

In The
United States Court Of Appeals
For The Fourth Circuit

**MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK; JULIA MCKEOWN;
MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents;
SAM SILVAINE; DANA CARAWAY,**
Plaintiffs – Appellees,

v.

**DALE FOLWELL, in his official capacity as State Treasurer of N.C.;
DEE JONES, in her official capacity as executive Administrator of the
N.C. State Health Plan for Teachers and State Employees,**
Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

JOINT APPENDIX
Volume I of IX
(Pages: 1 – 607)

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TABLE OF CONTENTS
Joint Appendix - Volume I of IX

	Page:
Docket Entries.	JA1
First Amended Complaint	
filed March 9, 2021.	JA47
<i>Amici Curiae's</i> Motion for Leave to File Brief in Support of Plaintiffs	
filed November 30, 2021..	JA95
State Health Plan Defendants'	
Motion for Partial Summary Judgment	
filed November 30, 2021..	JA106
State Health Plan Defendants' Memorandum	
In Support of Partial Summary Judgment,	
With Exhibits,	
filed November 30, 2021..	JA110
 <u>Exhibits:</u>	
1. Deposition of Dale Folwell	
taken on August 12, 2021..	JA150
2. Deposition of Dee Jones	
taken on August 3, 2021..	JA157
3. 80/20 and 70/30 Plans - 2021 Recommendation..	JA177

Exhibits to
State Health Plan Defendants’ Memorandum
In Support of Partial Summary Judgment
filed November 30, 2021, Continued:

4. Declaration of BCBSNC,
With Attachments,
sworn November 30, 2021. JA183

5. Prior Authorization and Utilization Management
Concepts in Managed Care Pharmacy
Vol. 25, No. 6 June 2019 JMCP. JA197

6. Deposition of Dan H. Karasic, M.D.
taken on September 20, 2021. JA201

7. Deposition of Randi C. Ettner, Ph.D.
taken on October 15, 2021. JA206

8. Deposition of Stephen B. Levine, M.D.
taken on September 10, 2021. JA208

9. Deposition of George R. Brown, M.D.
taken on September 23, 2021. JA212

10. Affidavit of Alina Neuberger MD, MBA
sworn September 29, 2021. JA214

11. Affidavit of Adam Korn
sworn September 29, 2021. JA224

Exhibits to
State Health Plan Defendants’ Memorandum
In Support of Partial Summary Judgment
filed November 30, 2021, Continued:

- 12. Deposition of Sergeant Dana Caraway,
With Attachments,
taken on September 17, 2021. JA226

- 13. Deposition of Becki Johnson
taken on September 15, 2021..... JA258

Plaintiffs’ Motion for Summary Judgment
filed December 20, 2021..... JA278

Plaintiffs’ Memorandum in Support of Summary Judgment,
With Exhibits,
filed December 20, 2021..... JA282

Exhibits:

- 1. Declaration of Maxwell Kadel
sworn November 24, 2021..... JA323

- 2. Declaration of Connor Thonen-fleck
sworn November 15, 2021..... JA341

- 3. Declaration of Jason Fleck
sworn November 11, 2021..... JA348

- 4. Declaration of Julia McKeown
sworn November 19, 2021..... JA375

Exhibits to
Plaintiffs’ Memorandum in Support of Summary Judgment
filed December 20, 2021, Continued:

5. Declaration of C.B.
sworn November 24, 2021. JA388

6. Declaration of Michael D. Bunting, Jr.
sworn November 22, 2021. JA394

7. Declaration of Sam Silvaine
sworn November 22, 2021. JA402

8. Declaration of Shelley K. Bunting
sworn November 24, 2021. JA408

9. Declaration of Dana Caraway
sworn November 15, 2021. JA449

Plan Defendants’ Response in Opposition to
Motion for Leave to File Brief of *Amici Curiae*
filed December 20, 2021. JA466

Plaintiffs’ Opposition to State Health Plan Defendants’
Motion for Partial Summary Judgment,
With Attachment,
filed December 30, 2021. JA480

Attachment:

Supplemental Declaration of Amy Richardson,
With Exhibits,
sworn December 30, 2021. JA509

Reply Brief of *Amici Curiae*
filed January 3, 2022. JA532

Reply in Support of State Health Plan Defendants’
Motion for Partial Summary Judgment
filed January 13, 2022. JA544

State Health Plan Defendants’ Response in Opposition
To Plaintiffs’ Motion for Summary Judgment,
With Attachments,
filed January 19, 2022. JA561

TABLE OF CONTENTS
Joint Appendix - Volume II of IX

Attachments to
State Health Plan Defendants’ Response in Opposition
To Plaintiffs’ Motion for Summary Judgment,
With Attachments, Continued:

1. Deposition Transcript Excerpt of Defendant Dee Jones,
sworn August 3, 2020 1..... JA608

2.. Declaration of Dr. Stephen B. Levine, M.D.,
With Exhibits,
sworn April 28, 2021..... JA622

3. Declaration of Dr. Paul W. Hruz, PhD.
sworn April 30, 2021..... JA735

4. Declaration of Dr. Paul R. McHugh, M.D.,
With Exhibit A
sworn May 1, 2021. JA850

5. Declaration of Dr. Patrick W. Lappert, M.D.
sworn May 1, 2021. JA897

6. Study by Branstrom and Pachankis..... JA953

7. Deposition Excerpt of Dr. Paul W. Hruz,
sworn Sept. 29, 2021. JA970

8. Article: Mental Healthcare Utilization of
Transgender Youth Before and
After Affirming Treatment. JA976

Attachments to
State Health Plan Defendants' Response in Opposition
To Plaintiffs' Motion for Summary Judgment,
With Attachments, Continued:

9. Prescription Medicine Prior Authorization Criteria..... JA987
10. Prescription Medicine Specialty
Guideline Management - Supprelin LA. JA991
11. Deposition Excerpt of Dr. George R. Brown, M.D.,
taken Sept. 23, 2021..... JA1001
12. Deposition Excerpt of Plaintiff Michael D. Bunting,
taken August 9, 2021.. JA1005
13. Deposition Excerpt of Dr. George R. Brown, M.D.,
taken Sept. 23, 2021..... JA1007
14. Declaration of Blue Cross Blue Shield of North Carolina,
With Exhibits,
sworn November 30, 2021. JA1011
15. Deposition Excerpt of Fr. Peter Robie, M.D.
taken September 22, 2021. JA1025
16. Deposition Excerpt of Dr. Randi C. Ettner, PhD.,
taken October 15, 2021..... JA1029
17. Deposition Excerpt of Dr. Stephen B. Levine, M.D.
taken September 100, 2021. JA1031
18. Deposition Excerpt of Dr. Dan H. Karasic, M.D.,
taken September 20, 2021. JA1035

TABLE OF CONTENTS
Joint Appendix Volume III of IX

Page:

Plan Plaintiffs' Reply in Support of Motion for Summary Judgment, With Attachment, filed February 2, 2022.	JA1038

Attachment:

Third Supplemental Declaration of Amy Richardson, With Exhibits, sworn February 2, 2022.	JA1060

Plaintiffs' Motion to Exclude Expert Testimony of Dr. Peter Robie filed February 2, 2022.	JA1092

Plaintiffs' Memorandum of Law in Support of Motion to Exclude Expert Testimony of Dr. Peter Robie. With Attachment, filed February 2, 2022.	JA1096

Attachment:

Declaration of Deepika H. Ravi, With Exhibits, sworn February 2, 2022.....	JA1119

Plaintiffs' Motion to Exclude Expert Testimony of Dr. Paul W. Hruz filed February 2, 2022.	JA1188

Plaintiffs’ Memorandum of Law in Support of Motion to
Exclude Expert Testimony of Dr. Paul W. Hruz,
With Attachment,
filed February 2, 2022. JA1192

Attachment:

Declaration of Omar Gonzalez-Pagan,
With Exhibits,
sworn February 2, 2022. JA1221

Plaintiffs’ Motion to Exclude
Expert Testimony of Dr. Paul R. McHugh
filed February 2, 2022. JA1593

TABLE OF CONTENTS
Joint Appendix Volume IV of IX

Page:

**Plaintiffs’ Memorandum of Law in Support of Motion to
Exclude Expert Testimony of Dr. Paul R. McHugh,
With Attachment,
filed February 2, 2022. JA1597**

Attachment:

**Declaration of Omar Gonzalez-Pagan,
With Exhibits,
sworn February 2, 2022. JA1627**

**Plaintiffs’ Motion to Exclude Expert
Testimony of Dr. Patrick W. Lappert
filed February 2, 2022. JA1899**

TABLE OF CONTENTS
Joint Appendix Volume V of IX

Page:

**Plaintiffs’ Memorandum of Law in Support of Motion
To Exclude Expert Testimony of Dr. Patrick W. Lappert,
With Attachment,
filed February 2, 2022. JA1902**

Attachment:

**Declaration of Dmitriy Tishyevich,
With Exhibits,
sworn February 2, 2022. JA1929**

TABLE OF CONTENTS
Joint Appendix Volume VI of IX

Page:

**Plaintiffs' Memorandum of Law in Support of Motion
To Exclude Expert Testimony of Dr. Patrick W. Lappert,
With Attachment,
filed February 2, 2022, Continued:**

Attachment:

**Declaration of Dmitriy Tishyevich,
With Exhibits,
sworn February 2, 2022..... JA2582**

**Plaintiffs' Motion to Exclude
Expert Testimony of Stephen B. Levine, M.D.
filed February 2, 2022. JA2881**

**Plaintiffs' Memorandum of Law in Support of Motion to
Exclude Expert Testimony of Stephen B. Levine, M.D.,
With Attachment,
filed February 2, 2022. JA2884**

Attachment:

**Declaration of Carl S. Charles,
With Exhibits,
sworn February 2, 2022..... JA2912**

TABLE OF CONTENTS
Joint Appendix Volume VII of IX

Page:

**State Health Plan Defendants’ Response in Opposition
To Plaintiffs’ Motions to Exclude Expert Testimony,
With Attachments,
filed February 23, 2022. JA3130**

Attachments:

**Declaration of Stephen B. Levine, M.D.
sworn April 28, 2021. JA3167**

**Expert Witness Declaration of Paul R. McHugh, MD
sworn May 1, 2021. JA3280**

**Expert Witness Declaration of Paul W. Hruz, M.D., Ph.D.
sworn April 30, 2021. JA3327**

**Declaration of Patrick W. Lappert, MD
sworn May 1, 2021. JA3442**

**Statement of State Health Plan
Coverage of Sex Change Operation
dated October 24, 2018. JA3498**

**Disclosure of Expert Witness Peter W. Robie, M.D., FACP
dated May 1, 2021. JA3499**

**Deposition of Stephen B. Levine, M.D.
taken on September 10, 2021. JA3501**

**Plaintiffs’ Reply in Support of Motions to
Exclude Expert Testimony,
With Attachment,
filed March 9, 2022. JA3504**

Attachment:

**Supplemental Declaration of Omar Gonzalez-Pagan,
With Exhibit,
sworn March 9, 2022..... JA3521**

**Memorandum Opinion and Order
filed April 7, 2022. JA3535**

**Brief of *Amici Curiae*
filed April 11, 2022. JA3539**

**Exhibit F - Expert Rebuttal Disclosure Report of
George Richard Brown, M.D., DFAPA
dated June 10, 2021
filed June 2, 2022. JA3563**

**Memorandum Opinion and Order
filed June 10, 2022. JA3569**

**Notice of Interlocutory Appeal
filed July 1, 2022.. JA3642**

**Motion to Correct Memorandum Opinion and Order
filed July 7, 2022.. JA3645**

**State Health Plan Defendant’s Memorandum in Support of
Motion to Correct Memorandum Opinion and Order
filed July 7, 2022.. JA3649**

Notice of Non-Opposition to State Health Plan’s Motion to Correct
filed July 15, 2022.. JA3655

Notice of Intent to Correct and Clarify
Memorandum Opinion and Order
filed July 18, 2022.. JA3658

Order
filed August 10, 2022..... JA3661

Corrected Memorandum Opinion and Order
filed August 10, 2022..... JA3663

TABLE OF CONTENTS

Joint Appendix Volume VIII of IX - Under Seal

Page:

Memorandum in Support of Plaintiffs’ Motion for Summary Judgment filed December 20, 2021.	JA3736

Declaration of Amy Richardson, With Exhibits, filed December 20, 2021.	JA3777

Exhibits:

1. Excerpt of Objs. and Resps. of Defs. Dale Powell and Dee Jones to Pls.' First Set of Inteerrogs. dated September 3, 2020.	JA3785
2. Am. Objs. and Resps. of Defs. Dale Folwell and Dee Jones to Pls.' Am. First Set of Requests for Admis. dated September 29, 2020.	JA3789
3. Excerpt of Am. Resps. and Objs. of Defs. Dale Folwell and Dee Jones to Pls.' First Set of Interrogs. dated October 9, 2020.	JA3795
4. Excerpt of Objs. and Resps. of Defs. Dale Folwell and Dee Jones to University Defs' First Set of Reqs. for Admis. and Interrogs. dated February 10, 2021.	JA3803

Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:

5. Excerpt of Objs. and Resps. of Def. North Carolina State Health Plan for the Teachers and State Employees to Pls.' First Reqs. for Admis., Inteerrogs., and Reqs. for Produc. of Docs. and Things
dated July 9, 2021. JA3808
6. Excerpt of Def. North Carolina Department of Public Safety's Resp. to Pls'. First Set of Interrogs.
dated June 18, 2021. JA3824
7. Excerpt of Def. North Carolina Department of Public Safety's Resp. to Pls'. First Set of Req. for Admis.
dated June 18, 2021. JA3829
8. Composite of Excerpts from 70/30 PPO Plan Benefits Booklets, 2016-2021, with yellow highlighting applied to relevant portions. JA3832
9. Composite of excerpts from 80/20 PPO Plan Benefits Booklets, 2016-2021, with yellow highlighting applied to relevant portions. JA3858
10. Disclosure of Expert Witnesses Who Do Not Provide a Written Report Pursuant to Fed. R. Civ. P. 26(a)(2) by Defs. Dale Folwell, Dee Jones and the North Carolina State Health Plan for Teachers and State Employees
dated May 1, 2021. JA3881
11. Excerpt of Dep. Tr. of Dale Folwell. JA3891

Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:

- 11(a). Excerpt of Ex. 14 to Dep. Tr. of Dale Folwell,
 "Financials Update,"
 dated October 22, 2018,
 PLANDEF0154431,0154481-82. JA3915
12. Excerpt of Dep. Tr. of Dee Jones,
 Rule 30(b)(6) Designee of NCSHP..... JA3919
13. Excerpt of Dep. Tr. of Dr. Peter Robie, M.D..... JA3961
14. Excerpt of Dep. Tr. of Becki Johnson, Rule 30(b)(6)
 Designee of N.C. Dept. of Public Safety. JA3971
15. Excerpt of Dep. Tr. of Pltf. Maxwell Kadel. JA4002
16. Excerpt of Dep. Tr. of Pltf. Connor Thonen-Fleck..... JA4007
17. Excerpt of Dep. Tr. of Pltf. Jason Fleck..... JA4015
18. Excerpt of Dep. Tr. of Pltf. Julia McKeown..... JA4021
19. Excerpt of Dep. Tr. of Pltf. C.B.. JA4027
20. Excerpt of Dep. Tr. of Pltf. Michael D. Bunting, Jr..... JA4032
21. Excerpt of Dep. Tr. of Pltf. Sam Silvaine..... JA4040
22. Excerpt of Dep. Tr. of Pltf. Dana Caraway..... JA4050
23. Excerpt of Dep. Tr. of Dr. George R. Brown, M.D.. ... JA4063

Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:

23(a). Expert Report of Dr. George R. Brown, M.D., DFAPA. . .	JA4074
23(b). Bibliography to Expert Report of Dr. George R. Brown, M.D., DFAPA.....	JA4107
23(c). Supp. Expert Report of Dr. George R. Brown, M.D., DFAPA.....	JA4116
23(d). Expert Rebuttal Report of Dr. George R. Brown, M.D., DFAPA.....	JA4124
23(e). C.V. of Dr. George R. Brown, M.D., DFAPA.	JA4179
23(f). Corrected bibliography to Dr. Brown's expert rebuttal report, served on Defendants dated July 1, 2021.	JA4223
24. Excerpt of Dep. Tr. of Dr. Loren S. Schechter, M.D.. . .	JA4238
24(a) Expert Report of Dr. Loren S. Schechter, M.D. (including attached bibliography).....	JA4255
24(b). Expert Rebuttal Report of Dr. Loren S. Schechter, M.D. (including attached bibliography).....	JA4272
24(c). C.V. of Dr. Loren S. Schechter.	JA4311
25. Excerpt of Dep. Tr. of Dr. Randi C. Ettner, Ph.D.....	JA4370
25(a). Expert Rebuttal Report of Dr. Randi C. Ettner, Ph.D...	JA4377

TABLE OF CONTENTS
Joint Appendix Volume IX of IX - Under Seal

Page:

Exhibits to

Declaration of Amy Richardson

filed December 20, 2021, Continued:

25(b). C.V. of Dr. Randi C. Ettner, Ph.D..... JA4421

25(c). Bibliography to Dr. Ettner's expert rebuttal report. . . . JA4433

**26. Excerpt of Dep. Tr. of
Dr. Johanna Olson-Kennedy, M.D., M.S.. JA4445**

**26(a). Expert Rebuttal Report of
Dr. Johanna Olson-Kennedy, M.D., M.S..... JA4456**

26(b). C.V. of Dr. Johanna Olson-Kennedy, M.D., M.S.. . . . JA4503

**26(c). Corrected bibliography to Dr. Olson-Kennedy's expert
rebuttal report, served on Defendants
dated September 24, 2021. JA4524**

27. Excerpt of Dep. Tr. of Dr. Dan H. Karasic, M.D.. JA4530

27(a). Expert Rebuttal Report of Dr. Dan H. Karasic, M.D.. . JA4537

27(b). C.V. of Dr. Dan H. Karasic, M.D.. JA4564

**27(c). Corrected bibliography to Dr. Karasic's expert
rebuttal report, served on Defendants
dated September 24, 2021. JA4585**

Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:

28. Excerpt of Dep. Tr. of Patrick Lappert, M.D... . JA4590
29. National Academies of Sciences, Engineering, and
Medicine, Understanding the Well-Being of
LGBTQI+ Populations (2020). JA4610
30. Email chain re: "time to talk on Tuesday?,"
dated May 27, 2016, PLANDEFO 136562-63. . . . JA4617
31. Email from Lotta Crabtree
re: "Coverage for gender dysphoria,"
dated July 5, 2016, PLANDEF00007 6540-41. . . . JA4620
32. Email chain re: "1557,"
dated July 14, 2016, KADEL00152143-44. JA4623
33. "DST POLICIES AND PROCEDURES,
Section 1557 Grievance Procedure,"
dated July 15, 2016, PLANDEF0012787-92. JA4626
34. Email chain re: "Bullet points for the BOT,"
With attachment titled, "Affordable Care Act- Section
1557 Final Rule," KADEL00136650
dated July 27, 2016, KADEL00136645-46. JA4633
35. Letter of Agreement with the Segal Company for
assistance related to compliance with Sect. 1557
dated November 1, 2016, PLANDEF0008908-10. . . . JA4637

Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:

36. Memo. to Mona Moon from Segal Consulting
re: "Transgender Cost Estimate,"
dated November 29, 2016, PLANDEF0006964-65. . . . JA4641
37. Email chain re: "1557 draft statement"
dated November 29, 2016, PLANDEF0016424-26. . . . JA4644
38. Email chain re: "Inclusion of Sex Change Surgery on Plan?,"
dated December 1, 2016, PLANDEF0007946-48. . . . JA4648
39. Slides presented to Board of Trustees entitled, "
Affordable Care Act -Section 1557 Requirements,
Coverage for Gender Dysphoria,"
dated December 2, 2016, PLANDEF0006966-89. . . . JA4653
40. Minutes for meeting of Board of Trustees
dated December 1-2, 2016, PLANDEF0012810-22. . . . JA4678
41. Email chain re: "State Health Plan board to
cover gender reassignment surgery,"
dated December 6, 2016, PLANDEF0007133-40. . . . JA4692
42. Email chain re: "WUNC: Gender Dysphoria
Coverage (noon deadline),"
dated December 8, 2016, PLANDEF0029555-57. . . . JA4701
43. BlueCross BlueShield of North Carolina
Corporate Medical Policy, "Gender Affirmation
Surgery and Hormone Therapy,"
dated January 1, 2017, PLANDEF0008644-52. . . . JA4705

Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:

- 44. Email from Chris Almberg re: "ACA Section 1557
Compliance Questionnaire," with attachment,
dated March 30, 2017, KADEL00223708-13. JA4715
- 45. Email chain re: "Hold Harmless,"
dated August 4, 2017, PLANDEF0069016. JA4722
- 46. Email chain re: "Medical Policy Development,"
dated September 28, 2017, PLANDEF0073378-81. . . . JA4724
- 47. Email chain re: "Gender Transition Services Amendment,"
attachment, "Amendment to Third Party
Administration Services Contract," PLANDEF0030342
dated December 6, 2017, PLANDEF0071731-32. JA4729
- 48. Email from Lonaine Munk
re: "Message from Treasurer Folwell,"
dated October 25, 2018, PLANDEF0028665-66. JA4733
- 49. Email from Susan Munay re: "Pharmacy appeals
related to gender dysphoria or transgender services,"
dated October 25, 2018, PLANDEF0120919-20. JA4736

**Exhibits to
Declaration of Amy Richardson
filed December 20, 2021, Continued:**

- 50. BlueCross BlueShield of North Carolina
Corporate Medical Policy, "Gender
Affirmation Surgery and Hormone Therapy,"
dated June 2021, KADEL00316786-96..... JA4739**

**Exhibit to
Plaintiffs' Memorandum to Exclude Expert
Testimony of Dr. Patrick W. Lappert
filed February 2, 2022:**

- 1. Declaration of Patrick W. Lappert, MD
sworn May 1, 2021..... JA4752**

18BB,MASTER,MEDIATION,TRIAL

**U.S. District Court
North Carolina Middle District (NCMD)
CIVIL DOCKET FOR CASE #: 1:19-cv-00272-LCB-LPA**

KADEL et al v. FOLWELL et al
Assigned to: JUDGE LORETTA C. BIGGS
Referred to: MAG/JUDGE L. PATRICK AULD
Case in other court: Fourth Circuit, 20-01409

22-01721

22-01730

Cause: 42:1983

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Date Filed: 03/11/2019
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Plaintiff

C.B.

