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14 *Attorneys for Defendant*

15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

17 D.H., by and through his mother, Janice  
18 Hennessy-Waller; and John Doe, by and  
19 through his guardian and next friend, Susan  
20 Doe, on behalf of themselves and all others  
21 similarly situated,

22 Plaintiffs,

23 vs.

24 Jami Snyder, Director of the Arizona Health  
25 Care Cost Containment System, in her  
26 official capacity,

27 Defendant.

Case No. 4:20-cv-00335-SHR

**DEFENDANT’S REPLY IN  
SUPPORT OF MOTION FOR TIME  
TO CONDUCT CLASS DISCOVERY  
AND RESPOND TO PLAINTIFFS’  
MOTION FOR CLASS  
CERTIFICATION**

(Assigned to the Honorable Scott H.  
Rash)

28 Defendant Jami Snyder (“Defendant”) submits this Reply in Support of the Motion for Time to Conduct Class Discovery and Respond to Plaintiffs’ Motion for Class Certification (“Motion for Time”). As set forth in the Rule 26(F) Case Management Report (Doc. 33, pp.6-8) and Defendant’s Motion for Time (Doc. 45), the issues presented in Plaintiffs’ Motion for Class Certification (Doc. 40) warrant close scrutiny, particularly in a case like this involving an irreversible gender reassignment surgery for children. To that end, principals of due process necessitate that Defendant be given an opportunity to conduct

1 a reasonable amount of discovery on the elements of class certification, so that she has  
2 sufficient information in order to properly respond to Plaintiffs' Motion for Class  
3 Certification.

4 As an initial matter, Plaintiffs argue that Defendant's Motion for Time violated the  
5 meet and confer requirements set forth in Local Rule 7.3. Not so. As noted in detail below,  
6 Defendants met and conferred with Plaintiffs regarding Defendant seeking time to conduct  
7 bifurcated discovery (on class issues first) before Defendant would be required to respond  
8 to a motion for class certification. Indeed:

- 9
- 10 • On October 29, 2020, counsel for Plaintiffs and Defendant participated in a Rule  
11 26(f) conference to discuss, among other things, a discovery plan. (*See* Email  
12 Exchange re: Scheduling a Rule 26(f) conference, Exhibit 1) During that meeting,  
13 counsel for Defendant discussed bifurcating discovery into two phases: (1) class  
14 discovery, and (2) merits discovery.
  - 15 • On October 30, 2020, counsel for Plaintiffs indicated they were "still preparing a  
16 response to [Defendant's] suggestion for bifurcating discovery," but asked if  
17 Defendant would agree that the parties can begin serving discovery requests. (*See*  
18 Email Exchange re: D.H. v. Snyder: Initial Disclosure Deadline, Exhibit 2) In  
19 response, counsel for Defendant noted, "[c]onsistent with our position we articulated  
20 on the phone call yesterday, we will agree the parties can begin serving written  
21 discovery requests on the issue of class certification only at this time." (*Id.*)
  - 22 • Thereafter, Plaintiffs' counsel prepared an initial draft Rule 26(F) Case Management  
23 Report. After exchanging different drafts of the Rule 26(F) Report (*see* Exhibit 2) so  
24 the parties could discuss and address, among other things, a bifurcated discovery  
25 approach and class action briefing, the parties subsequently finalized and filed a joint  
26 Rule 26(F) Case Management Report. (Doc. 33)
  - 27 • In the Rule 26(F) Report, Defendant articulated her position that she needed time to  
28 conduct class action discovery before she could adequately respond to the class

1 action issues: “Defendant proposes that discovery be conducted in two phases: (1)  
2 class certification discovery, and (2) merits discovery after the resolution of the class  
3 certification issue. Defendant proposes that (a) class certification discovery (limited  
4 to Fed.R.Civ.P. 23 issues) be completed by April 1, 2021, and (b) Plaintiffs file a  
5 motion for class certification on or before May 1, 2021.” (Doc. 33, p.6)

- 6 • In Plaintiffs’ portion of the Rule 26(F) Report, Plaintiffs outlined their position on  
7 the issues: “Plaintiffs propose that fact discovery on all issues, claims, and defenses  
8 begin immediately. Contrary to Defendant’s suggestion, there is no need to bifurcate  
9 discovery to allow for discovery specific to class certification.” Moreover, “Plaintiffs  
10 initially proposed closing fact discovery in mid-April 2021, but in response to  
11 Defendant’s suggestion to bifurcate discovery and delay the close of fact discovery  
12 by three months, Plaintiffs instead offer to extend their proposed deadlines by six  
13 weeks, and thus propose a fact discovery cut-off date of May 27, 2021.” (Doc. 33,  
14 pp. 3-5)

