
 2 A. Yes, I'm there.
 3 Q. Okay. So just for the record, I'm on page
 4 DHHRBMS001011.
 5 And could you please take a minute to read
 6 to yourself that first paragraph, and just let me know
 7 when you're ready to talk about it.
 8 A. Okay, I'm finished.
 9 Q. Thank you. That third sentence in that
 10 paragraph says, "At the individual patient level, a
 11 variety of factors, including, but not limited to, gender
 12 identity and gender affirmation via surgery or hormonal
 13 manipulation, may affect the applicability of some
 14 InterQual criteria."
 15 Do you know how those factors affect the
 16 applicability of InterQual criteria?
 17 A. No.
 18 Q. And is that something that anybody at BMS would
 19 know?
 20 A. No, I don't believe so.
 21 Q. And is that something someone at Kepro would
 22 know?
 23 A. Possibly.
 24 Q. And if somebody at Kepro were to know that,
 25 what do you think that person's job title would be?

Page 25

1 A. Clinical reviewer.
 2 Q. Okay. And are there specific clinical
 3 reviewers that you work with?
 4 A. No.
 5 Q. Approximately how many clinical reviewers does
 6 BMS work with at Kepro?
 7 A. I'm not -- I don't know.
 8 Q. Okay. And in your oversight of Kepro's
 9 application of the InterQual guidelines, have you ever
 10 had reason to question or ask whether Kepro is taking
 11 into account the information in Note 1 here?
 12 A. No.
 13 Q. Okay. And then there are several, several -
 14 more than a hundred - more pages, and they -- they're --
 15 they encompass the Bates range or the page number range
 16 that defendants identified in their written response,
 17 which, again, is 1009 through 1112.
 18 And you are welcome to scroll through
 19 these, but I understand that all of these are InterQual
 20 guidelines that Kepro would utilize.
 21 And my question to you is going to be: Is
 22 that your understanding? And you can take as much time
 23 as you want to answer.
 24 A. Yes, that is my understanding also.
 25 Q. All right. Thank you.

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1 And then do you know whether InterQual has
 2 guidelines for similar procedures as those identified
 3 here with respect to hysterectomy and oophorectomy that
 4 are used for the treatment of gender dysphoria?
 5 A. I believe that they do.
 6 Q. Okay. And in its work for BMS, does Kepro
 7 utilize those guidelines?
 8 A. No.
 9 Q. And why is that?
 10 A. Because it's not a covered service under BMS.
 11 Q. Okay. All right. You can exit out of that
 12 document.
 13 And just back on the question of
 14 InterQual, the guidelines whether or not key point --
 15 sorry -- Kepro utilizes them are meant to determine
 16 medical necessity, right?
 17 A. Yes.
 18 Q. Okay. So I'm going to introduce another
 19 exhibit.
 20 (Exhibit No. 4 marked.)
 21 BY MS. PRAKASH:
 22 Q. So it should appear in the marked folder as
 23 JM4.
 24 A. I have it open.
 25 Q. Great. So these are Defendants' Second

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1 Supplemental Response to Plaintiffs' Second Set of
 2 Interrogatories to Defendants Crouch, Beane, and BMS.
 3 Do you agree with me on that?
 4 A. Yes.
 5 Q. Okay. So Interrogatory 8 we already -- we just
 6 talked about with respect to the last exhibit.
 7 But this one has a supplemental response.
 8 So if you scroll down to the second page, there is a list
 9 of diagnostic codes. Do you see that?
 10 A. Yes.
 11 Q. Okay. So in the response itself it says,
 12 "Below is a sample listing of the approved diagnoses
 13 since 2016." And then it goes on.
 14 But can you tell me what sample listing
 15 means in this context?
 16 A. Yes. This would not be an all-inclusive list.
 17 Q. Okay. Do you know what is missing or how it
 18 was determined that certain things would be excluded?
 19 A. There wasn't actually anything excluded.
 20 What -- there was no good way to come up with a list of
 21 approved diagnoses because a lot of it is determined by
 22 medical history, previous treatment, the severity and the
 23 combination of other symptoms and conditions.
 24 So what I did to get this list is take the
 25 procedure codes, put them in the system at Gainwell to

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1 run a report for any diagnosis that we had on file that
 2 was approved for the procedures.
 3 Q. I see. And so these codes that appear on page
 4 2 of this exhibit are codes -- diagnostic codes for which
 5 a corresponding procedure was approved by BMS; is that
 6 right?
 7 A. Yes.
 8 Q. Okay. And do you know where these codes come
 9 from? Like is there a universal system or are they
 10 specific to BMS? Could you just help me out with that?
 11 A. No, there's a universal system and it's the
 12 ICD-10 codes, and it's used around the world.
 13 Q. Okay. And then if you scroll to the third
 14 page, procedure codes are listed there starting with CPT.
 15 What does CPT mean?
 16 A. I don't know.
 17 Q. Okay. And then how did BMS determine that
 18 these are the procedure codes that are responsive to the
 19 request?
 20 A. CPT is also a universally known coding system,
 21 and we -- BMS utilizes the Optimum software for coding;
 22 and it's basically an online version where you can put in
 23 the name of a procedure, and it will tell you the
 24 corresponding CPT codes for that procedure.
 25 Q. Okay. And so in this instance in responding to

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1 this request, you would have put in hysterectomy and
 2 oophorectomy, right?
 3 A. Yes.
 4 Q. Great. And then none of the codes that are on
 5 page 2 for diagnoses would be for gender dysphoria,
 6 right?
 7 A. Correct.
 8 Q. Okay. And let's see...
 9 Part C on page 3 talks about medical
 10 necessity.
 11 How does BMS determine what needs prior
 12 authorization versus what is just automatically covered?
 13 A. Most surgeries -- any inpatient surgery needs
 14 prior authorization. Outpatient surgeries are
 15 determine -- director --
 16 THE REPORTER: I didn't hear the whole --
 17 the end of the answer.
 18 BY MS. PRAKASH:
 19 Q. Could you just start that answer again, please.
 20 A. Sure. Basically everything goes through the
 21 medical director and he determines if a PA is required or
 22 not.
 23 Q. Is that the medical director at BMS?
 24 A. Yes.
 25 Q. And -- but -- but that determination is not

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1 made each time that there is an outpatient surgery,
 2 right?
 3 A. No. The medical director will determine the --
 4 if -- based on the code, not based on the patient.
 5 Q. I see.
 6 A. So -- okay.
 7 Q. So -- so that sounds like a one-time
 8 determination, though, because the codes don't change; is
 9 that right?
 10 A. It can be, unless a provider requests a review,
 11 then it will go back to the medical director with
 12 whatever information they submit with it that they
 13 consider it to be -- not need a PA. So it can be
 14 reviewed additionally.
 15 Q. Got it. So if you keep scrolling down,
 16 Interrogatory 9 asks the same questions but with respect
 17 to vaginoplasty. Do you see that?
 18 A. Yes.
 19 Q. And then the supplemental response about
 20 diagnostic codes says: We have no claims or approvals
 21 for this service?
 22 What does that mean?
 23 A. I used the same procedure for each of the
 24 different procedures to get the diagnostic codes, but we
 25 don't have any -- we, as in Medicaid, do not have any

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1 claims or requests for those codes, at least since 2016,
 2 which is as far back as I went.
 3 Q. And when you say you have no claims or
 4 approvals, that includes denials, right?
 5 A. Correct.
 6 Q. So there have been no denials or approvals?
 7 A. Correct, yes.
 8 Q. Got it.
 9 Okay. And then I have, if you scroll down
 10 to page 10 -- sorry -- Interrogatory 10 on page 4, it
 11 asks the same questions with respect to different
 12 procedures, right?
 13 A. Yes.
 14 Q. And the same process for coming up with these
 15 responses that you testified to with respect to the
 16 previous two interrogatories was used with respect to
 17 Interrogatory 10, right?
 18 A. Yes.
 19 Q. Thank you. Okay. Back out of that document.
 20 (Nicole Schladt enters the Zoom room.)
 21 Q. Okay. If you refresh the marked exhibits
 22 folder, JM5 should be in there now.
 23 (Exhibit No. 5 marked.)
 24 A. Okay. I'm in.
 25 BY MS. PRAKASH:

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1 Q. Okay. And this says Defendants' Response to
 2 Plaintiffs' Second Set of Interrogatories to Defendants'
 3 Crouch, Beane, and BMS.
 4 Is that what you understand this to be?
 5 A. Yes.
 6 Q. So I'd like you to scroll down to page 3 which
 7 is Interrogatory 11. It starts at the bottom of that
 8 page.
 9 A. Okay. I'm there.
 10 Q. Okay. And so this asks to identify the number
 11 of health plan participants who have submitted one or
 12 more claims with a diagnosis code for gender dysphoria or
 13 gender incongruence, and then lists those specific
 14 diagnoses that are included in this request.
 15 The response says upon information and
 16 belief, and then on page 4 lists numbers per year.
 17 Do you know why the response starts with
 18 upon information and belief?
 19 A. No.
 20 Q. And do you have any doubt that these numbers
 21 are accurate?
 22 A. I do not.
 23 Q. Okay. And do you know where these numbers were
 24 pulled from?
 25 A. I pulled the numbers from the Gainwell system.

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1 Q. Okay. And how did you go about doing that?
 2 A. I ran a report for all claims with the listed
 3 diagnosis codes that were listed in the number 11, and
 4 then I excluded duplicate members and just used the
 5 unique number of members for each year.
 6 Q. Okay. If you could answer one more question
 7 about this.
 8 Are these numbers all approved claims, or
 9 all claims, whether they were approved or denied, or
 10 how -- what do these numbers represent?
 11 A. They are all claims approved or denied.
 12 Q. Okay. If you wanted to, you would be able to
 13 use the system to separate out the numbers of denied
 14 versus approved claims, right?
 15 A. I could separate it out for the fee-for-service
 16 claims.
 17 Q. Okay. And what about the claims that fall
 18 under managed care?
 19 A. That would need to be requested from the
 20 managed care company.
 21 Q. Okay. Why is it that BMS doesn't have access
 22 to that?
 23 A. We -- I don't know why we don't have access to
 24 their systems.
 25 Q. Okay. But you would agree with me that none of

Page 34	<p>1 the numbers listed here represent approvals for surgical 2 procedures, right?</p> <p>3 A. I can't guarantee that.</p> <p>4 Q. Well, are you aware of any instance in which 5 surgical procedures have been approved for any of the 6 diagnoses listed in Interrogatory 11?</p> <p>7 A. Can you repeat the question?</p> <p>8 Q. Are you aware of any instance in which surgical 9 procedures have been approved for any of the diagnoses in 10 Interrogatory 11?</p> <p>11 A. No, I'm not aware of any.</p> <p>12 Q. Okay. And so it's fair to say that the numbers 13 that are listed in response to Interrogatory 11 do not 14 include approvals for surgical care, right?</p> <p>15 A. Again, I can't guarantee that.</p> <p>16 Q. Why can't you?</p> <p>17 A. Can I explain?</p> <p>18 Q. Yes.</p> <p>19 A. Okay. When the report was pulled, it was 20 pulled based on the diagnosis code, in the diagnosis code 21 that was billed on the claim.</p> <p>22 A diagnosis -- one of the diagnosis codes 23 listed in number 11 could be on the claim, but not be 24 actually completely related to the service. So I can't 25 guarantee that there was not a claim that was submitted</p>	Page 36	
Page 35	<p>1 for surgery, any type of surgery, that had a diagnosis of 2 gender dysphoria as a diagnosis that was not the primary 3 diagnosis.</p> <p>4 Q. I see. Okay. So it may be that surgery was 5 approved for a diagnoses that is not listed in 6 Interrogatory 11, but the patient had that diagnosis in 7 addition to something else?</p> <p>8 A. Correct.</p> <p>9 Q. Got it. Okay. Thank you. You can exit out of 10 that document.</p> <p>11 Okay. If you refresh the marked exhibits 12 folder, you should have JM6 in there. Just let me know 13 when you've got that open.</p> <p>14 (Exhibit No. 6 marked.)</p> <p>15 A. Okay. It's open.</p> <p>16 BY MS. PRAKASH:</p> <p>17 Q. This is -- it looks like the third supplement 18 response. It's just some of the interrogatories that 19 we've been looking at, specifically Interrogatory 11, 20 right?</p> <p>21 A. Yes.</p> <p>22 Q. And then on the second page of this document, 23 it refers us to an e-mail from Aetna and two attachments, 24 right, in the supplemental response?</p> <p>25 A. Yes.</p>	<p>1 Q. And I attached everything but the Excel sheet 2 that is referenced. So if you scroll down to page 5, the 3 Bates number at the bottom is DHHRBMS016321.</p> <p>4 Do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. And this looks like an e-mail from 7 someone at Aetna to Susan Hall.</p> <p>8 Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. And do you know who Susan Hall is?</p> <p>11 A. Yes.</p> <p>12 Q. Who is she?</p> <p>13 A. She's one of those other managers that I 14 couldn't name earlier.</p> <p>15 Q. Okay. Great.</p> <p>16 And it looks like what Aetna is providing 17 is the number of members with paid claims and the number 18 of members with denied claims with respect to the 19 diagnoses listed in Interrogatory 11.</p> <p>20 Is that what you understand they would be 21 attaching here?</p> <p>22 A. Yes.</p> <p>23 Q. So then I would like to look at that 24 attachment. So if you exit out of this exhibit, I will 25 enter that.</p>	Page 37
Page 37	<p>1 (Exhibit No. 7 marked.)</p> <p>2 BY MS. PRAKASH:</p> <p>3 Q. And because it is an Excel sheet, I am unable 4 to apply an exhibit sticker to it, but it should appear 5 in your marked exhibits folder with the file name that 6 starts with Exhibit JM7.</p> <p>7 Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. Could you please click on that and then 10 you'll have to download it in order to be able to utilize 11 the document.</p> <p>12 Do you see the download button?</p> <p>13 A. I have it up.</p> <p>14 Q. Okay. Great.</p> <p>15 And then for the record, I will represent 16 to you that this was produced to us with the Bates number 17 DHHRBMS016332.</p> <p>18 Is this the document that Aetna would have 19 provided to BMS?</p> <p>20 A. I would assume so.</p> <p>21 Q. Okay. Have you seen this before?</p> <p>22 A. I believe I have, yes.</p> <p>23 Q. Okay. And what do you understand it to -- to 24 be?</p> <p>25 A. A spreadsheet of the number of members who</p>	Page 37	