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Defendant

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**NORTH AMERICAN SOCIETY FOR
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**NATIONAL ASSOCIATION OF
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Date Filed	#	Docket Text
03/11/2019	<u>1</u>	COMPLAINT against All Defendants (Filing fee \$ 400 receipt number 0418-2527770.), filed by C.B., Connor Thonen-Fleck, Sam Silvaine, Jason Fleck, Maxwell Kadel, Julia McKeown, Michael D Bunting Jr..(RICHARDSON, AMY) (Entered: 03/11/2019)
03/11/2019		CASE REFERRED to Mediation pursuant to Local Rule 83.9b of the Rules of Practice and Procedure of this Court. Please go to our website under Attorney Information for a list of mediators which must be served on all parties. (Coyne, Michelle) (Entered: 03/11/2019)
03/11/2019	<u>2</u>	NOTICE of Appearance by attorney TARA L. BORELLI on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (BORELLI, TARA) (Entered: 03/11/2019)
03/11/2019	<u>3</u>	NOTICE of Appearance by attorney NOAH E. LEWIS on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (LEWIS, NOAH) (Entered: 03/11/2019)
03/11/2019	<u>4</u>	NOTICE of Appearance by attorney MEREDITH T. BROWN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (BROWN, MEREDITH) (Entered: 03/11/2019)
03/11/2019	<u>5</u>	NOTICE of Appearance by attorney OMAR F. GONZALEZ-PAGAN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (GONZALEZ-PAGAN, OMAR) (Entered: 03/11/2019)
03/11/2019		Case ASSIGNED to JUDGE LORETTA C. BIGGS and MAGISTRATE JUDGE L. PATRICK AULD. (Coyne, Michelle) (Entered: 03/11/2019)
03/11/2019	<u>6</u>	Summons Issued as to All Defendants. (Coyne, Michelle) (Entered: 03/11/2019)

03/11/2019	<u>7</u>	Notice of Right to Consent. Counsel shall serve the attached form on all parties. (Attachments: # <u>1</u> Consent Form)(Coyne, Michelle) (Entered: 03/11/2019)
03/12/2019	<u>8</u>	NOTICE of Appearance by attorney DEEPIKA H. RAVI on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (RAVI, DEEPIKA) (Entered: 03/12/2019)
03/14/2019	<u>9</u>	WAIVER OF SERVICE Returned Executed by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. DALE FOLWELL waiver sent on 3/13/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/14/2019)
03/14/2019	<u>10</u>	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. DEE JONES waiver sent on 3/13/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/14/2019)
03/14/2019	<u>11</u>	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES waiver sent on 3/13/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/14/2019)
03/22/2019	<u>12</u>	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL waiver sent on 3/14/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/22/2019)
03/22/2019	<u>13</u>	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. UNIVERSITY OF NORTH CAROLINA AT GREENSBORO waiver sent on 3/14/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/22/2019)
03/22/2019	<u>14</u>	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. NORTH CAROLINA STATE UNIVERSITY waiver sent on 3/14/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/22/2019)
03/26/2019	<u>15</u>	NOTICE of Appearance by attorney CATHERINE F. JORDAN on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO (JORDAN, CATHERINE) (Entered: 03/26/2019)
03/26/2019	<u>16</u>	Corporate Disclosure Statement by UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (JORDAN, CATHERINE) (Entered: 03/26/2019)
03/26/2019	<u>17</u>	Corporate Disclosure Statement by NORTH CAROLINA STATE UNIVERSITY. (JORDAN, CATHERINE) (Entered: 03/26/2019)
03/26/2019	<u>18</u>	Corporate Disclosure Statement by UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL. (JORDAN, CATHERINE) (Entered: 03/26/2019)
05/06/2019	<u>19</u>	NOTICE of Appearance by attorney OLGA E. VYSOTSKAYA DE BRITO on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (VYSOTSKAYA DE BRITO, OLGA) (Entered: 05/06/2019)
05/06/2019	<u>20</u>	Consent MOTION for Extension of Time to File Answer re <u>1</u> Complaint by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(VYSOTSKAYA DE BRITO, OLGA) (Entered: 05/06/2019)
05/06/2019		ORDER granting <u>20</u> Motion for Extension of Time to Answer for DALE FOLWELL; DEE JONES; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Answer due by 6/12/2019. Signed by John Brubaker,

		Clerk of Court, on 5/6/2019. (Brubaker, John) (Entered: 05/06/2019)
05/07/2019	<u>21</u>	MOTION for Extension of Time to File Answer re <u>1</u> Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order Granting Extension of Time)(JORDAN, CATHERINE) (Entered: 05/07/2019)
05/08/2019		ORDER granting <u>21</u> Motion for Extension of Time to Answer for UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Answer due by 6/12/2019. Signed by John Brubaker, Clerk of Court, on 5/8/2019. (Brubaker, John) (Entered: 05/08/2019)
06/07/2019	<u>22</u>	NOTICE of Appearance by attorney MARK A. JONES on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (JONES, MARK) (Entered: 06/07/2019)
06/07/2019	<u>23</u>	NOTICE of Appearance by attorney KEVIN GUY WILLIAMS on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (WILLIAMS, KEVIN) (Entered: 06/07/2019)
06/07/2019	<u>24</u>	MOTION for Extension of Time to File Answer <i>or Appropriate Responsive Pleading</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(JONES, MARK) (Entered: 06/07/2019)
06/10/2019	<u>25</u>	Joint MOTION for Extension of Time to File Answer re <u>1</u> Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order Granting Extension of Time)(JORDAN, CATHERINE) (Entered: 06/10/2019)
06/10/2019		Motions Referred: RE: <u>24</u> MOTION for Extension of Time to File Answer <i>or Appropriate Responsive Pleading</i> , <u>25</u> Joint MOTION for Extension of Time to File Answer re <u>1</u> Complaint , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 06/10/2019)
06/11/2019		TEXT ORDER finding as moot <u>24</u> Motion for Extension of Time and granting <u>25</u> Motion for Extension of Time. Defendants shall answer or otherwise respond by 07/08/2019. Plaintiffs shall file any response to any timely file motion to dismiss by 08/05/2019 and Defendants shall file any reply by 08/19/2019. Issued by MAG/JUDGE L. PATRICK AULD on 06/11/2019. (AULD, L.) (Entered: 06/11/2019)
06/17/2019	<u>26</u>	NOTICE of Appearance by attorney JOHN G. KNEPPER on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (KNEPPER, JOHN) (Entered: 06/17/2019)
07/03/2019	<u>27</u>	MOTION to Withdraw as Attorney OLGA E. VYSOTSKAYA DE BRITO by on behalf of DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order Draft Proposed Order Allowing a Motion to Withdraw)(VYSOTSKAYA DE BRITO, OLGA) (Entered: 07/03/2019)
07/03/2019		Motion Referred: RE: <u>27</u> MOTION to Withdraw as Attorney OLGA E. VYSOTSKAYA DE BRITO , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 07/03/2019)
07/04/2019		TEXT ORDER granting <u>27</u> Motion for Leave to Withdraw. Attorney OLGA E. VYSOTSKAYA DE BRITO is terminated as counsel of record for Defendants Dale Folwell, Dee Jones, and the North Carolina State Health Plan. Issued by MAG/JUDGE L. PATRICK AULD on 07/04/2019. (AULD, L.) (Entered: 07/04/2019)
07/05/2019	<u>28</u>	NOTICE of Appearance by attorney SAM M. HAYES on behalf of Defendant DALE FOLWELL (HAYES, SAM) (Entered: 07/05/2019)

07/08/2019	<u>29</u>	NOTICE of Appearance by attorney KIMBERLY D. POTTER on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO (POTTER, KIMBERLY) (Entered: 07/08/2019)
07/08/2019	<u>30</u>	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Response to Motion due by 7/29/2019 (POTTER, KIMBERLY) (Entered: 07/08/2019)
07/08/2019	<u>31</u>	MEMORANDUM filed by Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO re <u>30</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Exhibit A March 20, 2019 Advisory Letter, # <u>2</u> Exhibit B June 20, 2013 Advisory Letter)(POTTER, KIMBERLY) (Entered: 07/08/2019)
07/08/2019	<u>32</u>	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 7/29/2019 (WILLIAMS, KEVIN) (Entered: 07/08/2019)
07/08/2019	<u>33</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>32</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 07/08/2019)
08/05/2019	<u>34</u>	RESPONSE in Opposition re <u>32</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DALE FOLWELL, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, DEE JONES filed by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 8/19/2019 (RICHARDSON, AMY) (Entered: 08/05/2019)
08/05/2019	<u>35</u>	RESPONSE in Opposition re <u>30</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO, NORTH CAROLINA STATE UNIVERSITY filed by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 8/19/2019 (RICHARDSON, AMY) (Entered: 08/05/2019)
08/14/2019	<u>36</u>	MOTION for Extension of Time to File Response/Reply as to <u>35</u> Response in Opposition to Motion, by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order Granting Extension of Time)(JORDAN, CATHERINE) (Entered: 08/14/2019)
08/14/2019		Motion Referred: RE: <u>36</u> MOTION for Extension of Time to File Response/Reply as to <u>35</u> Response in Opposition to Motion, to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 08/14/2019)
08/14/2019		TEXT ORDER granting <u>36</u> Motion for Extension of Time. Defendants University of North Carolina at Chapel Hill, North Carolina State University, and University of North Carolina at Greensboro shall file any reply to <u>35</u> Response by 09/18/2019. Issued by MAG/JUDGE L. PATRICK AULD on 08/14/2019. (AULD, L.) (Entered: 08/14/2019)
08/19/2019	<u>37</u>	REPLY Memorandum filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>32</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) Modified on 8/20/2019 to correctly reflect pleading title. (Garland, Leah) (Entered: 08/19/2019)

		08/19/2019)
08/22/2019	<u>38</u>	Suggestion of Subsequently Decided Authority by Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 08/22/2019)
09/18/2019	<u>39</u>	REPLY, filed by Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO, to Response to <u>30</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (JORDAN, CATHERINE) (Entered: 09/18/2019)
09/23/2019		Motions Submitted: <u>30</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , <u>32</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 09/23/2019)
01/02/2020	<u>40</u>	Suggestion of Subsequently Decided Authority re <u>34</u> Response in Opposition to Motion, <u>35</u> Response in Opposition to Motion, by Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 01/02/2020)
02/21/2020	<u>41</u>	MOTION for Entry of Tolling Stipulation (Unopposed) by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 02/21/2020)
02/21/2020	<u>42</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>41</u> MOTION for Entry of Tolling Stipulation (Unopposed) filed by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 02/21/2020)
02/21/2020		Motion Submitted: <u>41</u> MOTION for Entry of Tolling Stipulation (Unopposed) to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 02/21/2020)
02/26/2020	<u>43</u>	ORDER signed by JUDGE LORETTA C. BIGGS on 02/26/2020, that the motion for approval and entry of the Tolling Stipulation is GRANTED. The Tolling Stipulation, entered on the docket as ECF No. <u>42</u> -1, shall be deemed filed as of the date of this order. (Garland, Leah) (Entered: 02/26/2020)
02/28/2020	<u>44</u>	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. AMY E. RICHARDSON is substituted as counsel for Plaintiffs. Attorney MEREDITH T. BROWN terminated. (RICHARDSON, AMY) (Entered: 02/28/2020)
03/11/2020	<u>45</u>	MEMORANDUM OPINION AND ORDER signed by JUDGE LORETTA C. BIGGS on 03/10/2020, that University Defendants' Motion to Dismiss, (ECF No. <u>30</u>), and State Defendants' Motion to Dismiss, (ECF No. <u>32</u>), are each DENIED in their entirety. (Garland, Leah) (Entered: 03/11/2020)
03/19/2020	<u>46</u>	MOTION for Extension of Time to File Answer re <u>1</u> Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order on Motion for Extension of Time)(JORDAN, CATHERINE) (Entered: 03/19/2020)
03/20/2020		ORDER granting <u>46</u> Motion for Extension of Time to Answer for NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Answer due by 4/24/2020. Signed by John Brubaker, Clerk of Court, on 3/20/2020. (Brubaker, John) (Entered: 03/20/2020)

03/20/2020	<u>47</u>	Consent MOTION for Extension of Time to File Answer <i>until April 24, 2020</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(WILLIAMS, KEVIN) (Entered: 03/20/2020)
03/23/2020		Motion Referred: RE: <u>47</u> Consent MOTION for Extension of Time to File Answer <i>until April 24, 2020</i> , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 03/23/2020)
03/23/2020		TEXT ORDER granting <u>47</u> Motion for Extension of Time. Defendants DALE FOLWELL, DEE JONES, and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES shall answer or otherwise respond by 04/24/2020. Issued by MAG/JUDGE L. PATRICK AULD on 03/23/2020. (AULD, L.) (Entered: 03/23/2020)
04/08/2020	<u>48</u>	NOTICE of Appearance by attorney DAVID BROWN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (BROWN, DAVID) (Entered: 04/08/2020)
04/08/2020	<u>49</u>	NOTICE of Appearance by attorney ALEJANDRA L. CARABALLO on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (CARABALLO, ALEJANDRA) (Entered: 04/08/2020)
04/08/2020	<u>50</u>	NOTICE OF INTERLOCUTORY APPEAL as to <u>45</u> Memorandum Opinion and Order, by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Filing fee \$ 505, receipt number 0418-2785530. (JONES, MARK) (Entered: 04/08/2020)
04/09/2020	<u>51</u>	Electronic Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: <u>50</u> Notice of Interlocutory Appeal. (Garland, Leah) (Entered: 04/09/2020)
04/09/2020	<u>52</u>	NOTICE of Docketing Record on Appeal from USCA re <u>50</u> Notice of Interlocutory Appeal filed by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. USCA Case Manager is Cathy Poulsen. USCA Case Number 20-1409. (Garland, Leah) (Entered: 04/09/2020)
04/22/2020	<u>53</u>	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. NORA F. SULLIVAN is substituted as counsel for Defendants. Attorney CATHERINE F. JORDAN terminated. (SULLIVAN, NORA) (Entered: 04/22/2020)
04/22/2020	<u>54</u>	Consent MOTION for Extension of Time to File Answer re <u>1</u> Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order Consent Motion for Second Extension of Time to Answer)(SULLIVAN, NORA) (Entered: 04/22/2020)
04/22/2020		Motion Referred: RE: <u>54</u> Consent MOTION for Extension of Time to File Answer re <u>1</u> Complaint , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 04/22/2020)
04/23/2020		TEXT ORDER granting <u>54</u> Consent Motion for Second Extension of Time. Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO shall answer or otherwise respond by 05/26/2020. Issued by MAG/JUDGE L. PATRICK AULD on 04/23/2020. (AULD, L.) (Entered: 04/23/2020)
04/24/2020	<u>55</u>	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. JAMES BENJAMIN GARNER is substituted as counsel for Defendants. Attorney SAM M. HAYES terminated. (GARNER, JAMES) (Entered: 04/24/2020)

04/24/2020	<u>56</u>	ANSWER to <u>1</u> Complaint with Jury Demand by DALE FOLWELL, DEE JONES. (JONES, MARK) (Entered: 04/24/2020)
05/20/2020	<u>57</u>	NOTICE of Appearance by attorney ZACHARY A. PADGET on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO (PADGET, ZACHARY) (Entered: 05/20/2020)
05/20/2020	<u>58</u>	Consent MOTION for Extension of Time to File Answer re <u>1</u> Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order Consent Motion for Third Extension of Time to Answer)(SULLIVAN, NORA) (Entered: 05/20/2020)
05/21/2020		TEXT ORDER granting <u>58</u> Consent Motion for Third Extension of Time. Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO shall answer or otherwise respond by 06/09/2020. Issued by MAG/JUDGE L. PATRICK AULD on 05/21/2020. (AULD, L.) (Entered: 05/21/2020)
06/09/2020	<u>59</u>	ANSWER to <u>1</u> Complaint with Jury Demand by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (SULLIVAN, NORA) (Entered: 06/09/2020)
06/10/2020	<u>60</u>	NOTICE of Initial Pretrial Conference Hearing: Initial Pretrial Conference Hearing set for 8/3/2020 09:30 AM in Greensboro Courtroom #1A before MAG/JUDGE L. PATRICK AULD. (Garrett, Kim) (Entered: 06/10/2020)
07/29/2020	<u>61</u>	Rule 26(f) Report (Joint) filed by all parties by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK.(RICHARDSON, AMY) (Entered: 07/29/2020)
07/30/2020		Motions Referred: RE: <u>61</u> Rule 26(f) Report (Joint) filed by all parties, to MAG/JUDGE L. PATRICK AULD (Garrett, Kim) (Entered: 07/30/2020)
08/03/2020	<u>62</u>	MOTION to Amend <u>1</u> Complaint by MAXWELL KADEL. Response to Motion due by 8/24/2020 (Attachments: # <u>1</u> Exhibit A – Amended Complaint, # <u>2</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 08/03/2020)
08/13/2020		TEXT ORDER adopting <u>61</u> Joint Report pursuant to Federal Rule of Civil Procedure 26(f). Issued by MAG/JUDGE L. PATRICK AULD on 08/13/2020. (AULD, L.) (Entered: 08/13/2020)
08/14/2020		Set Scheduling Order Deadlines: Discovery shall be established as Exceptional. Mediation should be conducted midway in the discovery period, the exact date to be set by the mediator after consultation with the parties. The parties agree that the mediator shall be Jon Harkavy. The parties do not consent to trial before a Magistrate Judge. Trial is expected to take approximately five (5) days. Plaintiff's have demanded a jury trial. Plaintiff's Amended Pleadings due by 10/1/2020. Defendant's Amended Pleadings due by 12/1/2020. Discovery due by 5/31/2021. Joinder of Parties for Plaintiff due by 10/1/2020. Joinder of Parties for Defendant due by 12/1/2020. (Garland, Leah) (Entered: 08/14/2020)
08/17/2020		MEDIATION SCHEDULING ORDER; Mediation due by 1/15/2021.(Kemp, Donita) (Entered: 08/17/2020)
08/17/2020	<u>63</u>	ORDER Appointing JONATHAN R. HARKAVY, as the Mediator pursuant to LR 83.9d(a). Signed by John S. Brubaker, Clerk of Court. (Kemp, Donita) Modified on 10/23/2020 – RESCINDED pursuant to <u>66</u> order. (Gammon, Cheryl). (Entered: 08/17/2020)
08/24/2020	<u>64</u>	RESPONSE in Opposition re <u>62</u> MOTION to Amend <u>1</u> Complaint filed by MAXWELL KADEL filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Replies due by 9/8/2020 (WILLIAMS, KEVIN) (Entered: 08/24/2020)