15 At the time of the status conference with the Court on December 11, 2020, the Court  
16 was in receipt of the parties’ Rule 26(F) Case Management Report. Based on comments  
17 made by the Court at the December 11, 2020 status conference, counsel for Defendant  
18 understood the Court had reviewed the Rule 26(F) Case Management Report and wanted to  
19 (1) first review Plaintiffs’ Motion for Class Certification, and (2) then decide whether  
20 discovery should be bifurcated as presented in the Rule 26(F) Case Management Report,  
21 including whether class action discovery would assist the Court in evaluating the elements  
22 of class certification in this case. To that end, the Court ordered Plaintiffs to file a motion  
23 for class certification within 30 days, and Plaintiffs subsequently filed their class  
24 certification motion. (Doc. 38, 40).

25 In response to comments made by the Court at the December 11, 2020 hearing,  
26 Defendant filed her Motion for Time in order to present the Court with the reasons why  
27 additional time for class action discovery was warranted, in order to allow Defendant to  
28

1 fully and thoroughly respond to Plaintiffs' Motion for Class Certification.

2           Throughout this process, it has become even more evident that additional time for  
3 class action discovery is necessary, and Defendant cannot sufficiently respond to Plaintiffs'  
4 Motion for Class Certification without that discovery. At a bare minimum, Defendant needs  
5 to be able to examine Plaintiffs' claims of "medical necessity" based on their own personal  
6 medical situations (indeed, such information is directly relevant to the commonality and  
7 typicality prongs for class action certification). Defendant has been asking Plaintiffs to  
8 produce their medical records since the inception of this lawsuit. Because Plaintiffs have  
9 failed to produce their medical records in response to these requests or in Plaintiffs' Initial  
10 Disclosure Statement, Defendant has issued Plaintiffs written discovery requests which  
11 seek, among other things, the production of Plaintiffs' medical records. All of Defendant's  
12 written discovery requests issued to Plaintiffs were attached as Exhibit A to the Motion for  
13 Time (Doc. 45). Defendant respectfully invites the Court to review Defendant's written  
14 discovery requests and consider whether that discovery would be helpful to the Court in  
15 evaluating and considering the elements required for class certification. Defendant submits  
16 that without that information, the Court will not be able to make an informed decision on  
17 the issue of class certification.

18           Plaintiffs' argument that Defendant does not need discovery is belied by the fact that  
19 Defendant served written discovery requests on Plaintiffs, seeking information that is  
20 needed to properly respond to the Motion for Class Certification. Tellingly, it is not until  
21 the last paragraph of Plaintiff's Reply that Plaintiffs acknowledge Defendant served these  
22 written discovery requests on Plaintiffs. The written discovery requests go to the heart of  
23 the issues that the Court will need to consider when evaluating Plaintiffs' Motion for Class  
24 Certification, including on the issues of numerosity, commonality, and typicality. *See, e.g.,*  
25 *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) ("Our cases  
26 stand for the unremarkable proposition that often the pleadings alone will not resolve the  
27  
28

1 question of class certification and that some discovery will be warranted”).<sup>1</sup>

2 Plaintiffs claim Defendant’s Motion for Time violated the meet-and-confer  
3 requirements in Local Rule 7.3(b). But it did not because the parties had already met and  
4 conferred on these issues. Indeed, the parties had communicated about and set forth their  
5 positions on the issues presented in the Motion for Time. Indeed, Plaintiffs stated their  
6 positions in the Rule 26(F) Report that (1) discovery should not be bifurcated, and (2) all  
7 discovery should close (both class and merits discovery) on May 27, 2021.<sup>2</sup> Plaintiffs’  
8 positions were in direct conflict with Defendant’s requests in the Motion for Time for (1)  
9 an April 26, 2021 deadline to complete class action discovery (with a request for bifurcated  
10 discovery), and (2) a May 12, 2021 deadline for Defendant to respond to the Motion for  
11 Class Certification.