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1 were -- who had approved or denied claims for gender
 2 dysphoria.
 3 Q. Okay. And is that across all of BMS or just
 4 with respect to those members who have Aetna as their
 5 MCO?
 6 A. I would say just Aetna as their MCO.
 7 Q. Okay. Do you know if this information, this
 8 type of information is available from the other two MCOs
 9 that BMS uses?
 10 A. I would assume so.
 11 Q. Okay. Do you know if BMS has requested that
 12 from the other two MCOs?
 13 A. I don't know.
 14 Q. Okay. And then with respect to the
 15 supplemental response to Interrogatory 11, which was
 16 JM6 -- and you're welcome to go back to that if you would
 17 like -- do you know why that supplemental response only
 18 references Aetna and not the Health Plan or UniCare?
 19 A. No.
 20 Q. And were you the person responsible for
 21 responding to this interrogatory?
 22 A. Yes.
 23 Q. And is there a reason you did not gather
 24 information from UniCare or the Health Plan to answer
 25 this?

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1 A. No.
 2 Q. You agree with me that getting information from
 3 UniCare and the Health Plan would complete this response?
 4 A. I don't necessarily agree with that, no.
 5 Q. Why not?
 6 A. The numbers that I supplied were -- encompassed
 7 MCO and fee-for-service.
 8 Q. And --
 9 A. I didn't request from Aetna, the Health Plan or
 10 UniCare.
 11 Q. So Aetna supplied the information of their own
 12 volition?
 13 A. I don't know where the request was made for
 14 Aetna to supply this information.
 15 Q. Okay. We will go to another exhibit. Like I
 16 said, since you're designated to talk about all these
 17 written responses, that's what we're going to go through.
 18 (Exhibit No. 8 marked.)
 19 BY MS. PRAKASH:
 20 Q. Okay. If you refresh the marked exhibits
 21 folder, you should have JM8 in there.
 22 A. Okay, I have it up.
 23 Q. Okay. And this is Defendants' Fifth
 24 Supplemental Response to Plaintiffs' First Set of Request
 25 for Production of Documents, right?

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1 A. Yes.
 2 Q. Okay. If you scroll down to the end of the
 3 second page, beginning of the third page, I'm looking at
 4 request number 3.
 5 And that asks for the number of members
 6 who requested coverage for gender-confirming care, the
 7 number of claims each has made, and whether those claims
 8 were approved or denied, the factual reasons for the
 9 decision, and whether the denials were based in whole or
 10 in part on the exclusion.
 11 Do you see that?
 12 A. Yes.
 13 Q. Okay. And the exclusion referenced there, I
 14 think, is the lack of coverage for surgical care as a
 15 treatment for gender dysphoria.
 16 Do you agree with me?
 17 A. Yes.
 18 Q. Okay. And listed in the supplemental response
 19 is a reference to an Excel sheet, but also diagnoses
 20 codes; and those diagnoses codes come from the ICD-10,
 21 correct?
 22 A. Yes.
 23 Q. Okay. And in that response, the second
 24 sentence says, "Please note that for all MCO claims as
 25 reflected in column A, an entry of denied in column X,

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1 simply means that such claim was presented to the MCO,
 2 and BMS does not have information about the outcome of
 3 that claim, and it would need to be obtained from the
 4 particular MCO."
 5 Is that what you were testifying to
 6 earlier when you said that the MCOs have access to
 7 whether certain claims were approved or denied?
 8 A. Yes.
 9 Q. Okay. And I think -- this might be a better
 10 question for me to ask you if we have the Excel sheet in
 11 front of us. So let me enter that one.
 12 (Exhibit No. 9 marked.)
 13 BY MS. PRAKASH:
 14 Q. Okay. It should appear in the marked exhibits
 15 folder with the file name that starts with JM9.
 16 Because it's an Excel sheet, I can't apply
 17 a stamp to it. For the record, it was produced to use
 18 with the Bates number DHHRBMS016178.
 19 Could you let me know when you've
 20 downloaded that document, please?
 21 A. I have it up now.
 22 Q. Okay. Great. One second, it's opening for me.
 23 If you scroll to the left -- the right --
 24 sorry -- in the column X it says -- it has a list of
 25 things: Denied, paid, reversed.

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1 Do you see that column?
 2 A. It's actually my column W, but, yes.
 3 Q. Hum. So you have a document -- you have an
 4 Excel sheet open, correct?
 5 A. Yes.
 6 Q. And at the top, the file name says Exhibit
 7 JM9-J.5th sup RFP 3 and 3d sup RFP 27 DHHRBMS016178.
 8 Do you have that same document in front of
 9 you?
 10 A. Yes.
 11 Q. And have you downloaded the Excel sheet so it's
 12 not appearing in a viewer window, but it's appearing as
 13 like an Excel document?
 14 A. Okay. I thought I had but I had not. Yes,
 15 now it's -- column X is denied or paid. I'm sorry.
 16 Q. Got it. No problem.
 17 So I understand from the supplemental
 18 response that we just looked at that if column X says
 19 denied, BMS doesn't, in fact, know whether it was denied
 20 or not, right?
 21 A. MCO claims. For fee-for-service, denied is a
 22 denied claim.
 23 Q. Got it. Okay.
 24 And then if you -- so I'm on the tab
 25 that's 2016. Are you on that same tab?

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1 A. Yes.
 2 Q. Okay. And if you scroll all the way back over
 3 to column A, I'm looking at row 8.
 4 Do you see that?
 5 A. Yes.
 6 Q. Okay. And then -- so cell A 8 in the tab 2016
 7 says MCO, right?
 8 A. Yes.
 9 Q. Could you repeat that, I think you broke up a
 10 little?
 11 A. Oh, I'm sorry. Yes.
 12 Q. Okay. And I understand that to mean that this
 13 particular row is talking about something within the
 14 managed care program, not fee-for-service, right?
 15 A. Correct.
 16 Q. Okay. And if you stick with row 8 and you keep
 17 scrolling over to go all the way back to column X, it
 18 says paid?
 19 A. Yes.
 20 Q. How does BMS know that that was paid if it's
 21 not fee-for-service?
 22 A. So when the MCO sends over their monthly file
 23 for their encounter claims, they're put into the
 24 fee-for-service system. When this happens,
 25 fee-for-service will -- will apply their edits, even

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1 though the claim's already been paid, so it doesn't
 2 affect payment or reimbursement, but it does go through
 3 the fee-for-service system, apply their edits, and
 4 sometimes they'll get a denial.
 5 Now, if it doesn't hit on any of the
 6 fee-for-service edits, then it will show paid in the
 7 system.
 8 Q. And is that for all claims from the MCOs or
 9 just certain types of claims?
 10 A. Can you be more specific?
 11 All claims that are ran through the
 12 system, or all claims that do not hit an edit?
 13 Q. All claims that are run through the system?
 14 A. Yes, it's true for all claims run through the
 15 system.
 16 Q. So are there any claims from the MCO that would
 17 not be run through the system?
 18 A. Not that I'm aware of.
 19 Q. So every claim from an MCO is run through the
 20 system, and what triggers whether it is marked as paid or
 21 not?
 22 A. Medicaid has a program -- it's not a program --
 23 but a system where it's called -- let me rephrase.
 24 There are certain diagnosis codes and
 25 certain procedure codes that will go through the Medicaid

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1 system and not hit an edit denied for being MCO primary.
 2 Q. Can I ask you before you continue explaining,
 3 when you say edit, what do you mean?
 4 A. When I say edit, it is a software program that
 5 will look at different types of things on a claim,
 6 whether codes can be billed together, whether there's
 7 something in the system that is going to stop that claim
 8 from paying.
 9 In the case of MCOs, when the claim is put
 10 through the system from the MCO, most of the claims are
 11 going to go hit an edit that says the MCO should have
 12 paid for this and deny.
 13 Certain codes will bypass that
 14 because it's considered a pay and chase code. Pay and
 15 chase is a code that Medicare has set up to say even if
 16 Medicaid is secondary and we don't receive an EOB with
 17 the claim, that we can pay the claim and then go back and
 18 try to reimburse from the primary payer.
 19 Those will show as paid because they
 20 didn't trigger that edit.
 21 Q. So the -- if it says paid in one of these lines
 22 where column A indicates MCO, it may, in fact, have been
 23 denied, or will it always have been paid?
 24 A. It will always have been paid.
 25 Q. Okay. And some of the ones that are listed as

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1 denied may have been paid?
 2 A. Correct.
 3 Q. And the ones that are listed as denied and may
 4 have been paid are not marked as paid because they didn't
 5 hit an edit in the system; is that right?
 6 A. No.
 7 Q. Okay. I think you're going to have to explain
 8 that to me again.
 9 The ones that are marked from the MCO that
 10 are marked as denied and did not -- and were, in fact,
 11 paid, why is it that they show up as denied here?
 12 A. In the system they will hit an edit which says
 13 the MCO should have paid primary.
 14 Q. So -- I see. So the system says this was an
 15 incorrect denial and it should have been paid; is that
 16 right?
 17 A. No, not exactly.
 18 The system -- the claim has already been
 19 paid. The system is just going to show denied.
 20 Basically the MCO sends us the claims for informational
 21 purposes. We don't necessarily use the paid amounts or
 22 show them in the system.
 23 Q. Okay. So I really don't want to belabor this,
 24 but I just want to see if I can understand the basics of
 25 this.

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1 For the MCO lines that are marked on this
 2 spreadsheet as denied, but in fact were paid, when they
 3 went through the system, they hit an edit, correct?
 4 A. Yes.
 5 Q. Okay. And that edit said what?
 6 A. Usually -- not a 100 percent of the time -- but
 7 usually it will say MCO is the primary payer, and it will
 8 deny the claim.
 9 Q. I see. And what system is that?
 10 A. MMIS.
 11 Q. Okay. And when it says MCO is the primary
 12 payer, what does that mean?
 13 A. The member belongs to an MCO group, not a
 14 fee-for-service group.
 15 Q. I see. And -- but it would still be Medicaid
 16 dollars that the MCO is using to pay for the claim,
 17 right?
 18 A. No. Technically the MCOs are paid a capitation
 19 rate where -- that gets more into finance.
 20 Q. Uh-huh. Yeah. So when the system -- I'm
 21 sorry, you said the system was MMIS; is that right?
 22 A. Yes.
 23 Q. Okay. When MMIS says that the MCO should have
 24 paid, does that mean paid within that capitated rate or
 25 paid above that or in addition to that?