09/08/2020	<u>65</u>	REPLY, filed by Plaintiff MAXWELL KADEL, to Response to <u>62</u> MOTION to Amend <u>1</u> Complaint filed by MAXWELL KADEL. (Attachments: # <u>1</u> Appendix A)(RICHARDSON, AMY) (Entered: 09/08/2020)
09/09/2020		Motion Referred: RE: <u>62</u> MOTION to Amend <u>1</u> Complaint , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 09/09/2020)
10/23/2020	<u>66</u>	ORDER appointing Kenneth P. Carlson, Jr. as the mediator. The order of 8/17/2020 appointing Jonathan Harkavy is hereby rescinded. (Gammon, Cheryl) (Entered: 10/23/2020)
12/08/2020	<u>67</u>	MOTION to Withdraw as Attorney NORA F. SULLIVAN by on behalf of NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Responses due by 12/29/2020 (Attachments: # <u>1</u> Text of Proposed Order)(SULLIVAN, NORA) (Entered: 12/08/2020)
12/08/2020		Motion Referred: RE: <u>67</u> MOTION to Withdraw as Attorney NORA F. SULLIVAN , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 12/08/2020)
12/08/2020		TEXT ORDER granting <u>67</u> Motion to Withdraw as Counsel. Attorney NORA F. SULLIVAN is terminated as counsel for Defendants University of North Carolina at Chapel Hill, North Carolina State University, and University of North Carolina at Greensboro. Issued by MAG/JUDGE L. PATRICK AULD on 12/08/2020. (AULD, L.) (Entered: 12/08/2020)
12/09/2020	<u>68</u>	NOTICE of Attorney Appearance by attorney LAUREN E. SNYDER on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (SNYDER, LAUREN) (Entered: 12/09/2020)
01/19/2021	<u>69</u>	Joint MOTION for Protective Order by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/2/2021 (Attachments: # <u>1</u> Exhibit Protective Order, # <u>2</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 01/19/2021)
01/19/2021		Motion Referred: RE: <u>69</u> Joint MOTION for Protective Order , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 01/19/2021)
01/19/2021	<u>70</u>	STIPULATED PROTECTIVE ORDER signed by MAG/JUDGE L. PATRICK AULD on 01/19/2021, as set out herein. (Garland, Leah) (Entered: 01/19/2021)
01/20/2021		TEXT ORDER clarifying <u>70</u> Stipulated Protective Order, in that, notwithstanding the language in Paragraph 17, <u>70</u> Stipulated Protective Order does not obligate any judge conducting an open-court proceeding to accept evidence via in camera submission simply because a party has designated such evidence as confidential under <u>70</u> Stipulated Protective Order. Issued by MAG/JUDGE L. PATRICK AULD on 01/20/2021. (AULD, L.) (Entered: 01/20/2021)
01/22/2021	<u>71</u>	USCA ORDER: The court grants the motion to relieve Samuel Robert Bagenstos as counsel from further representation on appeal. (USCA Case number: 20-1409) (Garland, Leah) (Entered: 01/22/2021)
01/27/2021	<u>72</u>	INTERIM REPORT OF MEDIATOR from Kenneth B. Carlson, Jr. – Mediation held on 12/11/2020 and is being continued pending scheduling of a continued mediated settlement conference which is expected to occur by the end of February 2021. (Recess – Mediation to be resumed at a later date)(Bond, Melisa) (Entered: 01/27/2021)
02/17/2021	<u>73</u>	MOTION for Extension of Time to Complete Discovery <i>Unopposed</i> by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 02/17/2021)
02/18/2021		Motion Referred: RE: <u>73</u> MOTION for Extension of Time to Complete Discovery <i>Unopposed</i> , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 02/18/2021)

02/25/2021		TEXT ORDER denying <u>73</u> Unopposed Motion to Extend Discovery Deadlines. Via Text Order dated 08/13/2020, the Court adopted the parties' <u>61</u> Joint Report, thereby establishing the scheduling order for this case, including a deadline of 03/01/2021 for Plaintiffs to serve their expert reports and 05/31/2021 for the conclusion of all discovery. In <u>73</u> Unopposed Motion (filed on 02/17/2021), Plaintiffs now ask the Court to extend all unexpired scheduling order deadlines by 90+ days. As support for that request, <u>73</u> Unopposed Motion asserts that Plaintiffs have diligently pursued discovery, but nonetheless cannot meet the existing deadlines. In particular, <u>73</u> Unopposed Motion states that (A) Plaintiffs "issued discovery requests, including document requests, to [] Defendants," (B) some Defendants have produced a large volume of documents, but "additional material remains to be provided," and (C) "due to delays related to the creation of a protective order, [other] Defendants have not yet provided responsive documents to Plaintiffs." That showing does not establish "good cause" within the meaning of Federal Rule of Civil Procedure 16(b)(4), because it does not reveal (A) when Plaintiffs served document requests, (B) what additional documents remain unproduced from Defendants who have produced a large volume of documents (and/or why), and (C) why the parties delayed in preparing a proposed protective order. Further, the statement, in <u>73</u> Unopposed Motion, that, "[g]iven the current status of production, Plaintiffs may be required to designate experts or secure information for additional issues," constitutes too speculative a basis for sweeping extensions of all pending scheduling order deadlines. Finally, <u>73</u> Unopposed Motion cites the pendency of <u>62</u> Motion for Leave to File an Amended Complaint and declares that its resolution "will affect the content of at least one expert's report," as well as Plaintiffs' production of documents from a proposed new plaintiff (which supposedly cannot occur yet because said proposed plaintiff "is not a party to the protective order"). As to the latter matter, the Court does not see how the parties' failure to address production of documents from non-parties either in their proposed protective order or otherwise creates good cause for an extension of scheduling order deadlines. Likewise, the Court does not view the prospect of one expert having to alter a report in an unexplained fashion depending on an unresolved motion to amend a pleading as an adequate ground for across-the-board alteration of scheduling order deadlines. Issued by MAG/JUDGE L. PATRICK AULD on 02/25/2021. (AULD, L.) (Entered: 02/25/2021)
03/05/2021	<u>74</u>	MEMORANDUM OPINION AND ORDER signed by MAG/JUDGE L. PATRICK AULD on 03/05/2021, that the Motion to Amend (Docket Entry <u>62</u>) is GRANTED. FURTHER ORDERED that Plaintiffs shall file their amended complaint in the form of Exhibit A (Docket Entry <u>62</u> -1) by March 12, 2021. (Garland, Leah) (Entered: 03/05/2021)
03/09/2021	<u>75</u>	First AMENDED COMPLAINT against All Defendants, filed by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR., and DANA CARAWAY. (RICHARDSON, AMY) Modified on 3/10/2021 to correct docket text. (Garland, Leah) (Entered: 03/09/2021)
03/09/2021	<u>76</u>	Summons Issued as to STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (Sheets, Jamie) (Entered: 03/09/2021)
03/09/2021	<u>77</u>	NOTICE of Attorney Appearance by attorney CARL S. CHARLES on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (CHARLES, CARL) (Entered: 03/09/2021)
03/16/2021	<u>78</u>	AFFIDAVIT OF SERVICE by Summons as to STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY served on 3/11/2021, answer due 4/1/2021. (RICHARDSON, AMY) (Entered: 03/16/2021)
03/17/2021	<u>79</u>	MOTION for Extension of Time to File Answer re <u>75</u> Amended Complaint, by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order)(PADGET, ZACHARY) (Entered: 03/17/2021)
03/17/2021		ORDER granting <u>79</u> Motion for Extension of Time to Answer filed by NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO.

		Answer due by 4/6/2021. Signed by John Brubaker, Clerk of Court, on 3/17/2021. (Brubaker, John) (Entered: 03/17/2021)
03/18/2021	<u>80</u>	NOTICE of Attorney Appearance by attorney ALAN D. MCINNES on behalf of Defendant STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY (MCINNES, ALAN) (Entered: 03/18/2021)
03/23/2021	<u>81</u>	NOTICE of Special Appearance by attorney TARA L. BORELLI on behalf of Plaintiff DANA CARAWAY (Filing fee \$ 25 receipt number 0418-3013785.) (BORELLI, TARA) (Entered: 03/23/2021)
03/23/2021	<u>82</u>	NOTICE of Attorney Appearance by attorney AMY E. RICHARDSON on behalf of Plaintiff DANA CARAWAY (RICHARDSON, AMY) (Entered: 03/23/2021)
03/23/2021	<u>83</u>	NOTICE of Special Appearance by attorney CARL S. CHARLES on behalf of Plaintiff DANA CARAWAY (Filing fee \$ 25 receipt number 0418-3013834.) (CHARLES, CARL) (Entered: 03/23/2021)
03/23/2021	<u>84</u>	NOTICE of Special Appearance by attorney DEEPIKA H. RAVI on behalf of Plaintiff DANA CARAWAY (Filing fee \$ 25 receipt number 0418-3013915.) (RAVI, DEEPIKA) (Entered: 03/23/2021)
03/23/2021	<u>85</u>	ANSWER to Amended Complaint by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 03/23/2021)
03/23/2021	<u>86</u>	NOTICE of Attorney Appearance by attorney DAVID BROWN on behalf of Plaintiff DANA CARAWAY (BROWN, DAVID) (Entered: 03/23/2021)
03/24/2021	<u>87</u>	MOTION for Extension of Time to Complete Discovery by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # <u>1</u> Text of Proposed Order)(PADGET, ZACHARY) (Entered: 03/24/2021)
03/24/2021	<u>88</u>	NOTICE of Special Appearance by attorney OMAR F. GONZALEZ-PAGAN on behalf of Plaintiff DANA CARAWAY (Filing fee \$ 25 receipt number 0418-3014409.) (GONZALEZ-PAGAN, OMAR) (Entered: 03/24/2021)
03/24/2021	<u>89</u>	NOTICE of Attorney Appearance by attorney LAUREN E. SNYDER on behalf of Plaintiff DANA CARAWAY (SNYDER, LAUREN) (Entered: 03/24/2021)
03/25/2021		Motion Referred: RE: <u>87</u> MOTION for Extension of Time to Complete Discovery , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 03/25/2021)
03/25/2021	<u>90</u>	ORDER signed by MAG/JUDGE L. PATRICK AULD on 03/25/2021, that the motion is GRANTED. FURTHER ORDERED that the deadlines for discovery in this case shall be amended as follows: 1. Defendants' affirmative and rebuttal expert reports due by May 1, 2021; 2. Plaintiff's rebuttal experts due by June 1, 2021; 3. Expert depositions between May 1, 2021, and June 30, 2021; 4. All discovery to be completed by June 30, 2021. (Garland, Leah) (Entered: 03/25/2021)
04/01/2021	<u>91</u>	MOTION for Extension of Time to File Answer re <u>75</u> Amended Complaint, by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (Attachments: # <u>1</u> Text of Proposed Order)(MCINNES, ALAN) (Entered: 04/01/2021)
04/01/2021	<u>92</u>	USCA ORDER. The court grants the motion to withdraw from further representation on appeal. USCA Case Number 20-1409. (Sheets, Jamie) (Entered: 04/01/2021)
04/01/2021		ORDER granting <u>91</u> Motion for Extension of Time to Answer for STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. Answer due by 4/16/2021. Signed by John Brubaker, Clerk of Court, on 4/1/2021. (Brubaker, John) (Entered: 04/01/2021)
04/06/2021	<u>93</u>	ANSWER to Amended Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (PADGET, ZACHARY) (Entered: 04/06/2021)

04/13/2021	<u>94</u>	NOTICE of Special Appearance by attorney MICHAEL W. WEAVER on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3028100.) (WEAVER, MICHAEL) (Entered: 04/13/2021)
04/14/2021	<u>95</u>	STIPULATION re <u>70</u> Protective Order by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 04/14/2021)
04/15/2021		TEXT ORDER adopting <u>95</u> Stipulation, amending <u>70</u> Stipulated Protective Order to include Plaintiff Dana Caraway and Defendant North Carolina Department of Public Safety as parties to <u>70</u> Stipulated Protective Order. Issued by MAG/JUDGE L. PATRICK AULD on 04/15/2021. (AULD, L.) (Entered: 04/15/2021)
04/16/2021	<u>96</u>	ANSWER to Amended Complaint by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (MCINNES, ALAN) (Entered: 04/16/2021)
05/07/2021	<u>97</u>	MOTION for Extension of Time to Complete Discovery (<i>Unopposed</i>) by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (MCINNES, ALAN) (Entered: 05/07/2021)
05/11/2021		Motion Referred: RE: <u>97</u> MOTION for Extension of Time to Complete Discovery (<i>Unopposed</i>), to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 05/11/2021)
05/11/2021	<u>98</u>	ORDER signed by MAG/JUDGE L. PATRICK AULD on 05/11/2021, that the Motion is GRANTED. It is FURTHER ORDERED that the deadlines in this case shall be amended as follows: a. June 1, 2021: Plaintiffs' current June 1 deadline to serve supplemental expert reports, per Docket Entry No. <u>90</u> , remains the same; b. June 15, 2021: Deadline for NCDPS to file leave to amend its pleadings; c. July 1, 2021: NCDPS's affirmative and rebuttal expert reports; d. July 31, 2021: Plaintiffs rebuttal expert reports; e. July 1, 2021, through September 30, 2021: Expert depositions. f. September 30, 2021: Close of discovery. (Garland, Leah) (Entered: 05/11/2021)
05/11/2021	<u>99</u>	Rule 26(f) Report (Joint) filed by all parties by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK.(RICHARDSON, AMY) (Entered: 05/11/2021)
05/11/2021	<u>100</u>	MOTION for Extension of Time for <i>Expert Rebuttal</i> (<i>Unopposed</i>) by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 05/11/2021)
05/12/2021		Motion Referred: RE: <u>100</u> MOTION for Extension of Time for <i>Expert Rebuttal</i> (<i>Unopposed</i>), to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 05/12/2021)
05/12/2021		TEXT ORDER adopting <u>99</u> Joint Report with the following clarification: the Clerk shall set the trial date based on the standard considerations (which do not guarantee the parties a ruling on dispositive motions any particular time in advance of the trial date). Issued by MAG/JUDGE L. PATRICK AULD on 05/12/2021. (AULD, L.) (Entered: 05/12/2021)
05/12/2021	<u>101</u>	ORDER signed by MAG/JUDGE L. PATRICK AULD on 05/12/2021, that the motion is GRANTED. It is FURTHER ORDERED that the deadlines for discovery in this case shall be amended as follows: 1. The deadline for production of Plaintiffs' expert rebuttal reports by Dr. George Brown and Dr. Randi C. Ettner is extended by 10 days to June 11, 2021. (Garland, Leah) (Entered: 05/12/2021)
05/28/2021	<u>102</u>	REPORT OF MEDIATOR from Kenneth P. Carlson, Jr. – Mediation Held on 12/11/2020 and continued through 05/24/2021. (IMPASSE) (Bond, Melisa) (Entered: 05/28/2021)
07/01/2021	<u>103</u>	MOTION for Extension of Time to <i>Submit Expert Disclosures</i> by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (Attachments: # <u>1</u> Text of

		Proposed Order)(MCINNES, ALAN) (Entered: 07/01/2021)
07/02/2021		Motion Referred: RE: <u>103</u> MOTION for Extension of Time to <i>Submit Expert Disclosures</i> , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 07/02/2021)
07/02/2021		TEXT ORDER granting <u>103</u> Motion to Extend Expert Disclosure Deadline. Defendant North Carolina Department of Public Safety shall serve its expert disclosures under Federal Rule of Civil Procedure 26(a)(2)(B) and (C) by 07/12/2021. Issued by MAG/JUDGE L. PATRICK AULD on 07/02/2021. (AULD, L.) (Entered: 07/02/2021)
07/08/2021	<u>104</u>	JOINT MOTION <i>for Entry of Stipulation</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Exhibit A: Joint Stipulation, # <u>2</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 07/08/2021)
07/09/2021		Motion Referred: RE: <u>104</u> JOINT MOTION <i>for Entry of Stipulation</i> , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 07/09/2021)
07/12/2021	<u>105</u>	ORDER signed by MAG/JUDGE L. PATRICK AULD on 07/12/2021, that the motion for approval and entry of the Stipulation is GRANTED. The Stipulation, entered on the docket as ECF No. <u>104</u> -1, shall be deemed filed as of the date of this Order. (Garland, Leah) (Entered: 07/12/2021)
08/11/2021	<u>106</u>	NOTICE of Special Appearance by attorney EVAN R. MAROLF on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3110461.) (MAROLF, EVAN) (Entered: 08/11/2021)
08/13/2021	<u>107</u>	MOTION to Withdraw as Attorney AMY E. RICHARDSON by on behalf of MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Responses due by 9/3/2021 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 08/13/2021)
08/16/2021		Motion Referred: RE: <u>107</u> MOTION to Withdraw as Attorney AMY E. RICHARDSON , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 08/16/2021)
08/17/2021		TEXT ORDER granting <u>107</u> Motion to Withdraw as Counsel. Attorney ALEJANDRA L. CARABALLO is terminated as counsel of record for Plaintiffs. Issued by MAG/JUDGE L. PATRICK AULD on 08/17/2021. (AULD, L.) (Entered: 08/17/2021)
08/17/2021	<u>108</u>	NOTICE of Special Appearance by attorney GRACE H. WYNN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3114217.) (WYNN, GRACE) (Entered: 08/17/2021)
08/20/2021	<u>109</u>	NOTICE of Special Appearance by attorney ADAM M. SAFER on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3117066.) (SAFER, ADAM) (Entered: 08/20/2021)
08/23/2021	<u>110</u>	Joint MOTION to Dismiss <i>Claims Against University Defendants</i> by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 9/13/2021 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 08/23/2021)
08/23/2021	<u>111</u>	NOTICE of Special Appearance by attorney DMITRIY G. TISHYEVICH on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR

		THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3117927.) (TISHYEVICH, DMITRIY) (Entered: 08/23/2021)
08/23/2021		Motion Submitted: <u>110</u> Joint MOTION to Dismiss <i>Claims Against University Defendants</i> to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 08/23/2021)
08/24/2021	<u>112</u>	ORDER signed by JUDGE LORETTA C. BIGGS on 8/24/21, that the motion is GRANTED. Plaintiffs' claims against the University Defendants under Title IX and Title VII are DISMISSED WITH PREJUDICE. Each party will bear its own attorneys fees and costs, with the exception of the attorney's fees and costs paid as part of the parties' settlement. (Butler, Carol) (Entered: 08/24/2021)
09/01/2021	<u>113</u>	USCA OPINION as set out herein. 20-1409 (Butler, Carol) (Entered: 09/07/2021)
09/01/2021	<u>114</u>	USCA JUDGMENT as to <u>50</u> Notice of Interlocutory Appeal filed by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, that in accordance with the decision of this court, the judgment of the district court is affirmed. This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41. No. 20-1409. (Attachments: # <u>1</u> USCA Notice)(Butler, Carol) (Entered: 09/07/2021)
09/08/2021	<u>115</u>	NOTICE of Hearing: Master Trial Calendar: JULY Jury Trial set for 7/5/2022 at 09:30 AM in Unassigned Courtroom. Trial briefs, etc. deadline set for 6/13/2022.(Blay, Debbie) (Entered: 09/08/2021)
09/08/2021	<u>116</u>	NOTICE of Special Appearance by attorney LAUREN H. EVANS on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3128675.) (EVANS, LAUREN) (Entered: 09/08/2021)
09/13/2021	<u>117</u>	NOTICE of Special Appearance by attorney WARREN HASKEL on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3131373.) (HASKEL, WARREN) (Entered: 09/13/2021)
09/23/2021	<u>118</u>	MANDATE of USCA as to <u>50</u> Notice of Interlocutory Appeal filed by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, that the judgment of this court, entered September 1, 2021, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41 (a) of the Federal Rules of Appellate Procedure. No. 20-1409 (Butler, Carol) (Entered: 09/23/2021)
09/27/2021	<u>119</u>	MOTION to Withdraw as Attorney DAVID BROWN by on behalf of MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Responses due by 10/18/2021 (Attachments: # <u>1</u> Text of Proposed Order)(BROWN, DAVID) (Entered: 09/27/2021)
09/27/2021	<u>120</u>	Consent MOTION for Extension of Time to Complete Discovery (<i>Taking of Two Expert-Witness Depositions</i>) by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(JONES, MARK) (Entered: 09/27/2021)
09/28/2021		Motions Referred: RE: <u>120</u> Consent MOTION for Extension of Time to Complete Discovery (<i>Taking of Two Expert-Witness Depositions</i>), <u>119</u> MOTION to Withdraw as Attorney DAVID BROWN , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 09/28/2021)
09/28/2021		TEXT ORDER granting <u>119</u> Motion to Withdraw as Counsel. Attorney NOAH E. LEWIS is terminated as counsel of record for Plaintiffs. Issued by MAG/JUDGE L. PATRICK AULD on 09/28/2021. (AULD, L.) (Entered: 09/28/2021)
09/28/2021		TEXT ORDER granting <u>120</u> Consent Motion to Extend Two Pretrial Scheduling Order Deadlines. The parties may take the deposition of Dr. Randi Ettner on or before 10/22/2021, and the parties may complete the deposition of Dr. Paul McHugh on or

		before 10/15/2021. These allowances do not constitute a general extension of the discovery deadline and do not alter any other deadlines in the case. The Court wishes Drs. Ettner and McHugh the best for their recoveries. Issued by MAG/JUDGE L. PATRICK AULD on 09/28/2021. (AULD, L.) (Entered: 09/28/2021)
10/06/2021	<u>121</u>	Joint MOTION for Extension of Time To File Motion for DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES Dispositive Motions (<i>with the Consent of all Parties</i>) until December 15, 2021 by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(JONES, MARK) (Entered: 10/06/2021)
10/06/2021		Motions Referred: RE: <u>121</u> Joint MOTION for Extension of Time To File Motion for DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES Dispositive Motions (<i>with the Consent of all Parties</i>) until December 15, 2021, to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 10/06/2021)
10/06/2021		TEXT ORDER granting in part <u>121</u> Joint-Consent Motion to Extend Deadlines, in that that parties shall file any dispositive motions by 11/30/2021, the parties shall file any responses to any such timely filed dispositive motions by 12/30/2021, and the parties shall file any replies to any such timely filed responses by 01/13/2021. The parties should not anticipate any further extensions of these deadlines. Issued by MAG/JUDGE L. PATRICK AULD on 10/06/2021. (AULD, L.) (Entered: 10/06/2021)
10/08/2021		Reset Scheduling Order Deadlines: Dispositive Motions due by 11/30/2021. (Sheets, Jamie) (Entered: 10/08/2021)
10/08/2021	<u>122</u>	Consent MOTION for Extension of Time to <i>Complete Deposition of Dr. McHugh</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(JONES, MARK) (Entered: 10/08/2021)
10/08/2021		Motion Referred: RE: <u>122</u> Consent MOTION for Extension of Time to <i>Complete Deposition of Dr. McHugh</i> , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 10/08/2021)
10/08/2021		TEXT ORDER granting <u>122</u> Consent Motion to Extend Pretrial Scheduling Order Deadlines. The parties may complete the deposition of Dr. Paul McHugh on or before 11/01/2021. This allowance does not constitute a general extension of the discovery deadline and does not alter any other deadlines in the case. Issued by MAG/JUDGE L. PATRICK AULD on 10/08/2021. (AULD, L.) (Entered: 10/08/2021)
10/12/2021	<u>123</u>	NOTICE of Intent to File Dispositive Motions by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (RICHARDSON, AMY) (Entered: 10/12/2021)
10/13/2021	<u>124</u>	NOTICE of Intent to File Dispositive Motions by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (WILLIAMS, KEVIN) (Entered: 10/13/2021)
10/13/2021	<u>125</u>	NOTICE of Intent to File Dispositive Motions by Defendant STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY (MCINNES, ALAN) (Entered: 10/13/2021)
11/05/2021	<u>126</u>	MOTION for Leave to File Excess Pages by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Responses due by 11/19/2021 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 11/05/2021)
11/05/2021		Motion Submitted: <u>126</u> MOTION for Leave to File Excess Pages to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 11/05/2021)
11/08/2021	<u>127</u>	Supreme Court of the United States Notice that the petition for a writ of certiorari in the above entitled case was filed on November 2, 2021 and placed on the docket November 5, 2021 as No. 21-674. (USCA Case Number 20-1409) (Butler, Carol)

		Modified on 11/9/2021 to add 4th circuit appeal number. (Sheets, Jamie) (Entered: 11/08/2021)
11/10/2021	<u>128</u>	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Defendant STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. JAMES B. TRACHTMAN is substituted as counsel for Defendant. Attorney ALAN D. MCINNES terminated. (TRACHTMAN, JAMES) (Entered: 11/10/2021)
11/12/2021	<u>129</u>	ORDER re <u>126</u> Motion for Leave to File Excess Pages, signed by JUDGE LORETTA C. BIGGS on 11/10/21, that the motion is DENIED.(Butler, Carol) (Entered: 11/12/2021)
11/24/2021	<u>130</u>	MOTION to Withdraw as Attorney EVAN R. MAROLF by on behalf of MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Responses due by 12/8/2021 (Attachments: # <u>1</u> Text of Proposed Order)(MAROLF, EVAN) (Entered: 11/24/2021)
11/29/2021		Motion Referred: RE: <u>130</u> MOTION to Withdraw as Attorney EVAN R. MAROLF , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 11/29/2021)
11/29/2021		TEXT ORDER granting <u>130</u> Motion to Withdraw as Counsel. Attorney EVAN R. MAROLF is terminated as counsel of record for Plaintiffs. Issued by MAG/JUDGE L. PATRICK AULD on 11/29/2021. (AULD, L.) (Entered: 11/29/2021)
11/30/2021	<u>131</u>	MOTION for Leave to File by AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN PSYCHIATRIC ASSOCIATION, ENDOCRINE SOCIETY, NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, SOCIETY OF OB/GYN HOSPITALISTS. Response to Motion due by 12/21/2021 (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Proposed Amicus Brief)(SAINT, SARAH) (Entered: 11/30/2021)
11/30/2021	<u>132</u>	MOTION for Summary Judgment by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. Response to Motion due by 12/30/2021 (TRACHTMAN, JAMES) (Entered: 11/30/2021)
11/30/2021	<u>133</u>	MEMORANDUM filed by Defendant STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY re <u>132</u> MOTION for Summary Judgment filed by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (TRACHTMAN, JAMES) (Entered: 11/30/2021)
11/30/2021	<u>134</u>	APPENDIX re <u>133</u> Memorandum <i>in Support of Motion for Summary Judgment</i> by Defendant STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (Attachments: # <u>1</u> Exhibit 1--Plaintiff's Objections and Responses to DPS's First Set of Interrogatories, Request for Admissions and Request for Production, # <u>2</u> Exhibit 2--Deposition of Dee Jones, # <u>3</u> Exhibit 3--Plaintiffs' First Set of Requests for Production to DPS, # <u>4</u> Exhibit 4--Declaration of George Wayne Goodwin, # <u>5</u> Exhibit 4A--Expert Report of George Wayne Goodwin, # <u>6</u> Exhibit 5--Expert Report of Jamison Green, Ph.D., # <u>7</u> Exhibit 6--DPS's Responses to Plaintiffs' First Set of Interrogatories, # <u>8</u> Exhibit 7--Copy of Boyden v. Conlin (unpublished))(TRACHTMAN, JAMES) (Entered: 11/30/2021)
11/30/2021	<u>135</u>	NOTICE of Attorney Appearance by attorney SHANA L. FULTON on behalf of Amicus Parties AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, ENDOCRINE SOCIETY, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, SOCIETY OF OB/GYN HOSPITALISTS (FULTON, SHANA) (Entered: 11/30/2021)
11/30/2021	<u>136</u>	MOTION for Partial Summary Judgment by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 12/30/2021 (JONES, MARK) (Entered: 11/30/2021)

11/30/2021	<u>137</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>136</u> MOTION for Partial Summary Judgment filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Exhibit Folwell Deposition, # <u>2</u> Exhibit Jones Deposition, # <u>3</u> Exhibit Plan Defendant Documents, # <u>4</u> Exhibit Declaration of Blue Cross/Blue Shield of North Carolina, # <u>5</u> Exhibit Wilkins Prior Authorization Article, # <u>6</u> Exhibit Karasic Deposition, # <u>7</u> Exhibit Ettner Deposition, # <u>8</u> Exhibit Levine Deposition, # <u>9</u> Exhibit Brown Deposition, # <u>10</u> Exhibit CVS.Neuberger.Declaration, # <u>11</u> Exhibit CVS.Korn.Declarations, # <u>12</u> Exhibit Caraway Deposition and Deposition Exhibit, # <u>13</u> Exhibit DPS Deposition)(JONES, MARK) (Entered: 11/30/2021)
11/30/2021	<u>138</u>	**STRICKEN** MOTION for Summary Judgment by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, CONNOR THONEN-FLECK. Response to Motion due by 12/30/2021 (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>139</u>	**STRICKEN** MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, CONNOR THONEN-FLECK re <u>138</u> MOTION for Summary Judgment filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Kadel Decl., # <u>2</u> Affidavit Thonen-Fleck Decl., # <u>3</u> Affidavit Fleck Decl., # <u>4</u> Affidavit McKeown Decl., # <u>5</u> Affidavit C.B. Decl., # <u>6</u> Affidavit M. Bunting Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>140</u>	**STRICKEN** Additional Attachments to Main Document re <u>139</u> Memorandum,, . (Attachments: # <u>1</u> Affidavit S. Bunting Decl., # <u>2</u> Affidavit Caraway Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>141</u>	**STRICKEN** Additional Attachments to Main Document re <u>139</u> Memorandum,, <i>Richardson Declaration Part One</i> . (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>142</u>	**STRICKEN** Additional Attachments to Main Document re <u>139</u> Memorandum,, <i>Richardson Declaration Part Two</i> . (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>143</u>	**STRICKEN** Additional Attachments to Main Document re <u>139</u> Memorandum,, <i>Richardson Declaration Part Three</i> . (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>144</u>	**STRICKEN** Additional Attachments to Main Document re <u>139</u> Memorandum,, <i>Richardson Declaration Part Four</i> . (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>145</u>	MOTION to Seal Exhibits to Plaintiffs' Motion for Summary Judgment on Their Constitutional Claims [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, CONNOR THONEN-FLECK. Response to Motion due by 12/14/2021 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 11/30/2021)
11/30/2021	<u>146</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS Memorandum in Support of Plaintiffs' Motion for Summary Judgment on Their Constitutional Claims filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>145</u> Motion to Seal,,. (Attachments: # <u>1</u> Affidavit Kadel Decl., # <u>2</u> Affidavit Thonen-Fleck Decl., # <u>3</u> Affidavit Fleck Decl., # <u>4</u> Affidavit McKeown Decl., # <u>5</u> Affidavit C.B. Decl., # <u>6</u> Affidavit M. Bunting Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie)

		(Entered: 11/30/2021)
11/30/2021	<u>147</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Additional Declarations of Bunting and Caraway</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>145</u> Motion to Seal,, (Attachments: # <u>1</u> Affidavit S. Bunting Decl., # <u>2</u> Affidavit Caraway Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>148</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part One</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>145</u> Motion to Seal,, (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>149</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part Two</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>145</u> Motion to Seal. (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>150</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part Three</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>145</u> Motion to Seal. (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>151</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part Four</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>145</u> Motion to Seal. (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>152</u>	**STRICKEN** MOTION for Partial Summary Judgment <i>on Their Statutory Claims</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 12/30/2021 (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>153</u>	**STRICKEN** MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>152</u> MOTION for Partial Summary Judgment <i>on Their Statutory Claims</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Kadel Decl., # <u>2</u> Affidavit Thonen-Fleck Decl., # <u>3</u> Affidavit Fleck Decl., # <u>4</u> Affidavit McKeown Decl., # <u>5</u> Affidavit C.B. Decl., # <u>6</u> Affidavit M. Bunting Decl., # <u>7</u> Affidavit Silvaine Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>154</u>	**STRICKEN** Additional Attachments to Main Document re <u>153</u> Memorandum,, . (Attachments: # <u>1</u> Affidavit S. Bunting Decl., # <u>2</u> Affidavit Caraway Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>155</u>	**STRICKEN** Additional Attachments to Main Document re <u>153</u> Memorandum <i>Richardson Declaration Part One.</i> (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>156</u>	**STRICKEN** Additional Attachments to Main Document re <u>153</u> Memorandum,, <i>Richardson Declaration Part Two.</i> (RICHARDSON, AMY) Modified on 12/10/2021

		to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>157</u>	**STRICKEN** Additional Attachments to Main Document re <u>153</u> Memorandum,, <i>Richardson Declaration Part Three</i> . (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>158</u>	**STRICKEN** Additional Attachments to Main Document re <u>153</u> Memorandum,, <i>Richardson Declaration Part Four</i> . (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>159</u>	MOTION to Seal <i>Exhibits to Plaintiffs' Motion for Summary Judgment on Their Statutory Claims</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 12/14/2021 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 11/30/2021)
11/30/2021	<u>160</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment on Their Statutory Claims</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>159</u> Motion to Seal,, (Attachments: # <u>1</u> Affidavit Kadel Decl., # <u>2</u> Affidavit Thonen-Fleck Decl., # <u>3</u> Affidavit Fleck Decl., # <u>4</u> Affidavit McKeown Decl., # <u>5</u> Affidavit C.B. Decl., # <u>6</u> Affidavit M. Bunting Decl., # <u>7</u> Affidavit Silvaine Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>161</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Additional Declarations of Bunting and Caraway</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>159</u> Motion to Seal,, (Attachments: # <u>1</u> Affidavit S. Bunting Decl., # <u>2</u> Affidavit Caraway Decl.)(RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>162</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part One</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>159</u> Motion to Seal,, (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>163</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part Two</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>159</u> Motion to Seal,, (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>164</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part Three</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>159</u> Motion to Seal,, (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
11/30/2021	<u>165</u>	**STRICKEN** SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part Four</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>159</u> Motion to Seal,, (RICHARDSON, AMY) Modified on 12/10/2021 to mark stricken per <u>176</u> Order. (Sheets, Jamie) (Entered: 11/30/2021)
12/02/2021	<u>166</u>	USCA ORDER. The Court amends its opinion filed on September 1, 2021, as follows: On the last line of page 30, the first "to" is changed to "for." On the first line

		of page 37, the word "is" is deleted between "this" and "case." USCA Case Number 20-1409. (Sheets, Jamie) (Entered: 12/02/2021)
12/02/2021	<u>167</u>	USCA AMENDED OPINION affirming by published opinion. USCA Case Number 20-1409. (Sheets, Jamie) (Entered: 12/02/2021)
12/06/2021	<u>168</u>	MOTION to Strike <u>161</u> SEALED Unredacted Documents (LR 5.4), <u>157</u> Additional Attachments to Main Document, <u>160</u> SEALED Unredacted Documents (LR 5.4), <u>154</u> Additional Attachments to Main Document, <u>142</u> Additional Attachments to Main Document, <u>152</u> MOTION for Partial Summary Judgment <i>on Their Statutory Claims</i> , <u>153</u> Memorandum,, <u>138</u> MOTION for Summary Judgment , <u>146</u> SEALED Unredacted Documents (LR 5.4), <u>164</u> SEALED Unredacted Documents (LR 5.4), <u>151</u> SEALED Unredacted Documents (LR 5.4), <u>141</u> Additional Attachments to Main Document, <u>147</u> SEALED Unredacted Documents (LR 5.4), <u>144</u> Additional Attachments to Main Document, <u>165</u> SEALED Unredacted Documents (LR 5.4), <u>158</u> Additional Attachments to Main Document, <u>156</u> Additional Attachments to Main Document, <u>150</u> SEALED Unredacted Documents (LR 5.4), <u>148</u> SEALED Unredacted Documents (LR 5.4), <u>162</u> SEALED Unredacted Documents (LR 5.4), <u>140</u> Additional Attachments to Main Document, <u>143</u> Additional Attachments to Main Document, <u>139</u> Memorandum,, <u>149</u> SEALED Unredacted Documents (LR 5.4), <u>155</u> Additional Attachments to Main Document, <u>163</u> SEALED Unredacted Documents (LR 5.4), <i>for failure to Comply with Local Rules 7.3(d)(1) and 56.1(c)</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 12/27/2021 (Attachments: # <u>1</u> Text of Proposed Order)(WILLIAMS, KEVIN) (Entered: 12/06/2021)
12/06/2021	<u>169</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>168</u> MOTION to Strike <u>161</u> SEALED Unredacted Documents (LR 5.4), <u>157</u> Additional Attachments to Main Document, <u>160</u> SEALED Unredacted Documents (LR 5.4), <u>154</u> Additional Attachments to Main Document, <u>142</u> Additional Attachments to Main Document filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 12/06/2021)
12/06/2021	<u>170</u>	MOTION to Expedite <i>Consideration of Plan Defendants' Motion to Strike (Doc. No. 168)</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 12/06/2021)
12/07/2021	<u>171</u>	AMENDED MEMORANDUM re <u>168</u> MOTION to Strike <u>161</u> SEALED Unredacted Documents (LR 5.4), <u>157</u> Additional Attachments to Main Document, <u>160</u> SEALED Unredacted Documents (LR 5.4), <u>154</u> Additional Attachments to Main Document, <u>142</u> Additional Attachments to Main Document (<i>AMENDED MEMORANDUM</i>) by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (JONES, MARK) (Main Document 171 replaced on 12/7/2021 with correct pdf document) (Taylor, Abby). (Entered: 12/07/2021)
12/08/2021	<u>172</u>	RESPONSE in Opposition re <u>168</u> MOTION to Strike <u>161</u> SEALED Unredacted Documents (LR 5.4), <u>157</u> Additional Attachments to Main Document, <u>160</u> SEALED Unredacted Documents (LR 5.4), <u>154</u> Additional Attachments to Main Document, <u>142</u> Additional Attachments to Main Document filed by DALE FOLWELL, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, DEE JONES filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 12/22/2021 (RICHARDSON, AMY) (Entered: 12/08/2021)
12/08/2021	<u>173</u>	NOTICE by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>172</u> Response in Opposition to Motion,, <i>Certificate of Word Count</i> (RICHARDSON, AMY) (Entered: 12/08/2021)
12/08/2021	<u>174</u>	REPLY, filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, to Response to <u>168</u> MOTION to Strike <u>161</u> SEALED Unredacted Documents (LR 5.4),

		<u>157</u> Additional Attachments to Main Document, <u>160</u> SEALED Unredacted Documents (LR 5.4), <u>154</u> Additional Attachments to Main Document, <u>142</u> Additional Attachments to Main Document filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (JONES, MARK) (Entered: 12/08/2021)
12/09/2021		Motions Submitted: <u>168</u> MOTION to Strike, <u>170</u> MOTION to Expedite <i>Consideration of Plan Defendants' Motion to Strike</i> (Doc. No. 168), to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 12/09/2021)
12/10/2021	<u>175</u>	L.R. 5.5 Report-Joint filed by all parties by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK.(RICHARDSON, AMY) (Entered: 12/10/2021)
12/10/2021	<u>176</u>	ORDER signed by JUDGE LORETTA C. BIGGS on 12/10/2021; that the Plan Defendants Motion to Expedite consideration, ECF No. <u>170</u> , is GRANTED. FURTHER that Defendant's Motion to Strike, ECF No. <u>168</u> , is GRANTED and the following submissions of the Plaintiffs are HEREBY STRICKEN: ECF Nos. 138, 139, 140, 141, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 160, 161, 162, 163, 164, 165. FURTHER that Plaintiffs' Motions to Seal, ECF Nos. <u>145</u> and <u>159</u> , are HEREBY DENIED as moot. If refiled these motions shall be filed in conformity with this Court's Local Rules, specifically Local Rules 5.4 and 5.5. FURTHER that Plaintiffs shall be allowed to file a single dispositive motion, and an accompanying memorandum/brief with an enlarged word count not to exceed 9,000 words, within ten days of the entry of this Order. FURTHER that Plan Defendants shall likewise be allowed an enlarged word count not to exceed 9,000 words for its Response Brief. FURTHER that all other filings and deadlines shall be in compliance with all prior orders of this Court and its Local Rules. (Sheets, Jamie) (Entered: 12/10/2021)
12/15/2021	<u>177</u>	NOTICE of Special Appearance by attorney EZRA U. CUKOR on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (Filing fee \$ 25 receipt number 0418-3194413.) (CUKOR, EZRA) (Entered: 12/15/2021)
12/20/2021	<u>178</u>	MOTION for Summary Judgment by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 1/19/2022 (RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>179</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>178</u> MOTION for Summary Judgment filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Kadel Decl., # <u>2</u> Affidavit Thonen-Fleck Decl., # <u>3</u> Affidavit Fleck Decl., # <u>4</u> Affidavit McKeown Decl., # <u>5</u> Affidavit C.B. Decl., # <u>6</u> Affidavit M. Bunting Decl., # <u>7</u> Affidavit Silvaine Decl., # <u>8</u> Affidavit S. Bunting Decl., # <u>9</u> Affidavit Caraway Decl.)(RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>180</u>	Additional Attachments to Main Document re <u>179</u> Memorandum,, <i>Richardson Declaration Part One</i> . (RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>181</u>	Additional Attachments to Main Document re <u>179</u> Memorandum,, . (Attachments: # <u>1</u> Affidavit Richardson Declaration Part Two, # <u>2</u> Affidavit Richardson Declaration Part Three)(RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>182</u>	MOTION to Seal <i>Exhibits to Plaintiffs' Motion for Summary Judgment</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 1/3/2022 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 12/20/2021)