12 With respect to the class certification requirements, Plaintiffs’ Reply makes even  
13 more clear the necessity of class action discovery. For example, Plaintiffs’ numerosity claim  
14 is based exclusively on one statement by Dr. Cronyn’s in a declaration.<sup>3</sup> Plaintiffs take the  
15 position that Defendant should just take at face value – without any discovery - Dr. Cronyn’s  
16 comment that “approximately 250 transgender youth per year ranging from 4 to 21, and of  
17 those patients, more than 40 are transgender boys who receive their health insurance  
18

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19 <sup>1</sup> Plaintiffs argue bifurcated discovery is not necessary because AHCCCS possesses  
20 sufficient information in its own records and Defendant has failed to adequately search for  
21 it, but this is not correct. First, individuals make requests for authorization of coverage for  
22 a procedure with their applicable health plan (e.g., United, Magellan, etc.) – and that  
23 information is not always provided to AHCCCS. Second, Plaintiffs are still identified in  
24 this lawsuit only as “D.H.” and “John Doe.” And finally, Plaintiffs claim AHCCCS could  
25 ascertain the size of the class for numerosity purposes by “identify[ing] all transgender  
26 males, between ages 13-20, that are receiving treatment for gender dysphoria,” but this  
27 claim incorrectly assumes all transgender males want surgery and it is medically appropriate  
28 for all of them (which is not the case).

<sup>2</sup> The closure of discovery was the subject of discussion between the parties on a few  
occasions. Indeed, as noted in the Rule 26(F) Report, “Plaintiffs initially proposed closing  
fact discovery in mid-April 2021,” but in response to Defendant’s suggestions, Plaintiffs  
offered to extend their proposed deadlines by six weeks (with a fact discovery cutoff of  
May 27, 2021). (Doc. 33, p. 5)

<sup>3</sup> Indeed, in the Motion for Time, Defendant points out that Plaintiffs have failed to cite any  
medical or scientific reports or research to support the numerosity claim. Tellingly,  
Plaintiffs do not respond to this point, nor do they point to any other evidence to support  
Dr. Cronyn’s claims.

1 through AHCCCS and need male chest reconstruction surgery.” (Doc. 40, pp. 4-5) It flies  
2 in the face of due process for a party to not be able to test an opposing party’s broad claim  
3 in one declaration that 40 individuals “need” chest reconstruction surgery. Furthermore, as  
4 pointed out in the Motion for Time, the proposed class are individuals under 21, but Dr.  
5 Cronyn’s count of “40” transgender boys includes 21-year-olds. In response to this point,  
6 Plaintiffs now claim this number may include “a few putative class members who now fall  
7 outside the age requirements for EPSDT” (p. 4) – but Plaintiffs have not articulated what  
8 they mean by “a few.” Defendant should be allowed to test what Plaintiffs mean by “a few.”  
9 This is just one example of why class action discovery is warranted.

10 On numerosity, Plaintiffs claim the low number of prior authorization requests for  
11 male chest reconstruction surgery is related to the AHCCCS categorical exclusion; they  
12 argue the exclusion “strongly discourages putative class members” from seeking prior  
13 authorization. But this is entirely speculative, and notably the exclusion did not stop  
14 Plaintiff D.H. from requesting prior authorization. (Doc. 1, ¶9)

15 Plaintiffs claim Defendant waived arguments in opposition to Plaintiffs’ Motion for  
16 Class Certification on the other elements of commonality, typicality, and adequacy. Not  
17 so. Defendant’s Motion for Time makes clear it needs additional time and discovery in  
18 order to adequately respond and present arguments to these remaining requirements for  
19 class certification. As noted above, Defendant even attached, as an Exhibit to the Motion  
20 for Time, written discovery requests Defendant served on Plaintiffs that are meant to  
21 address all the requirements of class certification. And that is the point – Defendant has  
22 been unable to collect sufficient information to adequately present arguments in opposition  
23 to the requirements for class certification. Defendant’s Motion for Time does not constitute  
24 a waiver of any such arguments. Indeed, this is consistent with Defendant’s position in the  
25 Rule 26(F) Report that “Defendant will need to conduct discovery related to class  
26 certification issues under Fed.R.Civ.P. 23, including” on the subjects of numerosity,  
27 commonality, typicality, and adequacy; further, “Defendant should be able to challenge  
28

1 Plaintiffs’ assertions regarding class certification, but is unable to fully do so without some  
2 discovery (including expert discovery) on class issues such as commonality, typicality, class  
3 definition, and adequacy.” (Doc. 33, pp. 2, 6) Accordingly, Defendant did not, as Plaintiffs  
4 claim, concede that Plaintiffs met the remaining requirements for class certification.

5 In conclusion, Defendant requests that the Court grant Defendant’s Motion for Time,  
6 and allow the parties approximately 90 days (until April 26, 2021) to complete class  
7 discovery, and extend the time for Defendant to respond to the motion for class certification  
8 to a reasonable time after that discovery concludes, or May 12, 2021.