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1 A. The claim is already paid by the MCO. When it
 2 goes through the MMIS system, the system is denying it
 3 saying it should have been paid by the MCO, but the MCO
 4 already actually paid it.
 5 They pay -- the way MCOs pay, BMS pays a
 6 capitation rate to the MCO. That's a per member, per
 7 month fee. So we pay -- Medicaid pays the MCO a set
 8 amount for each person that's in that MCO. The MCO then
 9 pays claims out of MCO money.
 10 I'm not explaining this very well because
 11 it is finance, but we pay by capitation rate.
 12 Q. Okay. So why does the system think that the
 13 MCO hasn't paid if they've already paid?
 14 A. The system is just -- it's just putting
 15 information in the system from the MCOs. It looks like
 16 claim information, but it's really just informational.
 17 Q. So is there any rhyme or reason as to why it
 18 would hit an edit versus not when a claim is put into the
 19 system?
 20 A. Yes, it's going to hit the edits based on the
 21 information put in the system.
 22 Q. Okay. So what about those edits makes the
 23 system not recognize whether the MCO has already paid or
 24 not?
 25 A. So -- I don't know.

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1 Q. Okay. Is there somebody who would know the
 2 answer to that?
 3 A. I think it would take a configuration person
 4 from Gainwell to explain that.
 5 Q. Okay. And if -- like we had looked at the
 6 previous spreadsheet from Aetna, if you wanted to know
 7 whether certain claim's paid or not, you'd be able to get
 8 that from the MCO?
 9 A. Right.
 10 Q. Okay. So let's scroll back in this
 11 spreadsheet.
 12 We talked about how column A means
 13 whether it's within managed care or fee-for-service,
 14 right?
 15 A. Yes.
 16 Q. What does column B indicate, do you know?
 17 A. An NPI number for the provider.
 18 Q. What is NPI?
 19 A. It's an identification number, a national
 20 provider identification number.
 21 Q. Got it. And then what about column C?
 22 A. It's an -- it's an internal number to Gainwell.
 23 Q. And do you know what it represents?
 24 A. I do not.
 25 Q. And what about column D?

Page 50	<p>1 A. It's the name of the provider.</p> <p>2 Q. And column E?</p> <p>3 A. Individual practitioners NPI.</p> <p>4 Q. Column F?</p> <p>5 A. Also an internal number to Gainwell.</p> <p>6 Q. And is column G the individual practitioner?</p> <p>7 A. Yes.</p> <p>8 Q. And column H is what?</p> <p>9 A. It is whether it is a MCO or not an MCO. MCO</p> <p>10 is considered -- it's called West Virginia Mountain</p> <p>11 Health Trust. That is then split into the three HMOs</p> <p>12 that we have -- or MCOs that we have.</p> <p>13 Q. What's the difference between column H and</p> <p>14 column I?</p> <p>15 A. For Medicaid, there isn't a difference. The</p> <p>16 difference comes for West Virginia CHIP.</p> <p>17 Q. Okay. What's the difference?</p> <p>18 A. West Virginia CHIP is split into three</p> <p>19 different plans, and then those plans are split into the</p> <p>20 HMOs.</p> <p>21 Q. Got it. Do you mean MCO or HMO?</p> <p>22 A. MCO, sorry.</p> <p>23 Q. We've been using that term, I don't think I</p> <p>24 defined it; but we're talking about managed care</p> <p>25 organizations, correct?</p>	Page 52	<p>1 right?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And then what is column Q?</p> <p>4 A. The description of the procedure code.</p> <p>5 Q. And what is column R?</p> <p>6 A. Any modifier associated with the procedure</p> <p>7 code.</p> <p>8 Q. And what do you mean by modifier?</p> <p>9 A. A modifier is usually a two-digit code that can</p> <p>10 be attached to the CPT code that will give addition -- to</p> <p>11 go with that procedure code.</p> <p>12 Q. You cut out there for a second. You said it is</p> <p>13 a --</p> <p>14 A. Usually a two-digit code, could be numerical or</p> <p>15 alphanumeric, and it can be attached to the CPT code that</p> <p>16 provides additional information.</p> <p>17 Q. Okay. Additional information about the</p> <p>18 procedure, right?</p> <p>19 A. Correct.</p> <p>20 Q. It doesn't --</p> <p>21 A. Well, about the procedure or the person.</p> <p>22 Q. Okay. And column X?</p> <p>23 A. Number of units.</p> <p>24 Q. What does unit mean?</p> <p>25 A. A unit is how many times that service has been</p>
Page 51	<p>1 A. Correct.</p> <p>2 Q. What is column J?</p> <p>3 A. Date of service.</p> <p>4 Q. And K is the ICD code?</p> <p>5 A. Yes. ICD-10.</p> <p>6 Q. Okay. And L is the name of the actual</p> <p>7 diagnosis?</p> <p>8 A. Yes.</p> <p>9 Q. And what is M?</p> <p>10 A. Any additional diagnosis that was listed on the</p> <p>11 claim.</p> <p>12 Q. So is L primary and M secondary?</p> <p>13 A. Yes.</p> <p>14 Q. And then is N tertiary or something else?</p> <p>15 A. Yes, it can be tertiary. Some of them you'll</p> <p>16 see listed together. Like column -- line 12 shows the</p> <p>17 third, fourth, and fifth diagnosis. Sometimes it</p> <p>18 squishes up and sometimes it's separate, but those are</p> <p>19 additional diagnosis codes.</p> <p>20 Q. Okay. So L is primary diagnosis, M, N, and O</p> <p>21 are not primary diagnoses?</p> <p>22 A. Correct.</p> <p>23 Q. What is column P?</p> <p>24 A. Column P is the CPT code.</p> <p>25 Q. Okay. And that is procedure code; is that</p>	Page 53	<p>1 performed for that day. Some CPT codes are also listed</p> <p>2 by minute increments. So for example, if you have a code</p> <p>3 that is a 15-minute increment code and you are with that</p> <p>4 patient for 60 minutes, you would have four units, four</p> <p>5 units of 15 minutes.</p> <p>6 Q. Got it. And do you know whether everything in</p> <p>7 column S is measuring 15-minute units, or how do you know</p> <p>8 what the measure is?</p> <p>9 A. It's determined by the description of the CPT</p> <p>10 code.</p> <p>11 Q. And then column T?</p> <p>12 A. The allowed amount.</p> <p>13 Q. And then column U?</p> <p>14 A. Paid amount.</p> <p>15 Q. And in column U, if we are in the situation</p> <p>16 where it is an MCO and it is listed as denied, will the</p> <p>17 paid amount in column U be zero even if it was, in fact,</p> <p>18 paid?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. And does BMS have data on the amount</p> <p>21 paid for each service?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Let me state that another way.</p> <p>24 Does BMS have data on the amount paid for</p> <p>25 each claim?</p>

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1 A. Can you des -- describe "have information"?

2 Q. Sure. So let's just take an example. I'm

3 looking at row 5, and in column T there's an allowed

4 amount of \$135. In column U, there's zero, but we don't

5 know whether it was, in fact, paid because it says denied

6 in column X and it's an MCO.

7 So my question is, does BMS have

8 information about the accurate number for column U?

9 A. Yes.

10 Q. Okay. And where is that information?

11 A. That, I don't know.

12 Q. Okay. And is there a reason that it's not

13 populated in this spreadsheet?

14 A. This spreadsheet is ran from the MMIS claims

15 system, and so it's going to populate off of the MMIS

16 paid amount, which is why it shows zero.

17 Q. Okay.

18 A. When the MCO sends the information over, it

19 will have the actual paid amount on it. I'm not sure

20 where that original information is stored, but BMS would

21 have access to get it if they requested it.

22 Q. Okay. And that original information would

23 include the amount paid, but also the specific provider

24 number and individual provider name and the other

25 information that would identify who that claim goes with,

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1 right?

2 A. Yes.

3 Q. Okay. What about column V, what is that?

4 A. It's an additional paid amount column.

5 Q. Why is there an additional column?

6 A. One -- let's see...

7 One column is for MCO payments, and one

8 column is for fee-for-service payments.

9 Q. I see. Okay.

10 And then is column W the date paid?

11 A. Yes.

12 Q. Okay. And then in column X, I know we've

13 talked about that for quite a while, but if you scroll

14 down, there's some that say reversed.

15 What does that mean?

16 A. Pretty much what it says. So the claim was

17 originally paid. Then for whatever reason it was

18 reversed which means that either the payment was taken

19 back or a corrected claim was turned in, and the claim

20 was reprocessed on another claim number.

21 Q. I see. So to the extent that happened, this

22 spreadsheet would only reflect that as to fee-for-service

23 claims?

24 A. Yes.

25 Q. Okay. Thank you. You can close out of that.

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1 MS. PRAKASH: And why don't we take a

2 10-minute break and come back around 9:30, I'm in Central

3 Time, so 10:30 or a little bit after 10:30. Is that

4 okay?

5 THE WITNESS: Okay.

6 MS. BANDY: Okay.

7 (Recess 9:23 a.m. - 9:32 a.m.)

8 (Ms. Borelli entered the Zoom room.)

9 BY MS. PRAKASH:

10 Q. Ms. Myers, we just took a break. Did you speak

11 with anybody during the break?

12 A. I checked in with my unit to see if anybody

13 needed anything.

14 Q. Okay. Anybody else?

15 A. No.

16 Q. Okay. And I've been taking your deposition

17 this morning remotely, so we are not in the same place.

18 Where are you today?

19 A. I'm in my office at 350 Capitol Street,

20 Charleston, West Virginia.

21 Q. Is anybody else in the office with you?

22 A. No.

23 Q. Has anybody been in the office with you while

24 you've been giving testimony this morning?

25 A. No.

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1 Q. And have you been looking at any documents

2 while giving testimony, other than the ones that I showed

3 you through Exhibit Share?

4 A. No.

5 Q. Okay. I am going to introduce our next

6 exhibit.

7 (Exhibit No. 10 marked.)

8 BY MS. PRAKASH:

9 Q. So it should appear now in the marked exhibits

10 folder. This is JM10. Please let me know when you've

11 got that open.

12 A. Okay. I have it open.

13 Q. Okay. And this starts with Defendants' Ninth

14 Supplemental Responses to Plaintiffs' First Set of

15 Requests for Production, right?

16 A. Yes.

17 Q. If you could scroll to number 3, please.

18 A. Okay.

19 Q. Okay. And that -- we have looked at that

20 request before, but not this particular response. So,

21 again, it's asking about claims for gender-confirming

22 care, and the supplemental response refers us to hormone

23 data attached as Exhibit 173, Bates number DHHRBMS021563.

24 Do you see that?

25 A. Yes.

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1 Q. Okay. And then if you keep scrolling all the
 2 way down, I have attached that. It's the last page of
 3 this exhibit, and at the bottom of that page, it says
 4 DHHRBMS021563.
 5 Do you see that?
 6 A. Yes.
 7 Q. Okay. Are you familiar with this document?
 8 A. I am not.
 9 MS. BANDY: I'm just going to place an
 10 objection. The designation for request for production 3
 11 does specify that Brian Thompson will address this
 12 request as it relates to pharmacy, but I mean, if she can
 13 answer. I mean, I'll --
 14 MS. PRAKASH: Okay.
 15 MS. BANDY: I just wanted to point out
 16 he's the actual designee on this topic.
 17 MS. PRAKASH: Okay. Great.
 18 BY MS. PRAKASH:
 19 Q. So I think I asked you are you familiar with
 20 this document and you said no. Is that an accurate
 21 recollection of your testimony?
 22 A. Yes, that's correct.
 23 Q. Thank you. So you can exit out of this one.
 24 And I will introduce the next written
 25 response here.

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1 (Exhibit No. 11 marked.)
 2 BY MS. PRAKASH:
 3 Q. It should appear in the marked exhibits folder
 4 as JM11.
 5 A. I have it up.
 6 Q. Okay. And this looks to be Defendants'
 7 Response to Plaintiffs' First Set of Requests for
 8 Production.
 9 Do you see that?
 10 A. Yes.
 11 Q. Okay. I'd like you to go to request number 10
 12 which is on page 7.
 13 A. I'm there.
 14 Q. Okay. And that asks for documents sufficient
 15 to identify the circumstances in which various services
 16 are covered through West Virginia Medicaid, including the
 17 diagnostic code, procedure code, medical necessity
 18 criteria, and other things.
 19 Is that a fair summary?
 20 A. Yes.
 21 Q. And it refers us to the BMS provider manual
 22 Chapter 519.16 on surgical services, right?
 23 A. Yes.
 24 Q. And that's the same document that we looked at
 25 earlier, right?