12/20/2021	<u>183</u>	SEALED UNREDACTED DOCUMENTS <i>Memorandum in Support of Plaintiffs' Motion for Summary Judgment</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>182</u> Motion to Seal,, (Attachments: # <u>1</u> Affidavit Kadel Decl., # <u>2</u> Affidavit Thonen-Fleck Decl., # <u>3</u> Affidavit Fleck Decl., # <u>4</u> Affidavit McKeown Decl., # <u>5</u> Affidavit C.B. Decl., # <u>6</u> Affidavit M. Bunting Decl., # <u>7</u> Affidavit Silvaine Decl., # <u>8</u> Affidavit S. Bunting Decl., # <u>9</u> Affidavit Caraway Decl.)(RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>184</u>	SEALED UNREDACTED DOCUMENTS <i>Richardson Declaration Part One</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>182</u> Motion to Seal,, (RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>185</u>	SEALED UNREDACTED DOCUMENTS filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>182</u> Motion to Seal,, (Attachments: # <u>1</u> Affidavit Richardson Declaration Part Two, # <u>2</u> Affidavit Richardson Declaration Part Three)(RICHARDSON, AMY) (Entered: 12/20/2021)
12/20/2021	<u>186</u>	RESPONSE in Opposition re <u>131</u> MOTION for Leave to File filed by NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, AMERICAN PSYCHIATRIC ASSOCIATION, SOCIETY OF OB/GYN HOSPITALISTS, ENDOCRINE SOCIETY, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF PEDIATRICS, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Replies due by 1/3/2022 (JONES, MARK) (Entered: 12/20/2021)
12/30/2021	<u>187</u>	RESPONSE in Opposition re <u>132</u> MOTION for Summary Judgment filed by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY filed by DANA CARAWAY. Replies due by 1/13/2022 (Attachments: # <u>1</u> Affidavit Supplemental Richardson Declaration)(RICHARDSON, AMY) (Entered: 12/30/2021)
12/30/2021	<u>188</u>	RESPONSE in Opposition re <u>136</u> MOTION for Partial Summary Judgment filed by DALE FOLWELL, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, DEE JONES filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 1/13/2022 (Attachments: # <u>1</u> Affidavit Supplemental Richardson Declaration)(RICHARDSON, AMY) (Entered: 12/30/2021)
01/03/2022	<u>189</u>	REPLY, filed by Amicus Parties AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, ENDOCRINE SOCIETY, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, SOCIETY OF OB/GYN HOSPITALISTS, to Response to <u>131</u> MOTION for Leave to File filed by AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, ENDOCRINE SOCIETY, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, SOCIETY OF OB/GYN HOSPITALISTS. (SAINT, SARAH) (Entered: 01/03/2022)
01/03/2022	<u>190</u>	RESPONSE to Plaintiffs' Motion to Seal filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>182</u> MOTION to Seal <i>Exhibits to Plaintiffs' Motion for Summary Judgment</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON

		FLECK, C.B., DANA CARAWAY, JULIA MCKEOWN, MAXWELL KADEL filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Exhibit A) (WILLIAMS, KEVIN) (Entered: 01/03/2022)
01/04/2022	<u>191</u>	NOTICE by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>190</u> Response to Motion, <i>Certificate of Word Count</i> (WILLIAMS, KEVIN) (Entered: 01/04/2022)
01/13/2022	<u>192</u>	Consent MOTION for Extension of Time to File Response/Reply as to <u>187</u> Response in Opposition to Motion, by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. (Attachments: # <u>1</u> Text of Proposed Order Granting Motion)(TRACHTMAN, JAMES) (Entered: 01/13/2022)
01/13/2022		Motion Referred: RE: <u>192</u> Consent MOTION for Extension of Time to File Response/Reply as to <u>187</u> Response in Opposition to Motion, , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 01/13/2022)
01/13/2022	<u>193</u>	REPLY, filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, to Response to <u>136</u> MOTION for Partial Summary Judgment filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (JONES, MARK) (Entered: 01/13/2022)
01/14/2022		TEXT ORDER granting <u>192</u> Consent Motion for Extension of Time. Defendant North Carolina Department of Public Safety shall file any reply to <u>187</u> Response by 01/19/2022. Issued by MAG/JUDGE L. PATRICK AULD on 01/14/2022. (AULD, L.) (Entered: 01/14/2022)
01/18/2022	<u>194</u>	REPLY, filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK, to Response to <u>182</u> MOTION to Seal <i>Exhibits to Plaintiffs' Motion for Summary Judgment</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that inc filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 01/18/2022)
01/18/2022	<u>195</u>	SUPREME COURT REMARK Petition for Writ of Certiorari denied. USCA 20-1409. (Hicks, Samantha) (Entered: 01/18/2022)
01/18/2022	<u>196</u>	RESPONSE in Opposition re <u>178</u> MOTION for Summary Judgment filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, C.B., DANA CARAWAY, JULIA MCKEOWN, MAXWELL KADEL and <i>REPLY to Response 187</i> filed by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. Replies due by 2/1/2022 (TRACHTMAN, JAMES) (Entered: 01/18/2022)
01/19/2022	<u>197</u>	RESPONSE in Opposition re <u>178</u> MOTION for Summary Judgment filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, C.B., DANA CARAWAY, JULIA MCKEOWN, MAXWELL KADEL filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit, # <u>9</u> Exhibit, # <u>10</u> Exhibit, # <u>11</u> Exhibit, # <u>12</u> Exhibit, # <u>13</u> Exhibit, # <u>14</u> Exhibit, # <u>15</u> Exhibit, # <u>16</u> Exhibit, # <u>17</u> Exhibit, # <u>18</u> Exhibit)(JONES, MARK) (Entered: 01/19/2022)
01/25/2022	<u>198</u>	MOTION for Leave to File Excess Pages by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Responses due by 2/8/2022 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 01/25/2022)
01/25/2022	<u>199</u>	MOTION to Expedite <i>Consideration of Plaintiffs' Motion for Leave to File Excess Pages</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK,

		MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 01/25/2022)
01/26/2022		Motions Submitted: <u>198</u> MOTION for Leave to File Excess Pages , <u>199</u> MOTION to Expedite <i>Consideration of Plaintiffs' Motion for Leave to File Excess Pages</i> to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 01/26/2022)
01/27/2022	<u>200</u>	ORDER signed by JUDGE LORETTA C. BIGGS on 1/27/2022; that the motion (ECF No. <u>198</u>) is GRANTED. Plaintiffs may file a reply brief limited to 4,625 words. (Sheets, Jamie) (Entered: 01/27/2022)
02/02/2022	<u>201</u>	REPLY, filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK, to Response to <u>178</u> MOTION for Summary Judgment filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Third Supplemental Declaration of Amy Richardson)(RICHARDSON, AMY) (Entered: 02/02/2022)
02/02/2022	<u>202</u>	MOTION to Exclude <i>Expert Testimony of Dr. Peter Robie</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/23/2022 (RAVI, DEEPIKA) (Entered: 02/02/2022)
02/02/2022	<u>203</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>202</u> MOTION to Exclude <i>Expert Testimony of Dr. Peter Robie</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Declaration of Deepika Ravi, # <u>2</u> Text of Proposed Order)(RAVI, DEEPIKA) (Entered: 02/02/2022)
02/02/2022	<u>204</u>	MOTION to Exclude <i>Expert Testimony of Dr. Paul W. Hruz</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/23/2022 (Attachments: # <u>1</u> Text of Proposed Order)(GONZALEZ-PAGAN, OMAR) (Entered: 02/02/2022)
02/02/2022	<u>205</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>204</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul W. Hruz</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Declaration of Omar Gonzalez-Pagan, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Exhibit D, # <u>6</u> Exhibit E, # <u>7</u> Exhibit F, # <u>8</u> Exhibit G, # <u>9</u> Exhibit H, # <u>10</u> Exhibit I, # <u>11</u> Exhibit J, # <u>12</u> Exhibit K, # <u>13</u> Exhibit L, # <u>14</u> Exhibit M)(GONZALEZ-PAGAN, OMAR) (Entered: 02/02/2022)
02/02/2022	<u>206</u>	MOTION to Exclude <i>Expert Testimony of Dr. Paul R. McHugh</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/23/2022 (Attachments: # <u>1</u> Text of Proposed Order)(GONZALEZ-PAGAN, OMAR) (Entered: 02/02/2022)
02/02/2022	<u>207</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>206</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul R. McHugh</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Declaration of Omar Gonzalez-Pagan, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Exhibit D, # <u>6</u> Exhibit E, # <u>7</u> Exhibit F, # <u>8</u> Exhibit G, # <u>9</u> Exhibit H, # <u>10</u> Exhibit I, # <u>11</u> Exhibit J)(GONZALEZ-PAGAN, OMAR) (Entered: 02/02/2022)

02/02/2022	<u>208</u>	MOTION to Exclude <i>Expert Testimony of Dr. Patrick W. Lappert</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/23/2022 (Attachments: # <u>1</u> Text of Proposed Order)(TISHYEVICH, DMITRIY) (Entered: 02/02/2022)
02/02/2022	<u>209</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>208</u> MOTION to Exclude <i>Expert Testimony of Dr. Patrick W. Lappert</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Declaration of Dmitriy Tishyevich, # <u>2</u> Exhibit 1 [Redacted], # <u>3</u> Exhibit 2, # <u>4</u> Exhibit 3, # <u>5</u> Exhibit 4, # <u>6</u> Exhibit 5, # <u>7</u> Exhibit 6, # <u>8</u> Exhibit 7, # <u>9</u> Exhibit 8, # <u>10</u> Exhibit 9, # <u>11</u> Exhibit 10, # <u>12</u> Exhibit 11, # <u>13</u> Exhibit 12, # <u>14</u> Exhibit 13, # <u>15</u> Exhibit 14, # <u>16</u> Exhibit 15, # <u>17</u> Exhibit 16, # <u>18</u> Exhibit 17)(TISHYEVICH, DMITRIY) (Entered: 02/02/2022)
02/02/2022	<u>210</u>	MOTION to Seal [ECF No. 209-2] <i>Exhibit 1 to Plaintiffs' Memorandum to Exclude Expert Testimony of Dr. Patrick W. Lappert</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/16/2022 (Attachments: # <u>1</u> Text of Proposed Order)(TISHYEVICH, DMITRIY) (Entered: 02/02/2022)
02/02/2022	<u>211</u>	SEALED UNREDACTED DOCUMENTS Plaintiffs' Memorandum to Exclude <i>Expert Testimony of Dr. Patrick W. Lappert</i> filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK, Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, NORTH CAROLINA STATE UNIVERSITY, STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY re <u>210</u> Motion to Seal,,. (Attachments: # <u>1</u> Declaration of Dmitriy Tishyevich, # <u>2</u> Exhibit 1 [Unredacted], # <u>3</u> Exhibit 2, # <u>4</u> Exhibit 3, # <u>5</u> Exhibit 4, # <u>6</u> Exhibit 5, # <u>7</u> Exhibit 6, # <u>8</u> Exhibit 7, # <u>9</u> Exhibit 8, # <u>10</u> Exhibit 9, # <u>11</u> Exhibit 10, # <u>12</u> Exhibit 11, # <u>13</u> Exhibit 12, # <u>14</u> Exhibit 13, # <u>15</u> Exhibit 14, # <u>16</u> Exhibit 15, # <u>17</u> Exhibit 16, # <u>18</u> Exhibit 17)(TISHYEVICH, DMITRIY) (Entered: 02/02/2022)
02/02/2022	<u>212</u>	MOTION to Exclude <i>Expert Testimony of Stephen B. Levine, M.D.</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 2/23/2022 (Attachments: # <u>1</u> Text of Proposed Order)(CHARLES, CARL) (Entered: 02/02/2022)
02/02/2022	<u>213</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>212</u> MOTION to Exclude <i>Expert Testimony of Stephen B. Levine, M.D.</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Declaration of Carl S. Charles, # <u>2</u> Exhibit A, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Exhibit D, # <u>6</u> Exhibit E, # <u>7</u> Exhibit F, # <u>8</u> Exhibit G, # <u>9</u> Exhibit H, # <u>10</u> Exhibit I, # <u>11</u> Exhibit J, # <u>12</u> Exhibit K, # <u>13</u> Exhibit L, # <u>14</u> Exhibit M, # <u>15</u> Exhibit N)(CHARLES, CARL) (Entered: 02/02/2022)
02/03/2022		Motions Submitted: <u>131</u> MOTION for Leave to File , <u>132</u> MOTION for Summary Judgment , <u>136</u> MOTION for Partial Summary Judgment , <u>178</u> MOTION for Summary Judgment , <u>182</u> MOTION to Seal <i>Exhibits to Plaintiffs' Motion for Summary Judgment</i> , to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 02/03/2022)
02/16/2022	<u>214</u>	RESPONSE re <u>210</u> MOTION to Seal [ECF No. 209-2] <i>Exhibit 1 to Plaintiffs' Memorandum to Exclude Expert Testimony of Dr. Patrick W. Lappert</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA

		STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Replies due by 3/2/2022 (JONES, MARK) (Entered: 02/16/2022)
02/23/2022	<u>215</u>	RESPONSE in Opposition re <u>212</u> MOTION to Exclude <i>Expert Testimony of Stephen B. Levine, M.D.</i> filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, C.B., DANA CARAWAY, JULIA MCKEOWN, MAXWELL KADEL, <u>204</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul W. Hruz</i> filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, DANA CARAWAY, C.B., JULIA MCKEOWN, MAXWELL KADEL, <u>208</u> MOTION to Exclude <i>Expert Testimony of Dr. Patrick W. Lappert</i> filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, DANA CARAWAY, C.B., JULIA MCKEOWN, MAXWELL KADEL, <u>206</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul R. McHugh</i> filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, DANA CARAWAY, C.B., JULIA MCKEOWN, MAXWELL KADEL, <u>202</u> MOTION to Exclude <i>Expert Testimony of Dr. Peter Robie</i> filed by CONNOR THONEN-FLECK, SAM SILVANIE, MICHAEL D. BUNTING, JR., JASON FLECK, DANA CARAWAY, C.B., JULIA MCKEOWN, MAXWELL KADEL filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Replies due by 3/9/2022 (Attachments: # <u>1</u> Exhibit Dr. Levine Report, # <u>2</u> Exhibit Dr. McHugh Report, # <u>3</u> Exhibit Dr. Hruz Report, # <u>4</u> Exhibit Dr. Lappert Report, # <u>5</u> Exhibit Dr. Robie Disclosure, # <u>6</u> Exhibit, # <u>7</u> Exhibit Levine Deposition)(JONES, MARK) (Entered: 02/23/2022)
03/01/2022	<u>216</u>	REPLY, filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK, to Response to <u>210</u> MOTION to Seal [ECF No. 209-2] <i>Exhibit 1 to Plaintiffs' Memorandum to Exclude Expert Testimony of Dr. Patrick W. Lappert</i> [If the party filing this motion is not the party claiming confidentiality, the party claiming confidentiality must file a response within 14 days that includes the materials required by L.R. 5.4(c)(3).] filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 03/01/2022)
03/09/2022	<u>217</u>	REPLY, filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK, to Response to <u>208</u> MOTION to Exclude <i>Expert Testimony of Dr. Patrick W. Lappert</i> , <u>206</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul R. McHugh</i> , <u>212</u> MOTION to Exclude <i>Expert Testimony of Stephen B. Levine, M.D.</i> , <u>204</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul W. Hruz</i> , <u>202</u> MOTION to Exclude <i>Expert Testimony of Dr. Peter Robie</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Supplemental Declaration of Omar Gonzalez-Pagan, # <u>2</u> Exhibit A - HHS Information Memorandum)(GONZALEZ-PAGAN, OMAR) (Entered: 03/09/2022)
03/10/2022		Motions Submitted: <u>202</u> MOTION to Exclude <i>Expert Testimony of Dr. Peter Robie</i> , <u>204</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul W. Hruz</i> , <u>206</u> MOTION to Exclude <i>Expert Testimony of Dr. Paul R. McHugh</i> , <u>208</u> MOTION to Exclude <i>Expert Testimony of Dr. Patrick W. Lappert</i> , <u>210</u> MOTION to Seal [ECF No. 209-2] <i>Exhibit 1 to Plaintiffs' Memorandum to Exclude Expert Testimony of Dr. Patrick W. Lappert</i> , <u>212</u> MOTION to Exclude <i>Expert Testimony of Stephen B. Levine, M.D.</i> , to JUDGE LORETTA C. BIGGS- (Blay, Debbie) (Entered: 03/10/2022)
04/07/2022	<u>218</u>	MEMORANDUM OPINION AND ORDER signed by JUDGE LORETTA C. BIGGS on 4/7/2022; that the Motion for Leave to File Brief of <i>Amici Curiae</i> the American Medical Association and Seven Additional Health Care Organizations in Support of Plaintiffs, (ECF No. <u>131</u>), is GRANTED. FURTHER that Proposed Amici shall file their amicus brief in the form of ECF No. <u>131</u> -2 within seven days of entry of this Order. (Sheets, Jamie) (Entered: 04/07/2022)
04/11/2022	<u>219</u>	<i>Amicus Curiae</i> BRIEF re <u>218</u> Memorandum Opinion and Order, . (SAINT, SARAH) (Entered: 04/11/2022)