9 RESPECTFULLY SUBMITTED this 8th day of February, 2021.

10  
11 **BURNSBARTON PLC**

12  
13 By     /s/ Kathryn Hackett King    

14 David T. Barton  
15 Kathryn Hackett King

16 **JOHNSTON LAW OFFICES, P.L.C.**  
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19 Phoenix, Arizona 85022

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21 *Attorneys for Defendant*  
22  
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27  
28

**CERTIFICATE OF SERVICE**

I hereby certifies that on February 8, 2021, I electronically transmitted the foregoing document, using the ECF System for filing and transmittal of a Notice of Electronic Filing and to ECF registrants and e-mailed a copy of the foregoing to the following:

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*Attorneys for Plaintiffs and the Class*

s/Tonya Denler

**EXHIBIT 1**



**From:** Asaf Orr AOrr@nclrights.org  
**Subject:** RE: Scheduling a Rule 26(f) conference  
**Date:** October 26, 2020 at 10:50 AM  
**To:** Logan Johnston ltjohnston@live.com, David Barton david@burnsbarton.com, Kate King kate@burnsbarton.com  
**Cc:** Ray, Brent bray@kslaw.com, Chinsky, Andrew achinsky@kslaw.com, Catherine McKee mckee@healthlaw.org, Abbi Coursolle coursolle@healthlaw.org, Chris Stoll CStoll@nclrights.org

---

Thanks, Logan. I will circulate a meeting invite with dial-in information later today.

**From:** Logan Johnston <ltjohnston@live.com>  
**Sent:** Monday, October 26, 2020 10:49 AM  
**To:** Asaf Orr <AOrr@nclrights.org>; David Barton <david@burnsbarton.com>; Kate King <kate@burnsbarton.com>  
**Cc:** Ray, Brent <bray@kslaw.com>; Chinsky, Andrew <achinsky@kslaw.com>; 'Catherine McKee' <mckee@healthlaw.org>; 'Abbi Coursolle' <coursolle@healthlaw.org>; Chris Stoll <CStoll@nclrights.org>  
**Subject:** Re: Scheduling a Rule 26(f) conference

Asaf - Let's do 10:00 a.m. (PT) on Thursday. Will you be circulating a phone number or just calling me? If the latter, please use 602 684-3790.

Thanks.

Logan

*Logan T. Johnston*  
*JOHNSTON LAW OFFICES, P.L.C.*  
*14040 N. Cave Creek Rd., Suite 309*  
*Phoenix, AZ 85022*  
*602.435.0050*

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**From:** Asaf Orr <AOrr@nclrights.org>  
**Sent:** Sunday, October 25, 2020 10:30 AM  
**To:** Logan Johnston <ltjohnston@live.com>; David Barton <david@burnsbarton.com>; Kate King <kate@burnsbarton.com>  
**Cc:** Ray, Brent <bray@kslaw.com>; Chinsky, Andrew <achinsky@kslaw.com>; 'Catherine McKee' <mckee@healthlaw.org>; 'Abbi Coursolle' <coursolle@healthlaw.org>; Chris Stoll <CStoll@nclrights.org>  
**Subject:** Scheduling a Rule 26(f) conference

Hi Logan, David, and Kathryn,

I write to set up a Rule 26(f) conference for next week. That will give us an opportunity to discuss the coming stages of this case, start to develop a discovery plan, and explore opportunities for settlement as required by the rule. Below is our availability (all times PT):

Wednesday: 12-1p  
Thursday: 10a-1p

Friday: 1-3p

I hope this e-mail finds you all well and look forward to hearing from you.

Very truly yours,  
Asaf

**Asaf Orr, Esq.** | Gender & Identity Law & Transgender Youth | [Asaf@NCLRights.org](mailto:Asaf@NCLRights.org)  
(Pronouns: He, him)

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**EXHIBIT 2**



**From:** Asaf Orr AOrr@nclrights.org  
**Subject:** RE: D.H. v Snyder: Initial Disclosure deadline  
**Date:** November 20, 2020 at 5:05 PM  
**To:** Kate King kate@burnsbarton.com  
**Cc:** Logan Johnston ltjohnston@live.com, David T Barton david@burnsbarton.com, Ray, Brent bray@kslaw.com, Chinsky, Andrew achinsky@kslaw.com, Catherine McKee mckee@healthlaw.org, Abbi Coursolle coursolle@healthlaw.org, Chris Stoll CStoll@nclrights.org, Barr, Daniel (Perkins Coie) DBarr@perkinscoie.com, Howe, Janet M. (Perkins Coie) JHowe@perkinscoie.com

Hi Kate,

Attached please find a redline version of our edits to the draft Rule 26(f) report. Please confirm that we have your client's consent to file a clean version with the Court.