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1 A. Yes.
 2 Q. Okay. And with respect to medical necessity
 3 criteria for the services that are listed in number 10,
 4 those criteria would be reflected in the InterQual
 5 guidelines that Kepro uses in its work for BMS, right?
 6 A. Yes.
 7 Q. And I think you testified earlier that Kepro
 8 doesn't utilize the guidelines for the diagnosis of
 9 gender-affirming care with respect to surgical services;
 10 is that right?
 11 A. Correct, yes.
 12 Q. Okay. And then if you bear with me, I will
 13 introduce the next written response.
 14 (Exhibit No. 12 marked.)
 15 BY MS. PRAKASH:
 16 Q. It's a little bit larger, so it's taking some
 17 time. Okay. It should appear in the marked exhibits
 18 folder now as JM12.
 19 A. I have it.
 20 Q. Great. And this, at least the beginning of it,
 21 appears to be Defendants' Third Supplemental Response to
 22 Plaintiffs' First Set of Requests for Production.
 23 Do you agree?
 24 A. Yes.
 25 Q. Okay. And if you go to number 10, which is on

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1 the second page of that document, we just looked at that
 2 specific request, but this is a supplemental response.
 3 And that supplemental response references
 4 Bates numbers DHHRBMS001009 through BMS -- sorry --
 5 through DHHRBMS001112 as well as another set of Bates
 6 numbers which is DHHRBMS002754 through 2784.
 7 Do you see that?
 8 A. Yes.
 9 Q. Okay. And the first set 1009 through 1112 were
 10 the InterQual guidelines that we looked at earlier.
 11 So I have attached those to this exhibit,
 12 but I would like to go to the second set of Bates numbers
 13 that start with 2754, and I believe that's page 110 of
 14 the pdf.
 15 I know that requires a lot of scrolling.
 16 Just let me know when you're there.
 17 A. Okay. Okay, I'm there.
 18 Q. Okay. Are these -- well, so on this first
 19 page, 2754, these are also InterQual guidelines, correct?
 20 A. Yes.
 21 Q. And these would be utilized by Kepro for BMS,
 22 correct?
 23 A. Yes.
 24 Q. Okay. And they would be utilized in the same
 25 way that we discussed with respect to the first set of

<p style="text-align: right;">Page 62</p> <p>1 InterQual guidelines that we looked at earlier; is that 2 right? 3 A. Yes. 4 Q. And just so I'm clear - and you can take as 5 much time as you need - the remainder of this exhibit 6 that goes all the way through page 2784 are InterQual 7 guidelines that Kepro would utilize in its work for BMS? 8 And just a yes or no on that is fine. And 9 take some time to scroll through so that you're sure. 10 A. Yes. 11 Q. Okay. So please exit out of that. And I will 12 introduce another exhibit. 13 (Exhibit No. 13 marked.) 14 BY MS. PRAKASH: 15 Q. In the marked exhibits folder, Exhibit JM13 16 should appear. Please let me know when you've got that. 17 A. Yes, I have it up. 18 Q. Okay. So this is an e-mail that was sent to 19 you as well as a couple people at Kepro, right? 20 Just for -- 21 A. Yes. Yes. 22 Q. And for the record, the Bates number on this 23 document is DHHRBMS015365 through 391. 24 And it looks like the e-mail came from 25 Karen Wilkinson. Who is that?</p>	<p style="text-align: right;">Page 64</p> <p>1 Q. If you scroll down, I've included that 2 attachment, which starts with Bates label 15368. 3 Can you let me know when you're there? 4 A. I'm there. 5 Q. Okay. And from that page down, these look like 6 InterQual guidelines for gender affirmation surgery. 7 Do you agree with that? 8 A. Yes. 9 Q. Okay. These are InterQual guidelines for 10 gender affirmation surgery that Kepro had, correct? 11 A. Yes. 12 Q. And I think you testified earlier that 13 guidelines such as these for gender affirmation surgery 14 would not be utilized by Kepro in its work for BMS, 15 right? 16 A. Correct. 17 Q. So do you know why Kepro had access to these 18 guidelines? 19 A. Kepro has clients other than West Virginia 20 Medicaid. 21 Q. I see. Okay. 22 And the purpose of these guidelines is to 23 determine medical necessity for various procedures, 24 right? 25 A. Yes.</p>
<p style="text-align: right;">Page 63</p> <p>1 A. She is a team leader at Kepro. 2 Q. Okay. And it looks like -- and you can scroll 3 down and look -- that she is -- actually, let's do this. 4 Can we scroll to page 15367, which should 5 be the third page of that exhibit. 6 A. I'm there. 7 Q. Okay. And partway near the top of the page but 8 partway down starts an e-mail from you to Emily Proctor, 9 Karen Wilkinson and Alicia Perry at Kepro, right? 10 A. Uh-huh. Yes. 11 Q. And there you're requesting criteria for 12 certain procedures, right? 13 A. Yes. 14 Q. Okay. And why did you make that request? 15 A. It was requested in the interrogatories. 16 Q. Okay. And so you made that request for the 17 purpose of responding to discovery in this case? 18 A. Yes. 19 Q. And in response, if you scroll up, it -- to the 20 very top of that exhibit, so back to the first page, 21 which is 15365, it looks like what Karen sent you, if you 22 look at the first part of that e-mail right under the 23 attachments, it looks like she sent you the InterQual 24 guidelines for gender affirmation surgery, right? 25 A. Correct.</p>	<p style="text-align: right;">Page 65</p> <p>1 Q. Okay. You can exit out of that, please. 2 A. Did I lose everybody? 3 Q. No, you've got us. 4 A. Okay. I'm sorry. It was eerily quiet for a 5 moment. 6 Q. Oh, yeah, it's just my mind thinking about what 7 to do next. 8 (Exhibit No. 14 marked.) 9 BY MS. PRAKASH: 10 Q. If you go back to the marked exhibits folder, 11 you should have JM14 in there. And for the record, that 12 is DHHRBMS015416 through 430. 13 Do you recognize this document? 14 A. Yes. 15 Q. Okay. What is it? 16 A. It looks to be a sheet that has Medicare 17 information for several different states. 18 Q. Does BMS use this document in any way? 19 MS. BANDY: I'm just going to object to 20 the form of the question. 21 You can answer. 22 A. I do -- I do not use this sheet for anything. 23 I can't say as to what anybody else at BMS uses. 24 BY MS. PRAKASH: 25 Q. Okay. Can you back out of that document, then.</p>

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1 (Exhibit No. 15 marked.)
 2 BY MS. PRAKASH:
 3 Q. And -- okay. In the marked exhibits folder,
 4 you should have Exhibit JM15, that's DHHRBMS013459
 5 through 61.
 6 A. I have it.
 7 Q. Do you recognize this document?
 8 A. I -- I believe I do.
 9 Q. Okay. What is this document?
 10 A. This looks to be a document that has CPT codes
 11 on it that would be -- have a edit associated with it for
 12 a certain sex.
 13 Q. Okay. And when you say "an edit associated
 14 with it," what does that mean?
 15 A. It is a CPT code that is specific to female or
 16 male.
 17 Q. Okay. And does that mean that if the CPT code
 18 is, for example, if the CPT code is specific to female,
 19 does that mean that a male cannot receive that specific
 20 procedure?
 21 MS. BANDY: I'd object to the form of the
 22 question.
 23 You can -- you can answer.
 24 A. Not necessarily.
 25 BY MS. PRAKASH:

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1 Q. Okay. Can you explain what you mean by that?
 2 A. Can you state your question again exactly so I
 3 can answer it correctly?
 4 Q. Yeah. Well, let me ask you this first: Does
 5 BMS use this -- these categories that are listed on this
 6 exhibit?
 7 MS. BANDY: I'm going to object as being
 8 outside the scope of the designated topics for this
 9 witness.
 10 But you can answer.
 11 A. Yes, we do.
 12 BY MS. PRAKASH:
 13 Q. Okay. And if a CPT code has an edit that makes
 14 it specific to female, under what conditions would a male
 15 be able to receive that procedure?
 16 MS. BANDY: Same objection.
 17 THE WITNESS: Do I go on?
 18 MS. BANDY: Yeah, go ahead.
 19 THE WITNESS: I'm sorry.
 20 MS. BANDY: Sorry.
 21 A. I would see two situations where that would be
 22 possible. If a -- the first situation would be if a CPT
 23 code is billed with a modifier, that indicates a
 24 transgender person, then it will override that edit and
 25 pay.

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1 Second situation would be if -- the second
 2 situation -- I've lost my train of thought.
 3 Can you tell me the question one more
 4 time, I'm sorry?
 5 BY MS. PRAKASH:
 6 Q. Well, let me just start with what you said in
 7 your first answer.
 8 A. Okay.
 9 Q. So if the CPT code includes a modifier for a
 10 transgender person, then it would override the edit and
 11 pay?
 12 A. Correct.
 13 Q. Okay. So it would never override and pay for
 14 surgical care as a treatment for gender dysphoria, right?
 15 A. Correct.
 16 Q. So in what circumstances would it override and
 17 pay?
 18 A. If a member is -- if a member is -- has a
 19 gender of male in the system but is -- was biologically a
 20 female at birth and the provider bills a Pap smear,
 21 normally a Pap smear would not pay for a male.
 22 However, if the provider bills the CPT
 23 code with the specific modifier that states a transgender
 24 person, then the system -- it tells the system that a Pap
 25 smear is allowed for a male in the system.

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1 Q. I see. And so is another way of saying that,
 2 that the system has modifiers that would allow services
 3 to be provided based on somebody's assigned sex at birth?
 4 MS. BANDY: I just want to place my
 5 continuing objection to the line of questioning being
 6 outside the scope of topics for the witness, but you can
 7 answer.
 8 MS. PRAKASH: Dawn, would you mind reading
 9 that back.
 10 (Record read.)
 11 A. No.
 12 BY MS. PRAKASH:
 13 Q. Okay. What is wrong about that statement?
 14 A. The system has an edit -- has a modifier that
 15 will allow a claim to go through for a person who does
 16 not identify as the gender that was assigned at birth.
 17 Q. And the claim that you're talking about in this
 18 instance would be a claim that is otherwise -- that
 19 otherwise has an edit that would match the sex that that
 20 person was assigned at birth?
 21 A. Yes.
 22 Q. Okay. And then you mentioned a modifier. What
 23 is the modifier?
 24 A. I don't -- I don't have it memorized off the
 25 top of my head.

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1 Q. Okay. Is it like a code that's put into the
 2 system?
 3 A. Yes, it's a two-letter code that is attached to
 4 the CPT code.
 5 Q. Okay. And I keep saying system, what system
 6 are we talking about?
 7 A. MMIS.
 8 Q. Okay. Great. So -- okay. So you've described
 9 to me one instance in which there would -- you could use
 10 a CPT code and it would pay despite being -- having an
 11 edit for a specific sex.
 12 Is the -- I think you said that there were
 13 two scenarios in which that would happen? Is there
 14 another one?
 15 A. Yes, but can I hear the question again?
 16 Q. Sure. Let me see if I can say it in a better
 17 way.
 18 The document that we're looking at has CPT
 19 codes on them that are -- that have edits based on sex.
 20 So certain procedure codes go with female, certain
 21 procedure codes go with male.
 22 And the system will allow a claim to pay
 23 if a code that matches with female is -- if that
 24 procedure is sought by a male in two instances; you've
 25 described one to me. What is the other?