05/05/2022	<u>220</u>	Suggestion of Subsequently Decided Authority by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 05/05/2022)
05/13/2022	<u>221</u>	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Defendant STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. ALEX R. WILLIAMS is substituted as counsel for Defendant. Attorney JAMES B. TRACHTMAN terminated. (WILLIAMS, ALEX) (Entered: 05/13/2022)
05/13/2022	<u>222</u>	NOTICE of Trial Calendar Jury Trial set for 7/5/2022 09:30 AM in Winston-Salem Courtroom #4 before JUDGE LORETTA C. BIGGS. (Williamson, Wanda) (Entered: 05/13/2022)
05/16/2022	<u>223</u>	Suggestion of Subsequently Decided Authority by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 05/16/2022)
05/17/2022	<u>224</u>	Suggestion of Subsequently Decided Authority by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (JONES, MARK) (Entered: 05/17/2022)
05/19/2022	<u>225</u>	Joint MOTION to Reset Trial Date <i>to Allow 8-10 Days for Proceedings</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 6/9/2022 (Attachments: # <u>1</u> Text of Proposed Order)(RICHARDSON, AMY) (Entered: 05/19/2022)
05/20/2022		Motion Submitted: <u>225</u> Joint MOTION to Reset Trial Date <i>to Allow 8-10 Days for Proceedings</i> to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 05/20/2022)
06/02/2022	<u>226</u>	Additional Attachments to Main Document re <u>213</u> Memorandum,, <i>Amended Exhibit F</i> . (RICHARDSON, AMY) (Entered: 06/02/2022)
06/03/2022	<u>227</u>	PRETRIAL DISCLOSURES by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK.(RICHARDSON, AMY) (Entered: 06/03/2022)
06/03/2022	<u>228</u>	PRETRIAL DISCLOSURES by STATE OF NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY.(WILLIAMS, ALEX) (Entered: 06/03/2022)
06/03/2022	<u>229</u>	FINAL PRETRIAL DISCLOSURES by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Exhibit 1 - Plan's Witness List, # <u>2</u> Exhibit 2 - Plan's Ex. List)(WILLIAMS, KEVIN) Modified on 6/6/2022 to remove duplicate text in attachment titles. (Sheets, Jamie) (Entered: 06/03/2022)
06/10/2022	<u>230</u>	MOTION in Limine <i>To Exclude Experts</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 6/17/2022 (WILLIAMS, KEVIN) (Entered: 06/10/2022)
06/10/2022	<u>231</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>230</u> MOTION in Limine <i>To Exclude Experts</i> filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 06/10/2022)
06/10/2022	<u>232</u>	MOTION in Limine <i>to Exclude Emotional Distress Evidence</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 6/17/2022 (WILLIAMS, KEVIN) (Entered: 06/10/2022)
06/10/2022	<u>233</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>232</u> MOTION in Limine <i>to Exclude Emotional Distress Evidence</i>

		filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 06/10/2022)
06/10/2022	<u>234</u>	MEMORANDUM OPINION AND ORDER signed by JUDGE LORETTA C. BIGGS on 6/10/2022; that DPS's Motion for Summary Judgment, (ECF No. <u>132</u>), is DENIED. FURTHER that Plan Defendants' Partial Summary Judgment, (ECF No. <u>136</u>), is GRANTED in part and JUDGMENT IS RESERVED in part, as set out. FURTHER that Plaintiffs' Motion for Summary Judgment, (ECF No. <u>178</u>), is GRANTED in part, DENIED in part, and JUDGMENT IS RESERVED in part as set out. Defendants are PERMANENTLY ENJOINED from enforcing the Plan's exclusion and are ORDERED to reinstate coverage for "medically necessary services for the treatment of gender dysphoria." The issue of damages is reserved for trial. FURTHER that Plaintiffs' Motion to Seal Exhibits to Plaintiffs' Motion for Summary Judgment, (ECF No. <u>182</u>), is GRANTED. FURTHER that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Peter Robie, (ECF No. <u>202</u>), is GRANTED. FURTHER that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Paul W. Hruz, (ECF No. <u>204</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. FURTHER that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Paul R. McHugh, (ECF No. <u>206</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. FURTHER that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Patrick W. Lappert, (ECF No. <u>208</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. FURTHER that Plaintiff's Motion to Seal portions of Dr. Lappert's report, (ECF No. <u>210</u>), is GRANTED. FURTHER that Plaintiffs' Motion to Exclude Expert Testimony of Stephen B. Levine, M.D., (ECF No. <u>212</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. (Sheets, Jamie) (Entered: 06/10/2022)
06/10/2022	<u>235</u>	MOTION in Limine to <i>Exclude the Testimony of Wayne Goodman</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 7/1/2022 (RICHARDSON, AMY) (Entered: 06/10/2022)
06/10/2022	<u>236</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>235</u> MOTION in Limine to <i>Exclude the Testimony of Wayne Goodman</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit of Dmitriy Tishyevich)(RICHARDSON, AMY) (Entered: 06/10/2022)
06/10/2022	<u>237</u>	MOTION in Limine to <i>Exclude Evidence of Plaintiffs' Other Claims or Lawsuits</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 7/1/2022 (RICHARDSON, AMY) (Entered: 06/10/2022)
06/10/2022	<u>238</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>237</u> MOTION in Limine to <i>Exclude Evidence of Plaintiffs' Other Claims or Lawsuits</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 06/10/2022)
06/10/2022	<u>239</u>	MOTION in Limine to <i>Exclude Rebuttal Experts</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 6/17/2022 (WILLIAMS, KEVIN) (Entered: 06/10/2022)
06/10/2022	<u>240</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>239</u> MOTION in Limine to <i>Exclude Rebuttal Experts</i> filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 06/10/2022)

		06/10/2022)
06/10/2022	<u>241</u>	MOTION in Limine <i>regarding pronoun usage and misgendering</i> by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Response to Motion due by 6/17/2022 (GONZALEZ-PAGAN, OMAR) (Entered: 06/10/2022)
06/10/2022	<u>242</u>	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>241</u> MOTION in Limine <i>regarding pronoun usage and misgendering</i> filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # <u>1</u> Affidavit Declaration of Omar Gonzalez-Pagan, # <u>2</u> Exhibit 1 – Letter Order in Eller v. Prince George's County Public Schools, # <u>3</u> Exhibit 2 – Order in United States v. Manning)(GONZALEZ-PAGAN, OMAR) (Entered: 06/10/2022)
06/14/2022	<u>243</u>	NOTICE of Hearing: Telephonic Status Conference set for 6/17/2022 at 11:00 AM before JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 06/14/2022)
06/17/2022		Minute Entry for proceedings held before JUDGE LORETTA C. BIGGS: Telephonic Status Conference held on 6/17/2022. Attorneys Michael Weaver, Lauren Snyder, Deepika Ravi, Grace Wynn, Tara Borelli, Omar Gonzalez-Pagan, David Brown, Ezra Cukor, Dmitriy Tishyevich, and Lauren Evans appeared via telephone on behalf of the Plaintiffs. Attorneys Mark Jones, John Knepper, and Kevin Williams appeared via telephone on behalf of NC State Health Care Plan. Attorney Alex Williams appeared via telephone on behalf of the Department of Public Safety. This matter will be removed from the July 2022 Civil Master Calendar and a new trial date will be set. (Court Reporter Michelle Maar.) (Blay, Debbie) (Entered: 06/17/2022)
06/17/2022	<u>244</u>	NOTICE of Hearing: Jury Trial set for 12/5/2022 at 09:30 AM in Winston-Salem Courtroom #4 before JUDGE LORETTA C. BIGGS. The parties shall comply in all respects with Fed. R. Civ. P. 26(a)(3) regarding final pretrial disclosure, including the time requirements set out therein. Unless the court orders otherwise, pretrial disclosures must be made no later than November 7, 2022. Motions in limine must be filed no later than November 14, 2022. Any objections to pretrial disclosures and responses to motions in limine must be served and promptly filed no later than November 21, 2022. Each party shall file a trial brief, along with proposed jury instructions on the issues no later than November 16, 2022. (Blay, Debbie) (Entered: 06/17/2022)
07/01/2022	<u>245</u>	NOTICE OF INTERLOCUTORY APPEAL as to <u>234</u> Memorandum Opinion and Order, by DALE FOLWELL, DEE JONES. Filing fee \$ 505, receipt number ANCMDC-3331247. (JONES, MARK) (Entered: 07/01/2022)
07/05/2022	<u>246</u>	Electronic Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>245</u> Notice of Interlocutory Appeal. (Sheets, Jamie) (Entered: 07/05/2022)
07/07/2022	<u>247</u>	MOTION to Correct <i>Memorandum Opinion and Order pursuant to Rule 60(a)</i> <u>234</u> by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # <u>1</u> Text of Proposed Order)(JONES, MARK) Modified on 7/8/2022 to link to pleading. (Sheets, Jamie) (Entered: 07/07/2022)
07/07/2022	<u>248</u>	MEMORANDUM filed by Defendant NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>247</u> MOTION to Correct <i>Memorandum Opinion and Order pursuant to Rule 60(a)</i> filed by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (JONES, MARK) (Entered: 07/07/2022)
07/08/2022		Motion Submitted: <u>247</u> MOTION to Correct <i>Memorandum Opinion and Order pursuant to Rule 60(a)</i> to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 07/08/2022)
07/08/2022	<u>249</u>	NOTICE of Docketing Record on Appeal from USCA re <u>245</u> Notice of Interlocutory Appeal filed by DALE FOLWELL, DEE JONES. USCA Case Manager: Rachel J. Lee. USCA Case Number 22-1721. (Sheets, Jamie) (Entered: 07/08/2022)

07/11/2022	<u>250</u>	NOTICE OF INTERLOCUTORY APPEAL as to <u>234</u> Memorandum Opinion and Order, by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Filing fee \$ 505, receipt number ANCMDC-3335788. (JONES, MARK) (Entered: 07/11/2022)
07/12/2022	<u>251</u>	Electronic Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>250</u> Notice of Interlocutory Appeal. (Sheets, Jamie) (Entered: 07/12/2022)
07/12/2022	<u>252</u>	NOTICE of Docketing Record on Appeal from USCA re <u>250</u> Notice of Interlocutory Appeal filed by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. USCA Case Manager: Rachel J. Lee. USCA Case Number 22-1730. (Sheets, Jamie) (Entered: 07/12/2022)
07/12/2022	<u>253</u>	USCA ORDER The court consolidates Case No. 22-1721 (L) and Case No. 22-1730. Entry of appearance forms and disclosure statements filed by counsel and parties to the lead case are deemed filed in the secondary case. (Sheets, Jamie) (Entered: 07/12/2022)
07/15/2022	<u>254</u>	NOTICE by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re <u>247</u> MOTION to Correct <i>Memorandum Opinion and Order pursuant to Rule 60(a)</i> (RICHARDSON, AMY) (Entered: 07/15/2022)
07/18/2022	<u>255</u>	NOTICE OF INTENT TO CORRECT AND CLARIFY MEMORANDUM OPINION AND ORDER <u>234</u> , signed by JUDGE LORETTA C. BIGGS on 7/18/2022; that if the Fourth Circuit remanded the above captioned matter for the purpose of allowing this Court to address NCSHP's motion (ECF No. <u>247</u>), this Court would grant the motion and (1) correct its Memorandum Opinion on page 67, and (2) clarify its Order on page 72, as stated herein. Pursuant to Rule 62.1(b), this Court instructs Defendant NCSHP to "promptly notify the circuit clerk" of this Notice. Fed. R. Civ. P. 62.1(b); see Fed. R. App. P. 12.1(a). (Sheets, Jamie) (Entered: 07/18/2022)
07/27/2022	<u>256</u>	MOTION to Stay <i>Injunction Pending Appeal</i> by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 8/17/2022 (Attachments: # <u>1</u> Text of Proposed Order)(JONES, MARK) (Entered: 07/27/2022)
07/27/2022	<u>257</u>	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re <u>256</u> MOTION to Stay <i>Injunction Pending Appeal</i> filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (JONES, MARK) (Entered: 07/27/2022)
08/02/2022	<u>258</u>	USCA ORDER the court deconsolidates case No. 22-1721, <i>Maxwell Kadel v. Dale Folwell</i> from No. 22-1730, <i>Maxwell Kadel v. North Carolina State Health Plan for Teachers</i> , and remands No. 22-1730, <i>Maxwell Kadel v. North Carolina State Health Plan for Teachers</i> , to the district court for the limited purpose of correcting portions of its Memorandum Opinion and Order. (Attachments: # <u>1</u> USCA Motion) (Sheets, Jamie) (Entered: 08/03/2022)
08/03/2022		CASE REFERRED RE: <u>258</u> Order to JUDGE LORETTA C. BIGGS. (Marsh, Keah) (Entered: 08/03/2022)
08/04/2022	<u>259</u>	Transcript of Proceedings held on 6/17/2022, before Judge Loretta C. Biggs. Court Reporter Michelle Maar. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. NOTICE RE: REDACTION OF TRANSCRIPTS: The parties have 5 business days to file a Notice of Intent to Request Redaction and 21 calendar days to file a Redaction Request. If no notice is filed, this transcript will be made electronically available to the public without redaction after 90 calendar days. Transcript may be viewed at the court public terminal or purchased through the court reporter before the 90 day deadline. After that date it may be obtained through PACER. Redaction Request due 8/29/2022. Redacted Transcript Deadline set for 9/9/2022. Release of Transcript Restriction set for 11/7/2022. (Marsh, Keah) (Entered: 08/04/2022)

08/10/2022	<u>260</u>	ORDER signed by JUDGE LORETTA C. BIGGS on 8/10/2022; For the reasons stated in this Court's Notice of Intent to Correct and Clarify Memorandum Opinion and Order, entered on July 18, 2022, (ECF No. <u>255</u>), Defendant NCSHP's unopposed Motion Memorandum Opinion and Order, (ECF no. <u>247</u>), is hereby GRANTED. A corrected version of this Court's Memorandum Opinion and Order, originally entered on June 10, 2022, (ECF No. <u>234</u>), will be filed simultaneously with this Order. The filing of this Order and the corrected Memorandum Opinion and Order completes this Court's proceedings related to the Fourth Circuit Court of Appeal's limited remand. (Hicks, Samantha) (Entered: 08/10/2022)
08/10/2022	<u>261</u>	MEMORANDUM OPINION AND ORDER (CORRECTED VERSION) signed by JUDGE LORETTA C. BIGGS on 8/10/2022; that DPS's Motion for Summary Judgment, (ECF No. <u>132</u>), is DENIED. FURTHER ORDERED that Plan Defendants' Partial Summary Judgment, (ECF No. <u>136</u>), is GRANTED in part and JUDGMENT IS RESERVED in part. It is GRANTED as to Plaintiff Caraway's claim arising under Title VII against NCSHP. JUDGMENT IS RESERVED regarding Plaintiffs' claims arising under the ACA pending further Order from this Court. FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment, (ECF No. <u>178</u>), is GRANTED in part, DENIED in part, and JUDGMENT IS RESERVED in part. It is GRANTED with respect to Plaintiffs' claims arising under the Equal Protection Clause and Plaintiff Caraway's claim arising under Title VII against DPS. Defendants Folwell and Jones, in their official capacities, are PERMANENTLY ENJOINED from enforcing the Plan's exclusion and are ORDERED to reinstate coverage for "medically necessary services for the treatment of gender dysphoria." The motion is DENIED as to Caraway's Title VII claim against NCSHP. JUDGMENT IS RESERVED regarding Plaintiffs' claims arising under the ACA pending further Order from this Court. The issue of damages is reserved for trial. FURTHER ORDERED that Plaintiffs' Motion to Seal Exhibits to Plaintiffs' Motion for Summary Judgment, (ECF No. <u>182</u>), is GRANTED. FURTHER ORDERED that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Peter Robie, (ECF No. <u>202</u>), is GRANTED. FURTHER ORDERED that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Paul W. Hruz, (ECF No. <u>204</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. FURTHER ORDERED that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Paul R. McHugh, (ECF No. <u>206</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. FURTHER ORDERED that Plaintiffs' Motion to Exclude Expert Testimony of Dr. Patrick W. Lappert, (ECF No. <u>208</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. FURTHER ORDERED that Plaintiff's Motion to Seal portions of Dr. Lappert's report, (ECF No. <u>210</u>), is GRANTED. FURTHER ORDERED that Plaintiffs' Motion to Exclude Expert Testimony of Stephen B. Levine, M.D., (ECF No. <u>212</u>), is GRANTED in part and DENIED in part in accordance with this Memorandum Opinion and Order. (Hicks, Samantha) (Entered: 08/10/2022)
08/10/2022		Transmission of Update Item to USCA to US Court of Appeals re <u>261</u> Memorandum Opinion and Order, <u>260</u> Order. (Hicks, Samantha) (Entered: 08/10/2022)
08/11/2022	<u>262</u>	USCA ORDER Upon consideration of the stipulated motion to voluntarily dismiss, the court dismisses this appeal, upon such terms as have been agreed to by the parties, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. USCA 22-1730. (Hicks, Samantha) (Entered: 08/11/2022)
08/11/2022	<u>263</u>	RULE 42(b) MANDATE of USCA as to <u>245</u> Notice of Interlocutory Appeal filed by DALE FOLWELL, DEE JONES; This court's order dismissing this appeal pursuant to Local Rule 42(b) takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. USCA 22-1730. (Hicks, Samantha) (Entered: 08/11/2022)
08/16/2022	<u>264</u>	NOTICE by MAXWELL KADEL <i>et al.</i> (RICHARDSON, AMY) (Entered: 08/16/2022)
08/17/2022	<u>265</u>	RESPONSE in Opposition re <u>256</u> MOTION to Stay <i>Injunction Pending Appeal</i> filed by DALE FOLWELL, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, DEE JONES filed by MICHAEL D. BUNTING, JR, C.B., DANA CARAWAY, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 8/31/2022 (RICHARDSON, AMY) (Entered: 08/17/2022)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL; JASON FLECK;
CONNOR THONEN-FLECK; JULIA
MCKEOWN; MICHAEL D. BUNTING, JR.;
C.B., by his next friends and parents,
MICHAEL D. BUNTING, JR. and SHELLEY
K. BUNTING; SAM SILVAINE; and DANA
CARAWAY,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as
State Treasurer of North Carolina; DEE
JONES, in her official capacity as Executive
Administrator of the North Carolina State
Health Plan for Teachers and State Employees;
UNIVERSITY OF NORTH CAROLINA AT
CHAPEL HILL; NORTH CAROLINA
STATE UNIVERSITY; UNIVERSITY OF
NORTH CAROLINA AT GREENSBORO;
and NORTH CAROLINA STATE HEALTH
PLAN FOR TEACHERS AND STATE
EMPLOYEES; and STATE OF NORTH
CAROLINA, DEPARTMENT OF PUBLIC
SAFETY;

Defendants.

No. 1:19-cv-00272-LCB-LPA

**FIRST AMENDED COMPLAINT
FOR DECLARATORY,
INJUNCTIVE, AND OTHER
RELIEF**

INTRODUCTION

1. Plaintiffs are current or former enrollees in the North Carolina State Health Plan for Teachers and State Employees (“NCSHP”). As part of compensation for employment, the State of North Carolina provides its employees with health care coverage

for them and their dependents through the NCSHP, a self-funded plan. However, by categorically depriving transgender enrollees of coverage for the treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual’s gender identity and sex assigned at birth—Defendants unlawfully discriminate against people like Plaintiffs, who either are transgender or have transgender family members who depend on them for health care coverage. In doing so, Defendants deny equal compensation for equal work to employees who are transgender or have transgender dependents, as well as harm employees’ transgender family members who depend on them for health care coverage.

2. The sweeping exclusion contained within the NCSHP denies coverage for health care, including counseling, hormone therapy, surgical care, and any other health care provided in relation to a person’s transgender status and/or gender transition. This exclusion contravenes the well-established medical consensus that gender-confirming health care can be medically necessary and even life-saving. Other NCSHP enrollees who are not transgender do not face a categorical exclusion barring coverage for health care that is medically necessary for them based on their sex and receive coverage for the same care that is denied to transgender enrollees.

3. Plaintiffs have all been denied coverage for medically necessary gender-confirming health care because they or their dependents are transgender, based on the categorical exclusion of gender-confirming health care in the NCSHP. Some Plaintiffs have forgone medically necessary gender-confirming health care, while others have been

forced to incur financial hardship without the financial protection afforded by coverage through the NCSHP. Plaintiffs have also suffered emotional distress, stigmatization, humiliation, and a loss of dignity because of the NCSHP's targeted discrimination against transgender enrollees, which wrongly deems their health care needs as unworthy of equal coverage.

4. The NCSHP covers more than 720,000 teachers, state employees, retirees, current and former lawmakers, state university and community college personnel, state hospital staff members, and their dependents. The NCSHP's mission is "to improve the health and health care of North Carolina teachers, state employees, retirees, and their dependents, in a financially sustainable manner, thereby serving as a model to the people of North Carolina for improving their health and well-being"—but when it comes to transgender enrollees, the NCSHP is not fulfilling that mission.

5. This targeted discrimination against transgender people violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Education Amendments of 1972 ("Title IX"), Section 1557 of the Patient Protection and Affordable Care Act (the "ACA"), and Title VII of the Civil Rights Act of 1964 ("Title VII").

6. Plaintiffs bring this lawsuit to challenge the categorical exclusion of gender-confirming health care contained within the NCSHP, to obtain a judgment to redress their individual injuries, and to have the exclusion declared unlawful, thereby preventing its enforcement.

PARTIES

A. Plaintiffs

7. Plaintiff Maxwell Kadel is a 37-year-old transgender man. Mr. Kadel was formerly employed by the University of North Carolina at Chapel Hill from October 2016 to November 2019. Mr. Kadel lives in Carrboro, North Carolina.

8. Plaintiff Jason Fleck is the father of Plaintiff Connor Thonen-Fleck (“Connor”), an 18-year-old transgender young man. Mr. Fleck is an employee of the University of North Carolina at Greensboro, and Connor receives health coverage as a dependent of Mr. Fleck. Mr. Fleck and Connor live in High Point, North Carolina.