Also, please find Plaintiffs' proposed protective order. We will send over a draft joint stipulation for the protective order soon.

Very truly yours,

Asaf

**From:** Kate King <kate@burnsbarton.com>

**Sent:** Sunday, November 15, 2020 12:15 PM

**To:** Asaf Orr <AOrr@nclrights.org>

**Cc:** Logan Johnston <ltjohnston@live.com>; David T Barton <david@burnsbarton.com>; Ray, Brent <bray@kslaw.com>; Chinsky, Andrew <achinsky@kslaw.com>; Catherine McKee <mckee@healthlaw.org>; Abbi Coursolle <coursolle@healthlaw.org>; Chris Stoll <CStoll@nclrights.org>; Barr, Daniel (Perkins Coie) <DBarr@perkinscoie.com>; Howe, Janet M. (Perkins Coie) <JHowe@perkinscoie.com>

**Subject:** Re: D.H. v Snyder: Initial Disclosure deadline

Hello Asaf,

Attached please find Defendant's additions to the report (in track changes). Thank you.

Kate

Kathryn Hackett King  
BurnsBarton PLC  
2201 E. Camelback Road  
Suite 360  
Phoenix, AZ 85016  
O 602.753.4510 IC 602.614.9819

**BurnsBarton**

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On Nov 10, 2020, at 9:06 PM, Kate King <kate@burnsbarton.com> wrote:

On NOV 10, 2020, at 2:20 PM, Kate King <kate@burnsbarton.com> wrote.

Hi Asaf, Thank you. I wanted to let you know we are reviewing and working on Defendant's additions to the report.

Kate

Kathryn Hackett King  
BurnsBarton PLC  
2201 E. Camelback Road  
Suite 360  
Phoenix, AZ 85016  
O 602.753.4510 IC 602.614.9819

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On Nov 7, 2020, at 10:25 PM, Asaf Orr <AOrr@nclrights.org> wrote:

Hi Kate,

Thank you for your response. Attached please find Plaintiffs' draft joint Rule 26(f) report. We look forward to seeing Defendant's additions to this report. Hopefully, we will be able to reach some additional agreements prior to submitting this report to the Court. Also, we hope to circulate a draft protective order for your review soon.

Very truly yours,  
Asaf

**From:** Kate King <kate@burnsbarton.com>  
**Sent:** Friday, October 30, 2020 4:19 PM  
**To:** Asaf Orr <AOrr@nclrights.org>  
**Cc:** Logan Johnston <ljohnston@live.com>; David T Barton <david@burnsbarton.com>; Ray, Brent <bray@kslaw.com>; Chinsky, Andrew <achinsky@kslaw.com>; Catherine McKee <mckee@healthlaw.org>; Abbi Coursolle <coursolle@healthlaw.org>; Chris Stoll <CStoll@nclrights.org>; Barr, Daniel (Perkins Coie) <DBarr@perkinscoie.com>; Howe, Janet M. (Perkins Coie) <JHowe@perkinscoie.com>  
**Subject:** Re: D.H. v Snyder: Initial Disclosure deadline

Hello Asaf, Thank you for your email. Consistent with our position we articulated on the phone call yesterday, we will agree the parties can begin serving written discovery requests on the issue of class certification only at this time (as limited to Rule 23 issues).

certification only at this time (so limited to Rule 23 issues).

Thank you, and have a nice weekend.  
Kate

Kathryn Hackett King  
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received this email in error, please immediately notify the sender and delete  
this email from your system without copying, disclosing, or using it.

On Oct 30, 2020, at 10:57 AM, Asaf Orr  
<[AOr@nclrights.org](mailto:AOr@nclrights.org)> wrote:

Hi Logan and Kate,

Thank you again for meeting with us yesterday  
regarding potential dates to propose to the Court for  
a scheduling order. We are still preparing a response  
to your suggestion for bifurcating discovery, but  
wanted to follow up on initial disclosures. We will  
agree to exchange initial disclosures on November  
23, 2020. In the meantime, does your client agree  
that parties can start serving discovery requests?

I hope this e-mail finds you both well and look  
forward to hearing back from you.

Very truly yours,  
Asaf

**Asaf Orr, Esq.** | Justice Matt Murray's Trial Counsel  
Youth Rights Director  
(Pronouns: He, him)  
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