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1 A. I don't remember where my train of thought was
 2 going. I'm sorry.
 3 Q. Okay. No problem.
 4 Why don't you exit out of that.
 5 (Exhibit No. 16 marked.)
 6 BY MS. PRAKASH:
 7 Q. Okay. In the marked exhibits folder you should
 8 see JM16.
 9 A. Yes, I have it up.
 10 Q. Okay. That is an e-mail from you to Tanya
 11 Cyrus, correct?
 12 A. Yes.
 13 Q. Who is Tanya Cyrus?
 14 A. She is a manager at BMS over program integrity
 15 and quality control.
 16 Q. It looks like you were attaching a document
 17 labeled gender CR language; is that right?
 18 A. Yes.
 19 Q. And then that document is on the second page of
 20 this exhibit, which is DHHRBMS013981; is that right?
 21 A. Yes.
 22 Q. Okay. And did you write the text on this page?
 23 A. I did.
 24 MS. BANDY: I'm going to object to the
 25 questioning about this document as being outside the

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1 scope of this witness's designated topics as an
 2 organizational representative.
 3 You can go ahead and answer, Jennifer.
 4 A. Yes, I did write it.
 5 BY MS. PRAKASH:
 6 Q. And what is it describing?
 7 A. This was a work group that I participated in
 8 where we corrected the system so that a claim could be --
 9 could go through the system just like I described
 10 previously, using a modifier for a transgender member
 11 who -- and the modifier is KX on the claim.
 12 So that if a member who was assigned
 13 female at birth now identifies as a male, if the claim
 14 comes through for a Pap smear, the provider can attach
 15 the modify KX to the CPT code, and that claim will bypass
 16 the gender edit and go through and pay without being
 17 questioned or denied.
 18 Q. Okay. Did the gender edits work group have any
 19 other purpose other than addressing the issue that you
 20 just described?
 21 A. No.
 22 Q. Okay. Is that KX modifier ever used to deny
 23 claims?
 24 A. No.
 25 Q. Okay. So you talked a little bit about your

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1 job history, I think going back to 2013.
 2 Did you work at BMS or DHHR before 2013?
 3 A. No, I did not.
 4 Q. Okay. What did you do before coming to DHHR?
 5 A. I worked at HealthSmart, which is a third-party
 6 administrator. We paid medical, dental, vision claims.
 7 Q. Okay. Was that in West Virginia?
 8 A. Yes.
 9 Q. And what did you do before that?
 10 A. Before that, I took tolls on the West Virginia
 11 Turnpike.
 12 Q. And was that before or after college?
 13 A. That was during college.
 14 Q. Okay. And then have you ever been deposed
 15 before, Ms. Myers?
 16 A. No, I have not.
 17 Q. Well, I hope it wasn't too painful.
 18 Have you in your job at DHHR or your
 19 current job at BMS ever been disciplined?
 20 A. No, I have not.
 21 Q. Can you tell me what you did to prepare for
 22 your deposition today?
 23 A. I met with the law team twice, once in person
 24 and once via, I think, Zoom. And, oh, I did -- I did go
 25 back and look at the spreadsheet that we looked at today.


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1 And reviewed some of the denials and looked at the reason
 2 codes for the fee-for-service claims, and just to -- to
 3 check to see why some of the claims were denied for
 4 the -- and on the fee-for-service claims, all the denials
 5 were mostly reasons for, like, duplicate billings.
 6 There were none denied for the exclusion
 7 that you're -- we've been talking about. And that's
 8 about it.
 9 Q. And other than your lawyers, did you talk with
 10 anybody to prepare for your deposition?
 11 A. I did talk to Sarah Young, and we decided to --
 12 I do have a reference sheet that I did not use today so
 13 far. And she also had a reference sheet, and we decided
 14 to combine those into one reference sheet that we would
 15 both use, so we did discuss that.
 16 Q. And as the organizational representative, did
 17 you meet with any transgender Medicaid participants to
 18 prepare for today?
 19 A. I did not.
 20 Q. How about any mental health providers who
 21 specialize in care for transgender people?
 22 A. No, I did not.
 23 Q. How about any medical providers who specialize
 24 in care for transgender people?
 25 A. I did not.

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1 Q. And did you meet with any of the medical
 2 directors at BMS charged with making clinical coverage
 3 determinations for Medicaid?
 4 A. Not for this specifically, no.
 5 Q. Okay. And I think I asked you if you had been
 6 disciplined in your role at BMS or in DHHR.
 7 I don't think I asked you if you've ever
 8 been informally disciplined. I just wanted to make that
 9 distinction between formal and informal.
 10 A. No, I don't believe I have.
 11 MS. PRAKASH: Okay. I would like to take
 12 a short break, maybe five minutes, and then come back on
 13 the record.
 14 (Recess 10:07 a.m. - 10:12 a.m.)
 15 MS. PRAKASH: Ms. Myers, I have no more
 16 questions for you at this time. Your counsel might have
 17 some.
 18 MS. BANDY: I don't have any questions.
 19 And the witness will read.
 20 MS. PRAKASH: Okay. Thanks very much for
 21 your time.
 22 MS. BANDY: All right. Thank you.
 23 (Proceedings adjourned at 10:13 a.m.)
 24
 25

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1 REPORTER'S CERTIFICATE
 2 STATE OF MINNESOTA)
) ss.
 3 COUNTY OF HENNEPIN)
 4 I hereby certify that I remotely reported the
 5 videoconference deposition via Zoom of JENNIFER MYERS
 6 30(b)(6) Representative for Defendant West Virginia
 7 Department of Health and Human Resources, Bureau for
 8 Medical Services on the 8th day of April, 2022, in
 9 Charleston, West Virginia, and that the witness was by me
 10 first duly sworn to tell the whole truth;
 11 That the testimony was transcribed by me and is
 12 a true record of the testimony of the witness;
 13
 14 That the cost of the original has been charged
 15 to the party who noticed the deposition, and that all
 16 parties who ordered copies have been charged at the same
 17 rate for such copies;
 18 That I am not a relative or employee or
 19 attorney or counsel of any of the parties, or a relative
 20 or employee of such attorney or counsel;
 21 That I am not financially interested in the
 22 action and have no contract with the parties, attorneys,
 23 or persons with an interest in the action that affects or
 24 has a substantial tendency to affect my impartiality;
 25
 That the right to read and sign the deposition
 by the witness was not waived.
 WITNESS MY HAND AND SEAL THIS 22nd day of
 April, 2022.

 Dawn Workman Bounds, CSR 6129
 Notary Public, Hennepin County, Minnesota
 My commission expires January 31, 2024

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1 Veritext Legal Solutions
 2 1100 Superior Ave
 3 Suite 1820
 4 Cleveland, Ohio 44114
 5 Phone: 216-523-1313
 6
 7 April 22, 2022
 8
 9 To: Ms. Bandy
 10
 11 Case Name: Fain, Christopher Et Al. v. Crouch, William Et Al.
 12 Veritext Reference Number: 5096186
 13
 14 Witness: Jennifer Myers Deposition Date: 4/8/2022
 15
 16 Dear Madam:
 17 Enclosed please find a deposition transcript. Please have the witness
 18 review the transcript and note any changes or corrections on the
 19 included errata sheet, indicating the page, line number, change, and
 20 the reason for the change. Have the witness' signature notarized and
 21 forward the completed page(s) back to us at the Production address
 22 shown
 23 above, or email to production-midwest@veritext.com.
 24
 25 If the errata is not returned within thirty days of your receipt of
 this letter, the reading and signing will be deemed waived.
 Sincerely,
 Production Department
 NO NOTARY REQUIRED IN CA

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1 DEPOSITION REVIEW
CERTIFICATION OF WITNESS

2

3 ASSIGNMENT REFERENCE NO: 5096186
CASE NAME: Fain, Christopher Et Al. v. Crouch, William Et Al.
DATE OF DEPOSITION: 4/8/2022
WITNESS' NAME: Jennifer Myers

4 In accordance with the Rules of Civil
5 Procedure, I have read the entire transcript of
6 my testimony or it has been read to me.
7 I have made no changes to the testimony
8 as transcribed by the court reporter.

9 _____
Date Jennifer Myers

10 Sworn to and subscribed before me, a
11 Notary Public in and for the State and County,
12 the referenced witness did personally appear
13 and acknowledge that:

14 They have read the transcript;
15 They signed the foregoing Sworn
16 Statement; and
17 Their execution of this Statement is of
18 their free act and deed.

19 I have affixed my name and official seal
20 this ____ day of _____, 20____.

21 _____
22 Notary Public
23 _____
24 Commission Expiration Date
25

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1 DEPOSITION REVIEW
CERTIFICATION OF WITNESS

2

3 ASSIGNMENT REFERENCE NO: 5096186
CASE NAME: Fain, Christopher Et Al. v. Crouch, William Et Al.
DATE OF DEPOSITION: 4/8/2022
WITNESS' NAME: Jennifer Myers

4 In accordance with the Rules of Civil
5 Procedure, I have read the entire transcript of
6 my testimony or it has been read to me.
7 I have listed my changes on the attached
8 Errata Sheet, listing page and line numbers as
9 well as the reason(s) for the change(s).
10 I request that these changes be entered
11 as part of the record of my testimony.

12 I have executed the Errata Sheet, as well
13 as this Certificate, and request and authorize
14 that both be appended to the transcript of my
15 testimony and be incorporated therein.

16 _____
Date Jennifer Myers

17 Sworn to and subscribed before me, a
18 Notary Public in and for the State and County,
19 the referenced witness did personally appear
20 and acknowledge that:

21 They have read the transcript;
22 They have listed all of their corrections
23 in the appended Errata Sheet;
24 They signed the foregoing Sworn
25 Statement; and
Their execution of this Statement is of
their free act and deed.

I have affixed my name and official seal
this ____ day of _____, 20____.

Notary Public

Commission Expiration Date

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1 ERRATA SHEET
VERITEXT LEGAL SOLUTIONS MIDWEST

2 ASSIGNMENT NO: 5096186

3 PAGE/LINE(S) / CHANGE /REASON

4 _____

5 _____

6 _____

7 _____

8 _____

9 _____

10 _____

11 _____

12 _____

13 _____

14 _____

15 _____

16 _____

17 _____

18 _____

19 _____

20 _____
Date Jennifer Myers

21 SUBSCRIBED AND SWORN TO BEFORE ME THIS _____

22 DAY OF _____, 20____.

23 _____

24 _____
Notary Public

25 _____
Commission Expiration Date

[000740 - accurate]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate.

The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 5096186

CASE NAME: Fain, Christopher Et Al. v. Crouch, William Et Al.

DATE OF DEPOSITION: 4/8/2022

WITNESS' NAME: Jennifer Myers

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have made no changes to the testimony as transcribed by the court reporter.

5/13/2022

Jennifer Myers

Date

Jennifer Myers

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal

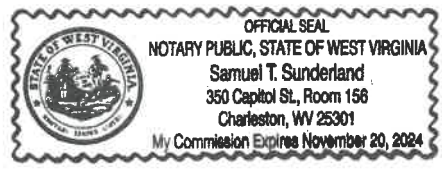
this 13th day of May, 2022.

Samuel T. Sunderland

Notary Public

11/20/24

Commission Expiration Date



Jennifer Myers

Topics

18 Interrogatory 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.

Interrogatory 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.”

Interrogatory 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.”

Interrogatory 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.”

Interrogatory 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).”

Request for Production 3 (*Brian Thompson will address this topic as it relates to pharmacy, Jennifer Myers will address the remainder of this topic*). “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.”

Request for Production 10 “Documents sufficient to identify the circumstances in which orchiectomy, penectomy, vaginoplasty, hysterectomy, phalloplasty, mammoplasty, breast reconstruction surgery, and/or mastectomy are 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.”

Request for Production 23 (*to the extent it relates to this witness’s topics*) “All Documents which Defendants considered, relied upon, or intend to rely upon, in answering each interrogatory and each request for admission in this action.”

Request for Production 27 [sic] “To the extent not already produced, Documents sufficient to indicate the number of claims submitted annually involving the diagnosis and/or treatment of gender dysphoria, the number of such claims that were denied, and whether the denials were based in whole or in part on the Exclusion.”

**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,

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 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.

**Exhibit
JM 2**

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:

<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.

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

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

Roberta F. Green, Esquire (WVSB #6598)

Caleb B. David, Esquire (WVSB #12732)

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**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,

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.

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 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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**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,

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.**

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha, to-wit:

I, Brian Thompson, M.S., PharmD, being first duly sworn, upon my oath do hereby depose and say that I have read the foregoing Interrogatory Nos. 3 and 4 in ***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*** and the facts contained therein are true, except insofar as they are stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, I believe them to be true.

Brian Thompson

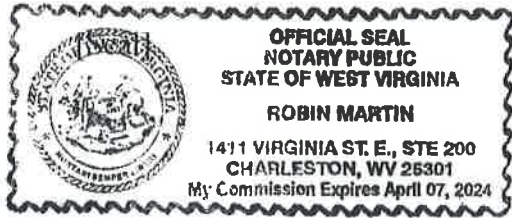
Brian Thompson, M.S., PharmD,
Director of Pharmacy Services
West Virginia Bureau for Medical Services

Taken, subscribed and sworn to before me this 13th day of Oct, 2021.

My commission expires: April 7 2024

Robin Martin

Notary Public



**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,

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.**

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha, to-wit:

I, Cynthia Beane, Commissioner, being first duly sworn, upon my oath do hereby depose and say that I have read the foregoing Interrogatory No. 2 in *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* and the facts contained therein are true, except insofar as they are stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, I believe them to be true.

Cynthia Beane

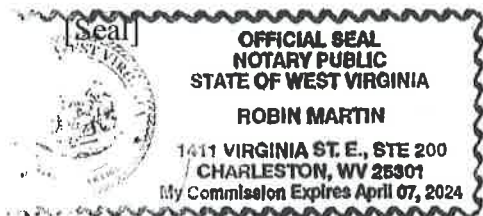
Cynthia Beane, Commissioner
West Virginia Bureau for Medical Services

Taken, subscribed and sworn to before me this 13th day of Oct, 2021.