9. Plaintiff Julia McKeown is a 44-year-old transgender woman. Ms. McKeown is employed by North Carolina State University. Ms. McKeown lives in Apex, North Carolina.

10. Plaintiff Michael D. Bunting, Jr. is the father of C.B., a 15-year-old transgender boy. Mr. Bunting was a long-term employee of the University of North Carolina at Chapel Hill. He continues to receive health coverage as a retiree, and C.B. receives health coverage as a dependent of Mr. Bunting. Shelley K. Bunting is C.B.’s mother. C.B. sues pursuant to Federal Rule of Civil Procedure 17(c) by and through his next friends and parents, Mr. Bunting and Ms. Bunting. Mr. Bunting, Ms. Bunting, and C.B. all live in Chapel Hill, North Carolina.

11. Plaintiff Sam Silvaine is 31 years old, transgender, and has a male affirmed sex. Mr. Silvaine was formerly employed by the North Carolina State University

Counseling Center from August 2016 until July 2018. Mr. Silvaine resides in Raleigh, North Carolina.

12. Plaintiff Dana Caraway is a 50-year-old transgender woman. Ms. Caraway is employed by the State of North Carolina, Department of Public Safety. Ms. Caraway lives in Morganton, North Carolina.

B. Defendants

13. Defendant Dale Folwell is sued in his official capacity as the North Carolina State Treasurer. As Treasurer, Mr. Folwell serves as Chair of the Board of Trustees of the State Health Plan for Teacher and State Employees and is responsible for designing, operating, and/or administering the NCSHP. Pursuant to N.C. Gen. Stat. § 135-48.30, the State Treasurer has the power and duty to: administer and operate the NCSHP and to set benefits, subject to approval by the majority of the Board of Trustees; design and implement coordination of benefits policies; and set administrative and medical policies. N.C. Gen. Stat. § 135-48.30 provides that the State Treasurer may delegate his powers and duties under this section to the Executive Administrator, the Board of Trustees, and employees of the Plan, but nonetheless maintains responsibility for the performance of those powers or duties. Additionally, as described below, Mr. Folwell has publicly announced that until he is ordered or required to do otherwise, he will maintain the discriminatory exclusion in the NCSHP. Mr. Folwell is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this Complaint.

14. Defendant Dee Jones is sued in her official capacity as Executive Administrator of the NCSHP. As Executive Administrator, Ms. Jones is statutorily authorized to negotiate, renegotiate, and execute contracts with third parties in the performance of her duties and responsibilities, pursuant to N.C. Gen. Stat. § 135-48.23. Ms. Jones is a “person” within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this Complaint.

15. Defendant University of North Carolina at Chapel Hill (“UNC”) is the flagship institution for the University of North Carolina system. UNC is an education program or activity receiving federal financial assistance. UNC also is an employer within the meaning of Title VII because as a university, UNC is engaged in an industry affecting commerce and has 15 or more employees. As an employer, UNC provides health care coverage to its employees through the NCSHP.

16. Defendant University of North Carolina at Greensboro (“UNCG”) is a constituent institution of the University of North Carolina. UNCG is an education program or activity receiving federal financial assistance.

17. Defendant North Carolina State University (“NCSU”) is a constituent institution of the University of North Carolina. NCSU is an education program or activity receiving federal financial assistance. NCSU also is an employer within the meaning of Title VII because as a university, NCSU is engaged in an industry affecting commerce, and has 15 or more employees. As an employer, NCSU provides health care coverage to its employees through the NCSHP.

18. Defendant State of North Carolina, Department of Public Safety (also, the “Department of Public Safety”) is an employer within the meaning of Title VII because as a government law enforcement agency, the Department of Public Safety is engaged in an industry affecting commerce and has 15 or more employees. As an employer, the Department of Public Safety provides health care coverage to its employees through the NCSHP.

19. Defendant NCSHP, a corporation, administers comprehensive group health insurance to eligible teachers and other North Carolina state employees, pursuant to N.C. Gen. Stat. § 135-48.2. The NCSHP is self-funded and empowered to determine, define, adopt, and remove health care benefits and exclusions, such as the categorical exclusion of gender-confirming health care that targets transgender enrollees for discriminatory treatment. Defendant NCSHP has knowingly and intentionally offered health care coverage to Plaintiffs that discriminates on the basis of sex.

20. In establishing the scope of health insurance coverage for state employees, the NCSHP acts as an agent for North Carolina government employers who participate in NCSHP, including but not limited to the Department of Public Safety, for purposes of determining components of state employees’ “compensation, terms, conditions, or privileges of employment” under Title VII. The NCSHP exists solely so that participating employers can delegate responsibility for the benefits provided to their employees, as its enacting statute makes clear. N.C. Gen. Stat. Ann. § 135-48.2(a) provides for creation of the NCSHP “exclusively for the benefit of” state employees, retirees, and eligible

dependents, to “administer one or more group health plans that are comprehensive in coverage.” Government employers that participate in the NCSHP, including the Department of Public Safety, delegate significant control over employee health benefits to the NCSHP.

21. The NCSHP also acts as an agent of participating government employers, including the Department of Public Safety, because it provides benefits in the form of health care coverage to those employees and thus exercises control over an important aspect of Plaintiffs’ employment, their health benefits. The NCSHP exercises this control by, for example, choosing whether to include or exclude gender-confirming health care. The NCSHP’s discriminatory denial of access to gender-confirming health care has thus significantly affected Plaintiffs’ access to equal employment opportunities.

22. Additionally, the NCSHP is a joint employer with participating government employers under Title VII. Those government employers contract with NCSHP for the provision of health coverage to the employees and, by determining whether to exclude gender-confirming health care, the NCSHP shares responsibility for essential terms and conditions of employment for those employees. The NCSHP thus exercises significant control over the same employees who are employed by state agencies, such as the Department of Public Safety, by determining components of those employees’ “compensation, terms, conditions, or privileges of employment” under Title VII, including but not limited to determining their access to gender-confirming health care.

23. Defendants, through their respective duties and obligations, are responsible for the discriminatory exclusion of gender-confirming health care in the NCSHP. Each Defendant, and those subject to their direction, supervision, or control, has or intentionally will perform, participate in, aid and/or abet in some manner the acts alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure the plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant and their successors, as well as all persons under their supervision, direction, or control, including, but not limited to, their officers, employees, and agents.

JURISDICTION AND VENUE

24. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution, under Title IX, 20 U.S.C. § 1681, *et seq.*, under Section 1557 of the ACA, 42 U.S.C. § 18116, and under Title VII, 42 U.S.C. § 2000e, *et seq.*

25. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because the matters in controversy arise under the Constitution and laws of the United States; and pursuant to 28 U.S.C. § 1343(a)(3) and (4) because the action is brought to redress deprivations, under color of state authority, or rights, privileges, and immunities secured by the U.S. Constitution and seeks to secure damages and equitable relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights.

26. Declaratory relief is authorized by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by 28 U.S.C. §§ 2201 and 2202.

27. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because Defendants UNC and UNCG reside within the District, and all Defendants reside within the State of North Carolina; and because a substantial part of the events that gave rise to Plaintiffs' claims took place within the District.

28. This Court has personal jurisdiction over Defendants because they are all domiciled in the State of North Carolina.

FACTUAL ALLEGATIONS

A. Sex, Gender Identity, and Gender Dysphoria

29. Gender identity refers to an individual's fundamental, internal sense of being a particular gender. It is an essential element of human identity that everyone possesses. Gender identity is innate, has biological underpinnings, and is fixed at an early age.

30. An individual's sex is generally assigned solely on the basis of external genitalia at the time of birth. External genitalia are but one of several sex-related characteristics and are not always indicative of a person's sex. Other sex-related characteristics, such as chromosomes, hormone levels, internal reproductive organs, secondary sex characteristics, and gender identity, are typically not assessed or considered during the assignment of sex at birth.

31. Where an individual's gender identity does not match that individual's sex assigned at birth, gender identity is the critical determinant of sex. A scientific consensus

recognizes that attempts to change an individual's gender identity to bring it into alignment with the sex assigned at birth are ineffective and harmful.

32. For transgender people, an incongruence between gender identity and the body's other sex characteristics can result in gender dysphoria—i.e., a feeling of clinically significant stress and discomfort born out of experiencing that something is fundamentally wrong. Gender dysphoria is a medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition; the World Health Organization's International Classification of Diseases, which is the diagnostic and coding compendia for medical professionals; and by other leading medical and mental health professional groups, including the American Medical Association ("AMA") and the American Psychological Association ("APA").

33. In addition to clinically significant distress, gender dysphoria can also result in severe anxiety, depression, and suicidal ideation or suicide without adequate treatment.

34. Untreated gender dysphoria often intensifies with time. The longer an individual goes without adequate treatment, the greater the risk of severe harms to the individual's health.

35. Gender dysphoria can be treated in accordance with internationally recognized Standards of Care formulated by the World Professional Association for Transgender Health ("WPATH"). These Standards of Care are recognized as authoritative by national medical and behavioral health organizations such as the AMA and APA, which have called for an end to exclusions of gender-confirming care from health insurance plans.

36. The process by which transgender individuals come to live in a manner consistent with their gender identity, rather than the sex they were designated at birth, is known as gender transition. The ability to live in a manner consistent with one's gender identity is critical to the health and well-being of transgender individuals and is a key aspect in the treatment of gender dysphoria.

37. The steps that transgender individuals take to transition are individualized, but typically include social, legal, and medical transition.

38. Social transition entails a transgender individual living in accordance with their gender identity in all aspects of life. For example, for a man who is transgender (designated female at birth), social transition can include wearing typically male attire, using male pronouns, and otherwise living openly as a man in all aspects of everyday life.

39. Legal transition involves steps to formally align a transgender individual's legal identity with their gender identity, such as legally changing one's name and updating the name and gender marker on their driver's license, birth certificate, and other forms of identification.

40. Medical transition, a critical part of transitioning for many transgender individuals, includes treatments that bring the sex-specific characteristics of a transgender individual's body into alignment with their gender identity, such as counseling to obtain a diagnosis of gender dysphoria, hormone replacement therapy, or surgical care.

41. Hormone replacement therapy involves taking hormones for the purpose of bringing one's secondary sex characteristics into typical alignment with one's gender

identity. Secondary sex characteristics are bodily features not associated with external and internal reproductive genitalia (primary sex characteristics). Secondary sex characteristics include, for example, hair growth patterns, body fat distribution, and muscle mass development. Hormone replacement therapy can have significant masculinizing or feminizing effects and can assist in bringing a transgender individual's secondary sex characteristics into alignment with their true sex, as determined by their gender identity, and therefore is medically necessary care for transgender people who need it to treat their gender dysphoria.

42. Gender-confirming surgical care or treatment—also known as gender confirmation surgery or “sex reassignment” surgery—refers to any surgical procedure undergone by a transgender individual to better align their primary or secondary sex characteristics with their gender identity. Such surgical care can include but is not limited to vaginoplasty, phalloplasty, hysterectomy, gonadectomy, mammoplasty, and mastectomy. These treatments deliberately change sex characteristics for the purpose of treating gender dysphoria.

43. Surgical care is medically necessary for transgender people who need it to treat their gender dysphoria.

44. An established body of medical research demonstrates the effectiveness and medical necessity of gender dysphoria treatment, including counseling, hormone therapy, and surgical treatment. Health care experts have recognized that such treatments are not

“cosmetic,” “elective,” or “experimental.” Rather, they are safe, effective, and medically necessary treatments for a serious health condition.

45. For example, WPATH has explained that, like hormone therapy and other gender-confirming treatments, “[t]he medical procedures attendant to gender affirming/confirming surgeries are not ‘cosmetic’ or ‘elective’ or ‘for the mere convenience of the patient.’ These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition. In some cases, such surgery is the only effective treatment for the condition, and for some people genital surgery is essential and life-saving.”

46. Similarly, in 2014, the federal Department of Health and Human Services Departmental Appeals Board confirmed that surgical treatment is safe and effective treatment for gender dysphoria. After reviewing expert medical testimony and published studies, the Appeals Board concluded that the Medicare program’s then-existing exclusion of such treatment from coverage was “not reasonable.”

47. These various components associated with transition—social, legal, and medical transition—do not change an individual’s gender, as that is already established by gender identity, but instead bring the individual’s appearance, legal identity, and sex-related characteristics into greater typical alignment with the individual’s gender identity and lived experience.

B. The State’s Targeted and Discriminatory Exclusion of Gender-Confirming Health Care

48. The NCSHP offers three health care plans to eligible state employees: the (1)

80/20 PPO Plan, the (2) 70/30 PPO Plan, and the (3) High Deductible Health Plan (collectively referred to as the “Health Plans”). Across all three plans, Blue Cross and Blue Shield of North Carolina (“BCBSNC”) serves as the claims administrator, and CVS Caremark (“CVS”) administers pharmacy benefits.

49. Covered services under the NCSHP include medically necessary pharmacy benefits, mental health benefits, and medical care such as surgical benefits at inpatient and outpatient facilities.

50. The NCSHP Health Plans are distinguished primarily by coverage ratios, deductible amounts, and general costs to the insured employee and their dependent-enrollees. The Health Plans do however have at least one feature in common. At all relevant times, the Health Plans have contained a categorical exclusion of coverage for transition-related health care, with the exception of the 2017 plan year.

51. Because the only people who require treatments related to gender-confirming health care are transgender people, denying coverage for such health care necessarily discriminates against transgender people. As a result of the exclusion in the Health Plans, non-transgender enrollees receive coverage for medically necessary mental health, prescription drug, and surgical needs that, because of their sex, transgender enrollees do not.

52. The medical consensus recognizes that discriminatory exclusions of gender-confirming health care in health insurance plans have no basis in medical science.

Preeminent medical and behavioral health organizations, such as the AMA and the APA, have called for an end to these exclusions.

53. In keeping with such medical consensus, BCBSNC has maintained a Corporate Medical Policy on Gender Confirmation Surgery and Hormone Therapy that acknowledges the general medical necessity of this care since 2011, and CVS similarly maintains coverage criteria policies for hormone replacement therapy as it pertains to the treatment of gender dysphoria.

54. Absent a categorical plan exclusion, claims for gender-confirming care would be evaluated under the BCBSNC and CVS criteria for individual medical necessity and covered under the plan in the same manner any other claims for medical, mental health, or pharmacy benefits.

55. In 2016–2017, the North Carolina State Treasurer’s Office (“Treasurer’s Office”) and the NCSHP Board of Trustees seemingly came to the same conclusion as many other states. Documents obtained through public records requests show that the NCSHP’s staff was aware at least as early as summer 2016 that the plan would need to be amended to comply with the ACA.

56. In late 2016, the then-North Carolina State Treasurer and a majority of the NCSHP Board of Trustees voted to remove the exclusion of gender-confirming health care for the 2017 Health Plans. A “Board of Trustees December 2016 Meeting Preview” prepared by the NCSHP staff advised that under the ACA, the NCSHP “[c]annot categorically exclude all health services related to gender identity,” and “[c]annot

categorically exclude all health services related to gender transition.” That document warned that individuals aggrieved by violations of the ACA “have a private right of action to sue” for such violations.

57. Minutes from the Board of Trustees’ proceedings to eliminate the exclusion indicate that it was advised by legal counsel that “[i]f the Plan continues to receive federal funding without including coverage for the treatment of gender dysphoria, the Plan will be considered non-compliant [with the ACA] as of January 1, 2017. This could result in the suspension or termination of the [federal Retiree Drug Subsidy] funding and/or the possibility of civil action by someone challenging the violation.”

58. In an email about the vote to remove the exclusion, then-Press Secretary for the Treasurer’s Office Brad Young explained, “If the [Health] Plan[s] did not take action to comply with federal law and federal regulation, the [Health] Plan[s] would have risked losing millions of dollars in federal funding and faced discrimination lawsuits for non-compliance.” The resolution that removed the exclusion was only applicable to the 2017 Health Plans.

59. Prior to the removal of the categorical exclusion, the Treasurer’s Office engaged a consulting firm to analyze the applicability of Section 1557 of the ACA to the NCSHP, and to estimate the fiscal impact of removing the gender-confirming health care exclusion. The consulting firm’s November 2016 analysis concluded that the NCSHP is likely a covered entity within the meaning of the ACA and thus needed to comply with the statute’s non-discrimination provisions.

60. Ultimately the report concluded that, “[b]ased on approximately \$3.2 billion of premiums, the cost for the NCSHP is estimated to be between .011% and .027% of premium.” Accordingly, the cost of removing the exclusion of gender-confirming health care in the NCSHP would be minimal.

61. Defendant Dale Folwell, Treasurer-elect at the time and now Treasurer of North Carolina, and Defendant Dee Jones, nevertheless failed to take any action to block the reinstatement of the exclusion of gender-confirming health care in the 2018 Health Plans, and negotiated contracts to ensure the NCSHP would be administered to exclude coverage of such medical care. Defendants Folwell and Jones took the same steps for the 2019 and 2020 Health Plans, which continue to exclude coverage for gender-confirming health care. At a NCSHP Board of Trustees meeting, affected state employees and their dependents testified about the devastating impact the loss of gender-confirming health care benefits has had on them and their families.

62. In a public statement, Treasurer Folwell stated, “Until the court system, a legislative body or voters tell us that we ‘have to,’ ‘when to,’ and ‘how to’ spend taxpayers’ money on sex change operations, I will not make a decision” to treat gender-confirming health care equally in the NCSHP.

63. Accordingly, the 2018, 2019, and 2020 Health Plans categorically exclude coverage for all gender-confirming health care for the purpose of treating gender dysphoria. Specifically, the 2018, 2019, and 2020 Health Plans exclude “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation” and

“[t]reatment or studies leading to or in connection with sex changes or modifications and related care” (hereinafter, the “Exclusion”).

64. Upon information and belief, each year after the NCSHP reinstated the Exclusion, it has been required to execute an agreement indemnifying BCBSNC for any liability BCBSNC incurs in connection with the Exclusion.

65. As a result of this sweeping Exclusion of medically necessary health care coverage, the Health Plans single out employees who are transgender, or who have transgender dependents, for unequal treatment by excluding coverage of medically necessary care for the treatment of gender dysphoria.

C. The State’s Denial of Medically Necessary Care to Plaintiffs

1. Plaintiff Maxwell Kadel

66. Plaintiff Maxwell Kadel (“Max”) is a transgender man. Max was designated female at birth but has a male gender identity. Max lives all aspects of his life in accordance with his male gender identity. Originally born in Nebraska, Max grew up in New Jersey and attended college in Indiana. Max moved to North Carolina almost eight years ago.

67. Max is a former employee of the UNC School of Government. Max began working at UNC in August of 2014 through a temporary job placement agency. Max obtained a permanent position with the UNC School of Government in October 2016, where he worked as an Administrative Support Associate until he accepted another job opportunity outside of state government in November 2019.

68. As a North Carolina state employee, Max was enrolled in the NCSHP, and received health care benefits from this plan as part of his compensation. He contributed each month to the plan via a paycheck deduction.

69. Max was a model employee, even winning a 2018 “Star Heel Award” for his job performance. This annual award program allows departments across UNC to recognize and reward employee excellence.

70. While Max did his best to excel in his position at UNC, Max lives with significant distress caused by gender dysphoria. Max has struggled with gender dysphoria since childhood and was formally diagnosed with gender dysphoria at the age of 33. As part of his prescribed treatment, Max began hormone therapy in June 2016.

71. Max has also obtained a legal name change and has corrected his name and gender marker on his North Carolina state driver’s license, Social Security Card, and U.S. Passport.

72. In 2017, Max considered pursuing chest surgery to create a more typically masculine chest, but he decided to wait and see whether hormone therapy would be sufficient to relieve his gender dysphoria.

73. In 2018, Max, in consultation with his health care providers, determined that chest surgery was necessary to alleviate his gender dysphoria, and he was ready to move forward with further consultations leading to surgery. Max then discovered that the NCSHP had reinstated its categorical Exclusion of gender-confirming health care, effective January 1, 2018, in all of its Health Plans.

74. After the Exclusion was reinstated in 2018, Max was deprived of insurance coverage for medically necessary hormone therapy and gender-confirming surgical care. Max paid out-of-pocket for hormone therapy. During that time, to lessen the financial burden of paying out-of-pocket for testosterone every month, Max often rationed and used vials of testosterone past the expiration date.