My commission expires: April 7 2024

Robin Martin

Notary Public



**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,

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.**

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha, to-wit:

I, Tanya Cyrus, being first duly sworn, upon my oath do hereby depose and say that I have read the foregoing Interrogatory 1 in *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* and the facts contained therein are true, except insofar as they are stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, I believe them to be true.

Tanya Cyrus

Tanya Cyrus
West Virginia Bureau for Medical Services

Taken, subscribed and sworn to before me this 13th day of Oct, 2021.

My commission expires: April 7 2024

Robin Martin

Notary Public

[Seal]



**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,

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.**

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha, **to-wit:**

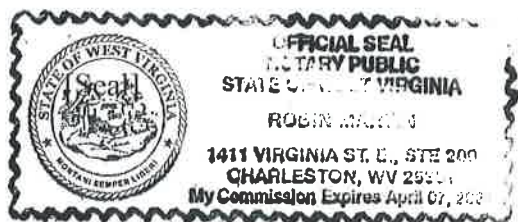
I, Dr. James Becker, Medical Director, being first duly sworn, upon my oath do hereby depose and say that I have read the foregoing Interrogatory 1 in *Defendants' Response to Plaintiff's First Set of Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services* and the facts contained therein are true, except insofar as they are stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, I believe them to be true.




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

Taken, subscribed and sworn to before me this 13th day of Oct, 2021.

My commission expires: April 7 2024





Notary Public

**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,

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.**

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF Lanahan, to-wit:

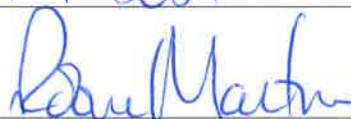
I, Vicki Cunningham, being first duly sworn, upon my oath does hereby depose and say that I have read the foregoing Interrogatory Nos. 6 and 7 in *Defendants' Response to Plaintiff's First Set of Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services* and the facts contained therein are true, except insofar as they are stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, I believe them to be true.



Vicki Cunningham
West Virginia Bureau for Medical Services

Taken, subscribed and sworn to before me this 13th day of Oct, 2021.

My commission expires: April 7 2024



Notary Public



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/s/Lou Ann S. Cyrus

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)
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**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,

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.**

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha, to-wit:

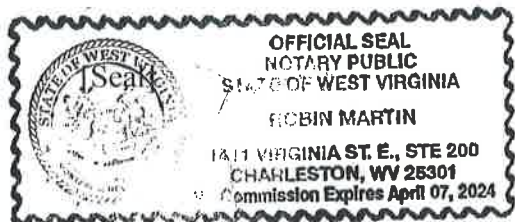
I, Jennifer Myers, Director of Professional Services, being first duly sworn, upon my oath do hereby depose and say that I have read the foregoing Interrogatory Nos. 1, 3 and 5 in ***Defendants' Response to Plaintiff's First Set of Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services*** and the facts contained therein are true, except insofar as they are stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, I believe them to be true.

Jennifer Myers

Jennifer Myers, Director of Professional Services
West Virginia Bureau for Medical Services

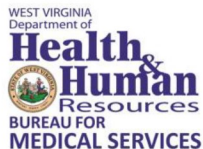
Taken, subscribed and sworn to before me this 14th day of Oct, 2021.

My commission expires: April 7 2024



Robin Martin

Notary Public



519.16 SURGICAL SERVICES

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519.16.3 Non-Covered Services	3
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DISCLAIMER: This chapter does not address all the complexities of Medicaid policies and procedures, and must be supplemented with all State and Federal Laws and Regulations. Contact BMS Fiscal Agent for coverage, prior authorization requirements, service limitations and other practitioner information.





519.16 SURGICAL SERVICES

BACKGROUND

West Virginia Medicaid covers medically necessary surgical procedures and requires prior authorization for all inpatient and specific outpatient procedures.

POLICY

519.16.1 COVERED SERVICES

Under Medicaid Resource Based Relative Value Scale (RBRVS) payment rules, physicians are paid a single global fee for all necessary services. Payments are not made for individual components of a complete or bundled procedure. Refer to the BMS [RBRVS RVU](#) file for multiple surgeries, bilateral surgery, co-surgery, team surgery and assistant-at-surgery procedures indicated with a "Y" (Refer to Appendix A in the current [CMS RBRVS RVU file](#) for a legend of status codes).

Procedures/service codes that are bundled into a primary procedure/service will not be reimbursed. Unbundled codes are not eligible for reimbursement. Multiple surgery payment rules apply to most surgical services except when the CPT code(s), by definition, are multiple procedures. When multiple surgeries are performed during the same operative session, payment is based on the full amount for the primary procedure and 50% of the fee for any other necessary and appropriate procedures performed during the session. The appropriate modifier must be included on the claim.

Only one assistant-at-surgery per surgical encounter is reimbursable. An assistant-at-surgery is not reimbursable when co-surgeon(s) or team surgery is billed. The appropriate modifier must be included on the claim with the appropriate service code for payment consideration.

If the surgical procedure does not require prior authorization, the assistant-at-surgery must include the same CPT code as the surgeon with the appropriate modifier on the CMS-1500 claim form and attach the operative report documenting their role during the procedure. The claim must be submitted with the operative report to BMS Fiscal Agent for payment consideration. When documentation is not available, the assistant-at-surgery services are not separately reimbursable.

A preoperative visit and follow-up care are bundled with the payment for the surgery and are not separately reimbursed. However, follow-up care may be reimbursed to other practitioners, such as an optometrist providing follow-up care for an ophthalmologist.

Surgical procedures performed in an Emergency Department (ED) are reimbursable. However, the physician is not reimbursed for an ED visit in addition to a surgical procedure performed in the ED on the same date of service. Refer to [Chapter 510, Hospital Services](#) for additional information.

519.16.2 PRIOR AUTHORIZATION

West Virginia Medicaid requires Prior Authorization for ALL hospital admissions and specific surgeries performed in offices, outpatient hospital settings, and ambulatory surgical centers. In addition, specific practitioner services and all unlisted codes for procedures/services require Prior Authorization.



519.16 SURGICAL SERVICES

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.

If the surgery is authorized by the UMC, separate prior authorization numbers for the surgeon and the outpatient facility are assigned. The surgeon or facility may access the prior authorization number via the web-based portal. The prior authorization number must be included on the claim form in order to be eligible for reimbursement.

When the procedure requires prior authorization, the UMC must be informed if an assistant-at-surgery is planned to participate in the procedure by the treating surgeon. If the procedure and the assistant-at-surgery are approved by the UMC, when billing, the assistant-at-surgery must include the same CPT code as the surgeon with the appropriate modifier and prior authorization number. The claim form must be submitted to the BMS Fiscal Agent for payment consideration.

Note: Mastectomy or related covered reconstructive procedures will not require prior authorization for individuals diagnosed with breast cancer.

Retrospective authorization is available by the UMC in the following circumstances:

- A procedure/service denied by the member's primary payer, providing all requirements for the primary payer have been followed, including appeal processes; or
- Retroactive West Virginia Medicaid eligibility.

Refer to [Chapter 100, General Administration and Information](#) for additional information.

519.16.3 NON-COVERED SERVICES

No surgical procedure will be covered on an inpatient basis if the procedure can be performed appropriately and safely in a physician's office or other outpatient setting.

The BMS [RBRVS RVU](#) file lists non-covered surgical services. Non-covered services also include, but are not limited to:

- **Cosmetic Surgery:** West Virginia Medicaid does not cover elective cosmetic surgery or services required as a result of complications from cosmetic surgery. Cosmetic surgery is defined as surgery having the primary purpose of improving the member's appearance and is not medically necessary. Examples of non-covered elective cosmetic surgeries include, but are not limited to otoplasty, rhinoplasty (except to correct internal nasal deformity), nasal reconstruction, osteoplasty for prognathism or micrognathia, dermabrasion, specific skin grafts, fascioplasty, lipectomy, liposuction, replacement of breast implants used for purposes other than reconstruction due to cancer, and application/removal of tattoos.
- Procedures considered investigational or experimental

Non-covered services are not eligible for a DHHR Fair Hearing or a Desk/Document review.



519.16 SURGICAL SERVICES

GLOSSARY

Definitions in [Chapter 200, Definitions and Acronyms](#) apply to all West Virginia Medicaid services, including those covered by this chapter.

Assistant-at-Surgery – A qualified, employed registered nurse or an advanced registered nurse practitioner or physician assistant licensed by the state in which they practice AND under the direct supervision of the surgeon, who provides aid in exposure, hemostasis, and other technical functions that assist the surgeon to perform a safe operation with optimal results for the member. The role of the Assistant-at-Surgery during the operative procedure must be documented in the operative report for consideration of reimbursement.

Assistant Surgeon – A physician who actively assists an operating surgeon in the performance of a surgical procedure. One physician acts as the surgeon and the other acts as an assistant. This is usually necessary because of the complex nature of the procedure(s) or the patient's condition. The assistant surgeon performs medical functions under the direct supervision of the operating physician. The assistant is generally in the same specialty as the operating surgeon.

Co-Surgeon – When 2 surgeons work together as primary surgeons performing distinct part(s) of a single reportable procedure, each surgeon must report their distinct operative work by reporting the same surgical procedure code.

Minimum Assistant Surgeon - The surgeon services are only required for a short period during the procedure.

REFERENCES

[Metabolic and Bariatric Surgery Accreditation and Quality Improvement Program \(MBSAQIP\)](#)

CHANGE LOG

REPLACE	TITLE	CHANGE DATE	EFFECTIVE DATE
Entire Chapter	Surgical Services		January 15, 2016

**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:

**Exhibit
JM 4**

- 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

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**CHRISTOPHER FAIN; ZACHARY
MARTELL; BRIAN MCNEMAR, SHAWN
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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:

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**IN THE UNITED STATES DISTRICT COURT
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**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,**
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; 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.

**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:

**Exhibit
JM 5**

- 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

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**IN THE UNITED STATES DISTRICT COURT
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Individually and on behalf of all others
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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 25th day of October, 2021, a true and exact copy of **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** was served on counsel via electronic means as follows:

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Plaintiffs,

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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' THIRD 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

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

**Exhibit
JM 6**

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).

SUPPLEMENTAL RESPONSE: Please see email from Aetna and two attachments, including a spreadsheet and a copy of Plaintiff's Second Set of Interrogatories to Defendants Williams Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services, Exhibit 106, Bates Numbered DHHRBMS016321-16331, and Exhibit 107, Bates Numbered DHHRBMS016332.

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

/s/Kimberly M. Bandy

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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

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 24th day of February 2022, a true and exact copy of **DEFENDANTS' THIRD 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 on counsel via electronic means as follows:

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From: **Page III, Alva** <[PagellIA@aetna.com](mailto:PageIIIA@aetna.com)>
Date: Wed, Oct 27, 2021 at 4:04 PM
Subject: Lawsuit Discovery
To: Hall, Susan L <susan.l.hall@wv.gov>

Susan:

The attached spreadsheet is a response to Interrogatory #11. Please note that the number of members with paid claims and the number of members with denied claims will not equal the total number of members with a dysmorphia claim. That's because a member can have a denied and paid claim so they can be in both categories.

Please let me know if you have any questions or comments.

Thanks,
Fuzzy

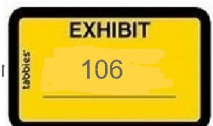
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Thank you, Aetna

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

CHRISTOPHER FAIN, *et al.*,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

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

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiffs request that Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services (collectively, "Defendants") answer the following Interrogatories in writing and under oath, and in accordance with the following Definitions and Instructions, within thirty (30) days of service hereof. Plaintiffs request electronic service of Defendants' responses to auvil@theemploymentlawcenter.com; aprakash@nka.com; nschladt@nka.com; asmithcarrington@lambdalegal.org; and tborelli@lambdalegal.org. These Interrogatories are continuing in nature and impose upon Defendants the obligations stated in Rule 26(e) of the Federal Rules of Civil Procedure.

DEFINITIONS

As used herein, the following terms shall have the meanings indicated below:

1. “Defendants,” “you,” and “your” means each of, and collectively William Crouch, Cynthia Beane, West Virginia Department of Health and Human Resources, Bureau for Medical Services, their respective agencies, officers, agents, employees, administrators, attorneys, representatives, contractors, consultants, investigators, and all other persons and entities working or purporting to act on behalf of, or in concert with, or in participation with any of them.

2. “Diagnostic Code” means an International Classification of Diseases, Ninth Revision, Clinical Modification (“ICD-9-CM”) code, an International Classification of Diseases, Tenth Revision, Clinical Modification (“ICD-10-CM”) code, and/or an International Classification of Diseases, Eleventh Revision, for Mortality and Morbidity Statistics (“ICD-11 MMS”) code.

3. “Document” as used herein shall have the meaning intended by the Federal Rules of Civil Procedure and shall also include “electronically stored information” (“ESI”).

4. The “Exclusion” consists of any exclusion from coverage for gender-confirming care in the health plans that are offered through West Virginia’s Medicaid Program, regardless of the terms used to describe it, and regardless of its form (whether written, an unwritten policy or practice, or some other form). The Exclusion includes, but is not limited to, exclusions of coverage for “[t]ranssexual surgery,” “[s]ex transformation procedures and hormone therapy for sex transformation procedures,” “[s]ex change, hormone therapy for sex transformation, and gender transition procedures/expenses will not be paid for by The Health Plan,” and “[s]ex transformation procedures and hormone therapy for sex transformation procedures.”

5. Unless otherwise specified, “Gender-Confirming Care” includes, but is not limited to, counseling, hormone therapy, surgical care, and/or any other form of care for the

treatment of gender dysphoria. Additionally, Gender-Confirming Care includes but is not limited to the care denied pursuant to each of the Exclusions in the health plans offered through West Virginia's Medicaid program.

6. "Health Plans" includes the Medicaid Plan and any health plan offered through West Virginia's Medicaid Program, including but not limited to the health plans offered by the managed care organizations that coordinate services to provide health coverage to West Virginia Medicaid participants, such as (1) UniCare Health Plan of West Virginia, Inc., (2) The Health Plan, and (3) Aetna Better Health of West Virginia.

7. "Medicaid Plan" refers to the comprehensive state plan for medical assistance that each state participating in Medicaid must maintain.

8. "Medicaid Program" refers to the joint federal-state program that provides access to health care for Medicaid-eligible individuals.

9. "Plaintiff" refers to Christopher Fain and any other named plaintiffs and proposed class representatives later included in this case with one or more claims against Defendants William Crouch, Cynthia Beane, and/or West Virginia Department of Health and Human Resources, Bureau for Medical Services.

10. "Procedure Code" means a Current Procedural Terminology ("CPT") code and/or a Healthcare Common Procedure Coding System ("HCPCS") code, and/or a code pursuant to the ICD-9-CM, ICD-10-CM, or ICD-11-MMS code.

11. "West Virginia Department of Health and Human Resources, Bureau for Medical Services" refers to the state agency charged with the responsibility of administering West Virginia's Medicaid Program.

INSTRUCTIONS

12. These Interrogatories are propounded upon Defendants Crouch, Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services. Defendants' answers to these Interrogatories shall be made within thirty (30) days of service of these Interrogatories.

13. In responding to these Interrogatories, you are required to furnish all information that is known or available to you or subject to your reasonable inquiry, including information known or in the possession, custody, or control of your advisors, investigators, employees, representatives, agents, independent contractors, consultants, accountants, attorneys, affiliates, any other person directly or indirectly employed by, or connected with, you or your attorneys, or any other person or public or private entity otherwise subject to your control.

14. These Interrogatories must be answered completely and specifically by you in writing and must be verified.

15. You may, in lieu of identifying any document or written communication, attach a true and correct copy of such document or communication as an exhibit to the answers to these Interrogatories, including a specific reference to the Interrogatory to which each such attached document or written communication relates. All documents that respond, in whole or in part, to any portion of the Interrogatories below shall be produced in their entirety, including all attachments and enclosures. To the extent that you rely on any document already produced in or otherwise in the record of this action to answer the Interrogatories, please identify the Bates number of that document or the relevant filing by record document number, date, and page number. To the extent that you rely on any testimony taken in a deposition in connection with

this case, please identify the paragraph and line number of the testimony in the deposition transcript.

16. If an objection is made to any Interrogatory, the objection should specifically state all grounds for the objection and whether responsive information, documents, or things are being withheld on the basis of the asserted objection. If you object to the scope or breadth of any of these Interrogatories, or if you object only in part to any of these Interrogatories, you are required, to the extent possible, to respond to the other part(s) of these Interrogatories notwithstanding your objection.

17. If any Interrogatory cannot be answered in full after exercising good-faith diligence to secure the information to do so, please so state and answer the Interrogatory to the extent possible, specifying any inability to answer each such Interrogatory and stating whether information or knowledge is available concerning the unanswered portion of the Interrogatory.

18. If any meaning of any term in any Interrogatory herein is unclear to you, without waiver of Plaintiff's right to seek a full and complete response to the Interrogatory, you shall assume a reasonable meaning, state what the assumed meaning is, and respond to the Interrogatory according to the assumed meaning to the best of your ability.

19. If any Interrogatory, or any portion thereof, is not answered by reason of a claim of privilege, work product or other grounds of non-response, a list is to be furnished at the time the answers to the Interrogatories are provided, identifying each of the particular Interrogatories thereof that are not answered and stating with specificity the legal and factual bases for the privilege, or other ground for nonresponse, claimed.

20. Unless otherwise specified, the time period covered by these Interrogatories is January 1, 2016, to the present. If it is necessary to refer to periods of time prior to January 1, 2016, in order to respond to an Interrogatory, please do so.

21. These Interrogatories are continuing in nature, up to and during the course of trial. Defendants' responses to these Interrogatories are to be promptly supplemented or amended if, after the time of their initial responses, Defendants learn that any response is or has become in some material respect incomplete or incorrect, to the full extent provided for by Federal Rule of Civil Procedure 26(e). Plaintiffs will object to any attempt to introduce evidence to the Court that should have been but was not disclosed in the responses or supplementation of the responses.

22. If Defendant objects to any part of an Interrogatory, Defendant shall specify each part of the Interrogatory to which Defendant objects; set forth with specificity the grounds for objecting to each such part of the Interrogatory, including the reasons; and otherwise respond to all parts of the Interrogatory to which Defendant does not object.

23. For purposes of interpreting or construing the scope of these Interrogatories, all terms shall be given their most expansive and inclusive interpretation. This includes, without limitation, the following:

- a. Construing "and" as well as "or" in the disjunctive or conjunctive, as necessary to make the Interrogatory more inclusive;
- b. Construing the singular form of the word to include the plural, and the plural form to include the singular;
- c. Construing the masculine to include the feminine, and vice versa;

- d. Construing the term “including” to mean “including but not limited to” and construing the term “all” to mean “any and all,” and vice versa;
- e. Construing the term “each” to include “every,” and construing “every” to include “each”;
- f. Construing the use of a verb in any tense as the use of the verb in all other tenses;
- g. Construing and interpreting all spelling, syntax, grammar, abbreviations, idioms, and proper nouns to give proper meaning and consistency to their context.

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.

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.

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.

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 codes: 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).

Dated: September 23, 2021

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Attorneys for Plaintiffs

**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,

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 FIFTH 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:

**Exhibit
JM 8**

- 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:

Please see documents obtained from Unicare regarding plaintiff, Christopher Fain which include an Excel Spreadsheet, marked as Exhibit 93, Bates No. DHHRBMS016080, and documents marked as Exhibit 94, Bates No. DHHRBMS016081 -016177. Please note, two Excel Spreadsheets were provided by Unicare that contained PHI for other participants which could not be redacted, and therefore, it is not being provided. The spreadsheets are titled, "West Virginia Member Claims—01/01/2016 through Current, Diagnosis F640 through F649 in any position" identified as "102721_Gender Dysphoria claims," and "West Virginia Member Claims—01/01/2016 through Current, Diagnosis F640 through F649 in any position" identified as "102721_Gender Dysphoria claim lines." This information can be obtained by Plaintiffs directly from Unicare.

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:

Please see the Excel spreadsheet marked Exhibit 95, Bates No. DHHRBMS016178, containing claims for Diagnoses codes: F64.0, F64.2, F64.8 and F64.9. Please note that, for all “MCO” claims as reflected in column “A,” an entry of “denied” in column “X” simply means that such claim was presented to the MCO, and BMS does not have information about the outcome of that claim, and it would need to be obtained from the particular MCO. BMS only has outcomes for claims that are “fee for service,” as indicated as “FFS” in column “A.”

7. If Defendants contend that the Exclusion of Gender-Confirming Care is supported by any governmental interest not encompassed in the Requests above, all Documents supporting that contention.

SUPPLEMENTAL RESPONSE: Please see information and communications from CMS regarding mandatory coverage, which does not include gender-confirming care, marked as Exhibit 96, Bates No. DHHRBMS016179 - 016223.

**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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**IN THE UNITED STATES DISTRICT COURT
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HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
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Individually and on behalf of all others
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Plaintiffs,

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v.

WILLIAM CROUCH, in his official capacity as
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Department Of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
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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 3rd day of February, 2022, a true and exact copy of **DEFENDANTS FIFTH 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:

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Counsel for William Crouch, Cynthia Beane, and

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**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
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Defendants.

**DEFENDANTS' NINTH SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST SET
OF REQUESTS FOR PRODUCTION TO DEFENDANTS WILLIAM CROUCH,
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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;

**Exhibit
JM 10**

- 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

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**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:

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	Males on estrogen	Females on Testosterone (Including Oxandrolone)	Females on testosterone (Excluding Oxandrolone)
2012	1	4	0
2013	2	5	0
2014	2	2	0
2015	2	6	0
2016	0	4	1
2017	19	20	14
2018	39	48	41
2019	44	65	56
2020	61	79	71
2021	114	139	121



**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,

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

DOCUMENT REQUESTS

1. Documents sufficient to show the total annual number of West Virginia Medicaid participants.

RESPONSE: Reports have been requested.

**Exhibit
JM 11**

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.

RESPONSE: Upon entry of an appropriate Protective Order, these Defendants can produce an excel spreadsheet with the pharmacy claims detail for Christopher Fain. Any communications to or from Mr. Fain's Managed Care Organization would not be in the possession of these Defendants.

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.

RESPONSE: Any requests made for gender-confirming care to Managed Care Organizations would not be in the possession of these Defendants.

Upon information and belief, counseling is a covered service. However, the data is not kept in a manner which would allow these Defendants to identify which patients have requested counseling for gender confirming care. These defendants would not necessarily know the reason for counseling and whether it was related to gender-confirming care or some other reason. Therefore, these Defendants are unable to further respond to this Request as stated.

Similarly, with respect to hormone therapy, upon information and belief hormone therapy is not denied on the basis that it is for gender-confirming care. However, the data is not kept in a manner which would allow these Defendants to identify which patients have requested hormone therapy for gender confirming care. These defendants would not necessarily know the reason for hormone therapy and whether it was related to gender-confirming care or some other reason. Therefore, these Defendants are unable to further respond to this Request as stated.

4. All Documents and communications relating to the Exclusion, including but not limited to:
 - a. All Documents and communications relating to the decision to maintain the Exclusion in the Health Plans in any plan year.

- b. All Documents and communications relating to the decision to permit coverage for hormone therapy for the purpose of treating gender dysphoria.
- c. All Document and communications relating to evaluating, examining, analyzing, and/or considering the Exclusion in any way.

RESPONSE: Upon information and belief:

- a. **These Defendants are conducting a search for any responsive documents;**
- b. **Please see Exhibit 1. (Bates No. DHHRBMS000001-5), relating to the removal of the gender edit for most estrogen and testosterone containing products;**
- c. **These Defendants are conducting a search for any responsive documents.**

- 5. All Documents and communications relating to gender dysphoria, transgender people, and/or Gender-Confirming Care.

RESPONSE: Objection to the scope of the request to the extent that it requests all documents and communications relating to gender dysphoria, transgender people, and/or Gender-Confirming Care throughout the Bureau of Medical Services. Without waiving this objection, these defendants are conducting a search for any responsive documents. A search of communications of Dr. James Becker, Medical Director, Jennifer J. Myers, Director of Professional Services, and Tanya Cyrus, for the terms “gender dysphoria,” “transgender people” and “Gender-Confirming Care” is being requested through the Office of Technology.

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.

RESPONSE: These defendants are conducting a search for any responsive documents. These Defendants would not be in possession of responsive information related to exclusions contained in Managed Care Organization plans.

7. If Defendants contend that the Exclusion of Gender-Confirming Care is supported by any governmental interest not encompassed in the Requests above, all Documents supporting that contention.

RESPONSE: These Defendants are unaware of any responsive documents.

8. Documents sufficient to identify the circumstances in which counseling and/or 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.

RESPONSE: Please see BMS Provider Manual Chapter 519.22 that can be accessed online at:

https://dhhr.wv.gov/bms/Provider/Documents/Manuals/Chapter%20519%20Practitioner%20Services/Policy_519.22_Mental_Health_Counseling_and_Substance_Abuse_Treatment_2018%20update_final.pdf

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.

RESPONSE: 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.

10. Documents sufficient to identify the circumstances in which orchiectomy, penectomy, vaginoplasty, hysterectomy, phalloplasty, mammoplasty, breast reconstruction surgery, and/or mastectomy are 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.

RESPONSE: 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

11. All Documents and communications relating to the Exclusion and/or Gender-Confirming Care in relationship to the federal Medicaid Act, 42 U.S.C. Sections 139a(a)(10)(A)-(B) and/or any regulation promulgated thereunder.

- a. With the exception of Documents and communications protected by attorney-client privilege, this Request includes, but is not limited to, all Documents and communications relating to the legal requirements of the federal Medicaid Act, 42 U.S.C. Sections 1396a(a)(10)(A)-(B) and/or any regulation promulgated thereunder with respect to the Exclusion and/or Gender-Confirming Care.

RESPONSE: These Defendants are not aware of any responsive documents.

12. All Documents and communications relating to the Exclusion and/or Gender-Confirming Care in relationship to Section 1557 of the Patient Protection and Affordable Care Act and/or any regulation promulgated thereunder.

- a. With the exception of Documents and communications protected by attorney-client privilege, this request includes, but is not limited to, all Documents and communications relating to the legal requirements of Section 1557 of the Patient Protection and Affordable Care Act and/or any regulation promulgated thereunder with respect to the Exclusion and/or Gender-Confirming Care.

RESPONSE: These Defendants are not aware of any responsive documents.

13. Documents sufficient to show all steps taken by Defendants and/or West Virginia Department of Health and Human Resources, Bureau for Medical Services to comply with any and all requirements of the federal Medicaid Act, 42 U.S.C. Sections 1396a(a)(10)(A)-(B), whether or not related to Gender-Confirming Care.

RESPONSE: This request is vague and does not describe the documents requested with sufficient particularity, and is overly broad and burdensome.

14. Documents sufficient to show all steps taken by Defendants to comply with any and all requirements of Section 1557 of the Patient Protection and Affordable Care Act, whether or not related to Gender-Confirming Care.

RESPONSE: Objection. This request is vague and does not describe the documents requested with sufficient particularity, and is overly broad and burdensome.

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

RESPONSE: These Defendants are conducting a search for any responsive documents.

16. All statements of witnesses or potential witnesses or persons interviewed in connection with this lawsuit.

RESPONSE: Please see Affidavits of Brian Thompson, Angela Wowczuk and Tadd Haynes, Exhibit 2, (Bates No. DHHRBMS000006-12).

17. Documents obtained from third parties as a result of authorizations, releases and/or subpoenas relating to the subject matter of this lawsuit.

RESPONSE: These Defendants are not aware of any responsive documents.

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.

RESPONSE: Exhibits have not yet been determined. These Defendants reserve the right to use any documents or materials produced in discovery by any party.

19. All Documents relating to audits, advice, and/or communications from any government office relating to the Exclusion.

RESPONSE: These Defendants are not aware of any responsive documents.

20. All communications related to legislation and/or lobbying surrounding the Exclusion and/or coverage for medical care for transgender people and gender dysphoria.

RESPONSE: These Defendants are conducting a search for any responsive documents.

21. All Documents that Defendants may identify in their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(ii).

RESPONSE: Please see Exhibit 1 to these responses, and the documents referenced by links to online sources. Please see Unicare Health Plan of West Virginia, Inc., Handbook attached as Exhibit 3, (Bates No. DHHRBMS000013-106). Additionally, upon entry of an appropriate Protective Order, these Defendants can produce an excel spreadsheet with the pharmacy claims detail for Christopher Fain.

22. All documents upon which Defendants considered, relied upon, or intend to rely upon, in support of their admissions and/or denials of any of the allegations contained in the Complaint.

RESPONSE: Please see the Medicaid State Plan available online at:

<https://dhhr.wv.gov/bms/CMS/SMP/Pages/WV-State-Medicaid-Plan.aspx>.

23. All Documents which Defendants considered, relied upon, or intend to rely upon, in answering each interrogatory and each request for admission in this action.

RESPONSE: Please see Exhibits 1 and 2 to these responses.

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.

RESPONSE: These Defendants are conducting a search for any additional documents.

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

By counsel

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**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,

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.

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 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:

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519.16 SURGICAL SERVICES

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DISCLAIMER: This chapter does not address all the complexities of Medicaid policies and procedures, and must be supplemented with all State and Federal Laws and Regulations. Contact BMS Fiscal Agent for coverage, prior authorization requirements, service limitations and other practitioner information.





519.16 SURGICAL SERVICES

BACKGROUND

West Virginia Medicaid covers medically necessary surgical procedures and requires prior authorization for all inpatient and specific outpatient procedures.

POLICY

519.16.1 COVERED SERVICES

Under Medicaid Resource Based Relative Value Scale (RBRVS) payment rules, physicians are paid a single global fee for all necessary services. Payments are not made for individual components of a complete or bundled procedure. Refer to the BMS [RBRVS RVU](#) file for multiple surgeries, bilateral surgery, co-surgery, team surgery and assistant-at-surgery procedures indicated with a "Y" (Refer to Appendix A in the current [CMS RBRVS RVU file](#) for a legend of status codes).

Procedures/service codes that are bundled into a primary procedure/service will not be reimbursed. Unbundled codes are not eligible for reimbursement. Multiple surgery payment rules apply to most surgical services except when the CPT code(s), by definition, are multiple procedures. When multiple surgeries are performed during the same operative session, payment is based on the full amount for the primary procedure and 50% of the fee for any other necessary and appropriate procedures performed during the session. The appropriate modifier must be included on the claim.

Only one assistant-at-surgery per surgical encounter is reimbursable. An assistant-at-surgery is not reimbursable when co-surgeon(s) or team surgery is billed. The appropriate modifier must be included on the claim with the appropriate service code for payment consideration.

If the surgical procedure does not require prior authorization, the assistant-at-surgery must include the same CPT code as the surgeon with the appropriate modifier on the CMS-1500 claim form and attach the operative report documenting their role during the procedure. The claim must be submitted with the operative report to BMS Fiscal Agent for payment consideration. When documentation is not available, the assistant-at-surgery services are not separately reimbursable.

A preoperative visit and follow-up care are bundled with the payment for the surgery and are not separately reimbursed. However, follow-up care may be reimbursed to other practitioners, such as an optometrist providing follow-up care for an ophthalmologist.

Surgical procedures performed in an Emergency Department (ED) are reimbursable. However, the physician is not reimbursed for an ED visit in addition to a surgical procedure performed in the ED on the same date of service. Refer to [Chapter 510, Hospital Services](#) for additional information.

519.16.2 PRIOR AUTHORIZATION

West Virginia Medicaid requires Prior Authorization for ALL hospital admissions and specific surgeries performed in offices, outpatient hospital settings, and ambulatory surgical centers. In addition, specific practitioner services and all unlisted codes for procedures/services require Prior Authorization.



519.16 SURGICAL SERVICES

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.

If the surgery is authorized by the UMC, separate prior authorization numbers for the surgeon and the outpatient facility are assigned. The surgeon or facility may access the prior authorization number via the web-based portal. The prior authorization number must be included on the claim form in order to be eligible for reimbursement.

When the procedure requires prior authorization, the UMC must be informed if an assistant-at-surgery is planned to participate in the procedure by the treating surgeon. If the procedure and the assistant-at-surgery are approved by the UMC, when billing, the assistant-at-surgery must include the same CPT code as the surgeon with the appropriate modifier and prior authorization number. The claim form must be submitted to the BMS Fiscal Agent for payment consideration.

Note: Mastectomy or related covered reconstructive procedures will not require prior authorization for individuals diagnosed with breast cancer.

Retrospective authorization is available by the UMC in the following circumstances:

- A procedure/service denied by the member's primary payer, providing all requirements for the primary payer have been followed, including appeal processes; or
- Retroactive West Virginia Medicaid eligibility.

Refer to [Chapter 100, General Administration and Information](#) for additional information.

519.16.3 NON-COVERED SERVICES

No surgical procedure will be covered on an inpatient basis if the procedure can be performed appropriately and safely in a physician's office or other outpatient setting.

The BMS [RBRVS RVU](#) file lists non-covered surgical services. Non-covered services also include, but are not limited to:

- **Cosmetic Surgery:** West Virginia Medicaid does not cover elective cosmetic surgery or services required as a result of complications from cosmetic surgery. Cosmetic surgery is defined as surgery having the primary purpose of improving the member's appearance and is not medically necessary. Examples of non-covered elective cosmetic surgeries include, but are not limited to otoplasty, rhinoplasty (except to correct internal nasal deformity), nasal reconstruction, osteoplasty for prognathism or micrognathia, dermabrasion, specific skin grafts, fascioplasty, lipectomy, liposuction, replacement of breast implants used for purposes other than reconstruction due to cancer, and application/removal of tattoos.
- Procedures considered investigational or experimental

Non-covered services are not eligible for a DHHR Fair Hearing or a Desk/Document review.



519.16 SURGICAL SERVICES

GLOSSARY

Definitions in [Chapter 200, Definitions and Acronyms](#) apply to all West Virginia Medicaid services, including those covered by this chapter.

Assistant-at-Surgery – A qualified, employed registered nurse or an advanced registered nurse practitioner or physician assistant licensed by the state in which they practice AND under the direct supervision of the surgeon, who provides aid in exposure, hemostasis, and other technical functions that assist the surgeon to perform a safe operation with optimal results for the member. The role of the Assistant-at-Surgery during the operative procedure must be documented in the operative report for consideration of reimbursement.

Assistant Surgeon – A physician who actively assists an operating surgeon in the performance of a surgical procedure. One physician acts as the surgeon and the other acts as an assistant. This is usually necessary because of the complex nature of the procedure(s) or the patient's condition. The assistant surgeon performs medical functions under the direct supervision of the operating physician. The assistant is generally in the same specialty as the operating surgeon.

Co-Surgeon – When 2 surgeons work together as primary surgeons performing distinct part(s) of a single reportable procedure, each surgeon must report their distinct operative work by reporting the same surgical procedure code.

Minimum Assistant Surgeon - The surgeon services are only required for a short period during the procedure.

REFERENCES

[Metabolic and Bariatric Surgery Accreditation and Quality Improvement Program \(MBSAQIP\)](#)

CHANGE LOG

REPLACE	TITLE	CHANGE DATE	EFFECTIVE DATE
Entire Chapter	Surgical Services		January 15, 2016

DISCLAIMER: This chapter does not address all the complexities of Medicaid policies and procedures, and must be supplemented with all State and Federal Laws and Regulations. Contact BMS Fiscal Agent for coverage, prior authorization requirements, service limitations and other practitioner information.

To: Cyrus, Tanya C [Tanya.C.Cyrus@wv.gov]
From: Myers, Jennifer J
Sent: Wed 11/4/2020 4:01:27 PM
Subject: CR language with CHIP added
Received: Mon 5/3/2021 3:55:41 PM
Gender CR language.docx

Jennifer Myers
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Exhibit
JM 16

DHHRBMS013980

The BMS Gender Edits workgroup was initiated to resolve a claims processing issue related to gender ID. There have been a few claims for pregnancy services for individuals who have identified as male when they applied for coverage. The claims deny based on current gender edits and we need to determine a way to allow the MMIS to reimburse the claims.

In preliminary meetings, the workgroup has decided that Medicaid and WVCHIP want to follow Medicare's guidance for using modifier KX on CMS 1500 claims and Condition Code 45 on UBs to identify services for a transgender Medicaid or WVCHIP member.

The attached spreadsheet will show each code and will list if appropriate to allow with KX modifier or if an additional action is needed. Medicaid and CHIP will be differentiated and may not follow the same rule on each code.

For Medicaid, any code that is not allowable with modifier KX, found in column N on the spreadsheet, a prior approval will be required, found in column O of the spreadsheet. Since the hierarchy denies for gender edit after prior authorization, these claims will need to be pended and manually reviewed for approval. If prior authorization is on file, the gender edit can be overridden and allowed for reimbursement. If prior authorization is not on file, the claim should be denied for no PA.

For CHIP, column J will describe the action to be taken, pend for review/PA or allow claim override with modifier. Column O will show any additional notes for the code. Please note, this is for claim edit overrides. There will also need to be work on the APC edit overrides for gender. For example, if a member identifies as Male, and a claim is submitted for pregnancy, APC will also throw a gender edit. The same rules will need to apply. If the UB04 is billed with condition code 45 and the service does not require a PA, the APC edit should also be overridden to allow the claim prior to a denial.