75. Max also had to forgo chest surgery, which caused him to experience significant gender dysphoria-related distress on a daily basis. Max wears a binder to compress his chest, but it causes him physical discomfort and breathing difficulties. Max also has asthma, which is exacerbated by having to bind his chest because he could not obtain a permanent medically necessary solution through surgery.

2. Plaintiffs Jason Fleck and Connor Thonen-Fleck

76. Jason Fleck has been employed by UNCG since 1997 and currently works as a Business Application Analyst. Connor Thonen-Fleck (“Connor”), his son, is a transgender young man. Connor was designated female at birth but has a male gender identity.

77. Connor has long excelled academically and is a college freshman. In addition to his rigorous academic responsibilities, Connor also works at a veterinary clinic. Connor is passionate about veterinary medicine and plans to pursue studies and a career in the veterinary field.

78. Connor struggled with gender dysphoria since childhood. His parents realized that Connor demonstrated stereotypically masculine tendencies and characteristics

from a young age. But until Connor began to transition, he was in serious and increasing distress. Ultimately, Connor came out as transgender to his parents and explained his need to transition.

79. Connor and his family developed a plan to secure treatment for his gender dysphoria. Connor initially began seeing a psychiatrist and therapist. By the time he was 15 years old, he had socially transitioned and was living in his authentic male gender identity in all aspects of his life.

80. In January of 2018, Connor began hormone therapy as part of treatment for his gender dysphoria. In March of 2018, Connor obtained a legal name and gender marker change and subsequently obtained a corrected birth certificate and driver's license.

81. Counseling, hormone therapy, and social transition significantly improved Connor's quality of life by reducing his gender dysphoria. However, Connor still experienced significant gender dysphoria on a daily basis because he is a male and had a typically female chest.

82. As part of treatment for his gender dysphoria, Connor's health care providers recommended chest surgery that would give Connor a more typical male chest. This surgery was medically necessary, including to bring Connor's body into better alignment with his gender identity and lived experience and further reduce his gender dysphoria.

83. As a North Carolina state employee, Plaintiff Jason Fleck is enrolled in the NCSHP and receives health care benefits from this plan as part of his compensation. As a

dependent of Mr. Fleck, Connor is also enrolled in the NCSHP. Mr. Fleck contributes each month to the plan via a paycheck deduction.

84. In 2017, Connor was enrolled in the 80/20 Health Plan. His visits with his psychiatrist and therapist were covered then because the categorical Exclusion of gender-confirming health care had been removed from the plan. During the fall of 2017, Connor's father re-enrolled himself and Connor in the 80/20 plan for the 2018 plan year.

85. Mr. Fleck and Connor struggled after that point to obtain coverage of Connor's required office visits to his endocrinologist, who prescribes and monitors Connor's masculinizing hormone therapy. Because Connor has received that care in connection with his gender dysphoria, insurance coverage for those visits has been inconsistent, and in some instances denied. Where coverage has been denied, Mr. Fleck and Connor have been left with full financial responsibility for the cost of the care.

86. On April 9, 2018, CVS issued a Notice of Determination ("ND") denying prior authorization for coverage of Connor's testosterone prescription. The ND explained that the diagnosis code submitted, F64.0 "Transsexualism," was not a covered diagnosis code for prescription testosterone under the NCSHP covering Connor. The ND explained that the prescription would be covered for males with "primary or hypogonadotropic hypogonadism," but not for Connor.

87. Like any person with a medical condition, Connor and his family have done their best to access medically necessary health care. Paying out-of-pocket for health care that has been denied under the plan has been an emotional and financial burden on Connor

and his parents. This became even more acute after the family had to pay out-of-pocket for chest reconstructive surgery for Connor, since living indefinitely without it had become unbearable for him.

88. Before obtaining that surgery, Connor lived with daily distress caused by having a typically female chest, and urgently required gender-confirming surgery to treat his gender dysphoria. Connor and his parents could not easily afford to pay for the surgery out of pocket, as it imposed a financial hardship on his family. Indeed, notwithstanding his full academic workload, Connor worked during high school in an effort to earn and save money so that he could contribute to the out-of-pocket costs for his surgery.

89. Connor's parents witnessed his daily distress due to his inability to access health insurance coverage for medically necessary care and were worried about the effects his untreated gender dysphoria had on his mental and physical health, his education, and his future plans. They finally saved enough for Connor to undergo surgery on May 28, 2018. Although shouldering that expense was stressful for Connor and his family, the relief the surgery provided Connor from his gender dysphoria was critical for his ongoing development and functioning as a young adult.

3. Plaintiff Julia McKeown

90. Plaintiff Julia McKeown ("Julia") is a transgender woman. Julia was designated male at birth, but her gender identity is female. Julia lives in accordance with her female gender identity in all aspects of her life.

91. Originally from Florida, Julia has struggled with gender dysphoria since childhood. Julia had to suppress her gender identity for much of her early life into adulthood. During her time in Florida, Julia completed her higher education, including a bachelor's degree, two master's degrees, and a doctoral degree. During this time, Julia was also battling severe, untreated gender dysphoria.

92. After completing her doctorate, Julia reached the point in 2010 where she could no longer suppress who she really was. Julia made the life-saving decision to live authentically, in accordance with her gender identity. In 2013, Julia began the medical part of her transition and started hormone therapy. Between 2010 and 2016, Julia was progressing in her career, life, and transition.

93. In 2016, Julia accepted a position with NCSU and moved to North Carolina from Florida. Since 2016, Julia has been employed by NCSU as a Teaching Assistant Professor in the Teaching Education and Learning Design Department of the NCSU College of Education. She currently teaches in the Learning, Design, and Technology Program. Julia also serves as the Graduate Coordinator for the Learning, Design, and Technology Program.

94. As a North Carolina state employee, Julia is enrolled in the NCSHP, and receives health care benefits from this plan as part of her compensation. She contributes each month to the plan via a paycheck deduction.

95. While hormone therapy and social transition have been important aspects of Julia's transition, Julia was still dealing with significant distress related to gender

dysphoria. By 2017-2018, Julia's medical provider referred her for vaginoplasty, as part of treatment for her gender dysphoria. After consulting with a surgeon, Julia and her surgeon requested preauthorization for vaginoplasty in or around July 2018. Towards the end of July, the preauthorization was denied because of the reinstatement of the Exclusion of gender-confirming health care in the NCSHP.

96. Julia appealed that decision to BCBSNC, but was informed that they only administer the plan and could not resolve the issue. Julia also filed a grievance with the NCSHP Section 1557 Coordinator after the denial of preauthorization. The grievance was denied in or around August 2018.

97. At that point in her life, Julia could no longer wait for surgery. Left with no other options, Julia made the difficult decision to withdraw funds from her retirement and savings accounts, in order to pay for her medically necessary surgery. Julia's surgical costs totaled over \$14,000.00.

98. Julia is also prescribed hormone therapy as part of treatment for her gender dysphoria, which is also excluded under the NCSHP. The Exclusion also prohibits Julia from seeking future medically necessary gender-confirming health care.

4. Plaintiffs Michael D. Bunting, Jr. and C.B.

99. Michael D. Bunting, Jr. was employed by UNC beginning in 1990 until his retirement nearly 30 years later. C.B., his son, is a transgender boy. C.B. was designated female at birth but has a male gender identity. C.B.'s mother, Shelley K. Bunting, is a

nurse practitioner in private practice. Mr. Bunting and Ms. Bunting bring this suit on their son's behalf.

100. C.B. is a high school student. He likes swimming, skateboarding, and playing video games. His favorite subjects in school are math and science.

101. Ever since he was a young child, C.B. would reject stereotypically female clothing and would dress in a more masculine manner. Beginning at a young age, C.B. would refuse to wear stereotypically female swimming suits, opting instead for board shorts and a shirt. In late 2016, he began wearing a short, typically masculine haircut.

102. Though C.B. always got along with people and has many friends, he exhibited high levels of anxiety, which his parents later came to understand was associated with his untreated gender dysphoria.

103. In early 2017, C.B. informed his parents that he was transgender. Soon after, C.B. and his parents met with a therapist in April 2017. After consultation with his family and therapist, C.B. asked to be placed on treatment to delay female puberty.

104. In April of 2017, C.B. and his parents sought an appointment with the Duke Child and Adolescent Gender Care Clinic ("Duke"), ultimately scheduled for August 2017.

105. During the summer of 2017, C.B. socially transitioned to living as his true self, informing friends and family of his male gender identity, wearing more masculine clothes, and living openly as the boy he is. However, as his breasts began to develop during the summer, C.B. began to experience additional anxiety.

106. As a result of the distress associated with his birth-designated sex (female), C.B. was diagnosed with gender dysphoria. In August 2017, C.B. began obtaining care from medical and mental health professionals and was prescribed puberty-delaying treatment, in the form of an implant, as part of his treatment for gender dysphoria.

107. Following the beginning of C.B.'s treatment, C.B.'s parents noticed that the anxiety he had been experiencing diminished and that he was now a happy, outgoing, and personable teenage boy.

108. C.B. is treated and known as a boy at school and in all other aspects of his life. He legally changed his name to a more typically male name in the Spring of 2018.

109. Plaintiff Michael D. Bunting, Jr. enrolled in the NCSHP as a North Carolina state employee, and he remains enrolled and continues to receive health care benefits as a retiree. As a dependent of Mr. Bunting, C.B. is also enrolled in the NCSHP. Mr. Bunting contributes a premium each month to the plan.

110. Because in 2017 the NCSHP did not contain an Exclusion for gender-confirming health care, C.B.'s puberty-delaying treatment was covered by the NCSHP.

111. C.B.'s puberty-delaying implant only lasted 12 to 18 months. Accordingly, C.B. needed the implant to be removed and replaced in early 2019.

112. However, in mid-2018, Ms. Bunting learned of the reinstitution of the Exclusion of gender-confirming care within the NCSHP.

113. Worried that they could not afford out-of-pocket the puberty-delaying treatment that C.B. needed, Mr. Bunting and Ms. Bunting communicated with the NCSHP

Board of Trustees, urging them to once again eliminate the Exclusion of gender-confirming health care within the NCSHP, with no success.

114. In mid-December 2018, following the lack of action by the NCSHP Board of Trustees at their December 2018 meeting to eliminate the Exclusion, Mr. Bunting and Ms. Bunting decided to purchase an additional health insurance plan that would cover puberty-delaying treatment for C.B. Through the federally-run ACA health care exchange they purchased an insurance plan from BCBSNC. Though Mr. Bunting and C.B. remained enrolled in the NCSHP and will continue to do so, purchasing additional coverage for C.B. was necessary in order for the Bunting family to be able to afford C.B.'s gender-confirming care. As a result, Mr. Bunting and Ms. Bunting had to pay an additional monthly premium and a \$6,750.00 deductible for C.B., separate and apart from C.B.'s existing coverage under the NCSHP.

115. In early 2019, C.B. began obtaining puberty-delaying treatment via injection, rather than a longer-lasting implant, because that was the only puberty-delaying treatment on the formulary of the additional health insurance purchased to supplement the coverage under the NCSHP.

116. The additional costs associated with C.B.'s gender-confirming care and the lack of coverage under the NCSHP due to the discriminatory Exclusion contributed to Mr. Bunting's decision in early January 2019 to retire from UNC. By the date of his retirement, Mr. Bunting had dedicated nearly 30 years of service to UNC and the North Carolina Tar Heels.

117. Mr. Bunting and C.B. remain enrolled in the NCSHP as a retiree and dependent, respectively, following Mr. Bunting's retirement on April 1, 2019. C.B. now receives masculinizing hormone therapy as part of his gender-confirming care. While the family no longer purchases separate ACA coverage, C.B.'s hormone therapy is not covered by NCSHP and they must pay for that care out-of-pocket.

118. The Exclusion stigmatizes C.B. as a transgender person and has caused pain, anger, and distress to C.B., Mr. Bunting, and the rest of the Bunting family.

5. Plaintiff Sam Silvaine

119. Plaintiff Sam Silvaine ("Sam") is transgender. Sam was designated female at birth but has a male affirmed sex. Sam lives all aspect of his life in accordance with his gender identity.

120. Sam moved to North Carolina in 2012 to pursue a master's degree. After obtaining his master's degree, Sam accepted a two-year fellowship with NCSU as a post-master's counseling fellow and was an employee of NCSU.

121. As a North Carolina state employee, Sam was enrolled in the NCSHP, and received health care benefits from this plan as part of his compensation. Sam was enrolled in the 80/20 NCSHP for plan years 2016, 2017, and 2018.

122. In January 2017, Sam began therapy as treatment for his gender dysphoria. Sam began hormone therapy in April 2017. Hormone therapy masculinized Sam's voice, some of his secondary sex characteristics, and physical appearance. As his body became more masculine and in greater alignment with his gender identity, his typically female chest

began to be even more noticeable to Sam. The marked incongruence increased Sam's gender dysphoria.

123. Sam used a binder daily to compress his chest. While binding lessened his gender dysphoria to an extent, it was not a permanent solution and caused Sam physical discomfort and restricted his physical activities. Sam's ability to do the things he loved, like hiking, backpacking, and climbing, were limited because of the need to wear the binder. The appearance of Sam's chest also presented a safety issue for Sam. Sam lives and is generally recognized as male in all aspects of his life. Being visibly male with a typically female chest invited undesired, invasive, and dangerous attention.

124. Eventually Sam, in consultation with and support from his health care providers, made the decision to seek chest surgery as part of treatment for his gender dysphoria.

125. In 2017, Sam's NCSHP plan did not contain a categorical Exclusion for gender-confirming health care. Sam's counseling and hormone therapy were covered. In August 2017, Sam and his surgeon sought prior authorization for reconstructive chest surgery. The prior authorization process took until October 2017 and at that time, the earliest available surgery date that Sam could obtain was in March 2018. Sam accepted the March 2018 date in order to avoid an even greater delay in the treatment he required.

126. After the categorical Exclusion of gender-confirming care was reinstated on January 1, 2018, the prior authorization for Sam's surgery was rendered invalid.

127. When Sam found out that his health insurance was no longer going to cover the surgery he desperately needed, he was devastated mentally and emotionally. Like other transgender North Carolina state employees who suddenly found themselves without health insurance coverage for their medically necessary health care, Sam was placed in a difficult position.

128. Sam was living with severe gender dysphoria and ultimately, he could not delay the surgery. Sam paid for the surgery out of pocket and underwent chest surgery on March 1, 2018.

129. The surgery proved life-changing for Sam and has significantly reduced the distress caused by his gender dysphoria. Sam has not been reimbursed by Defendants for his surgery costs or other out-of-pocket costs he incurred due to the Exclusion of gender-confirming health care in the 2018 plan.

6. Plaintiff Dana Caraway

130. Plaintiff Dana Caraway (“Dana”) is a transgender woman. Dana was designated male at birth, but her gender identity is female. Dana lives in accordance with her female gender identity in all aspects of her life.

131. Dana is in the process of seeking a court-ordered change of name to ensure that her government identity documents and records accurately reflect the name she assumed as part of her social transition, but that process has been delayed due to the COVID-19 pandemic.¹

¹ Ms. Caraway’s employee records thus still reflect her former name of Dowd Caraway.

132. Dana is employed by the State of North Carolina, Department of Public Safety, where she has worked as an officer since 1994. When she began her employment, the agency was called the Department of Correction; it was merged with several other agencies to make up the current Department of Public Safety in 2012. She has been very successful in her position. She was promoted to the position of supervisor in the Division of Adult Correction and Juvenile Justice, and currently holds the rank of Sergeant.

133. As a North Carolina state employee, Dana is enrolled in the NCSHP, and receives health care benefits from this plan as part of her compensation. She contributes each month to the plan via a paycheck deduction.

134. Dana was diagnosed with gender dysphoria in 2017, and began a process of social, legal, and medical transition. As part of her treatment, she has received hormone replacement therapy for several years, which feminized her appearance, up to a point.

135. As Dana's appearance has changed, it has caused her more distress to continue to have a typically male chest, genitalia, and voice. It also creates a safety issue to appear female but to have a typically male-sounding voice, especially given the prison environment in which Dana works.

136. To treat her gender dysphoria, Dana urgently requires gender reassignment surgery for her chest, genitalia, face, and voice. Dana is currently scheduled to have gender-confirming chest and genital surgery this year, as well as voice feminization surgery. She expects to have facial gender transition surgery next year. Because of the

Exclusion, Dana will have no choice but to pay out-of-pocket for these surgeries, which will impose financial hardship on her.

137. Dana’s surgeon sought preauthorization for Dana’s upcoming chest and genital surgeries. On June 19, 2020, BCBSNC denied coverage, for the stated reason that “the requested service is not a covered benefit” because of the Exclusion for “treatments ... in connection with sex changes or modifications.”

138. Because of the Exclusion of gender-confirming health care from the Health Plans, all Plaintiffs have suffered emotional distress, humiliation, degradation, embarrassment, emotional pain and anguish, violation of their dignity, loss of enjoyment of life, and other compensatory damages, in an amount to be established at trial.

CLAIMS FOR RELIEF

COUNT I

Deprivation of Equal Protection U.S. Const. Amend. XIV

(All Plaintiffs Against Defendants Dale Folwell and Dee Jones)

139. Plaintiffs re-allege and incorporate by reference each allegation of the prior paragraphs as though fully set forth herein.

140. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

141. Plaintiffs state this cause of action against Defendants Dale Folwell and Dee Jones, in their official capacities, for purposes of seeking declaratory and injunctive relief,

and challenge their adoption and enforcement of the discriminatory sex-based classifications in the NCSHP Health Plans both facially and as applied to Plaintiffs.

142. Each Defendant is a person acting under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiffs equal protection of the law.

A. Discrimination on the Basis of Sex

143. Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

144. Discrimination on the basis of sex characteristics, gender, gender identity, nonconformity with sex stereotypes, transgender status, and gender transition is discrimination on the basis of sex.

145. By categorically excluding, “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation,” and “[t]reatments or studies to or in connection with sex changes and modifications and related care,” Defendants are engaging in constitutionally impermissible sex-based discrimination.

146. Through their duties and actions to design, negotiate, administer, and implement the NCSHP’s categorical Exclusion, Defendants Folwell and Jones have unlawfully discriminated—and continue to unlawfully discriminate—against Plaintiffs based on sex-related considerations.

147. The NCSHP’s categorical Exclusion treats Plaintiffs differently from other persons who are similarly situated.

148. Under the NCSHP's categorical Exclusion, health plan participants who require gender-confirming care, or whose dependents require gender-confirming care, are denied coverage for that medically necessary care, while other health plan participants can access the same care as long as it is not required for gender transition.

B. Discrimination on the Basis of Transgender Status

149. By categorically excluding coverage for gender-confirming health care in the NCSHP Health Plans, Defendants are engaging in constitutionally impermissible discrimination on the basis of transgender status.

150. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to strict, or at least heightened, scrutiny.

- a. Transgender people have suffered a long history of discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.
- b. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit state and federal protections to protect them against discrimination.
- c. A person's transgender status bears no relation to a person's ability to contribute to society.

- d. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.
- e. Gender identity generally is fixed at an early age and highly resistant to change through intervention.

151. Because the NCSHP's categorical Exclusion on its face and as applied to Plaintiffs deprives transgender enrollees of their right to equal dignity, liberty, and autonomy by stigmatizing them and branding them as second-class citizens, it denies transgender persons equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment. The NCSHP's categorical Exclusion similarly serves to stigmatize NCSHP enrollees whose dependents are transgender; it brands them as second-class citizens and deprives them of their equal treatment and dignity.

152. Defendants' discriminatory Exclusion of gender-confirming care is not narrowly tailored or substantially related to any compelling or important government interest. Indeed, it is not even rationally related to any legitimate government interest.

153. Without injunctive relief from Defendants' discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT II
Violation of Title IX of the Education Amendments of 1972
20 U.S.C. § 1681, *et seq.*

(Plaintiffs Maxwell Kadel, Michael D. Bunting, Jr., and C.B. against Defendant University of North Carolina at Chapel Hill; Plaintiffs Julia McKeown and Sam

Silvaine against Defendant North Carolina State University; Plaintiffs Jason Fleck and Connor Thonen-Fleck against Defendant University of North Carolina at Greensboro)

154. Plaintiffs re-allege and incorporate by reference each allegation of the prior paragraphs as though fully set forth herein.

155. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681.

156. Under Title IX, discrimination on the basis of sex includes, but is not limited to, discrimination based on sex characteristics, gender, nonconformity with sex stereotypes, transgender status, and gender transition.

157. Defendants UNC, NCSU, and UNCG are recipients of federal financial assistance from the Department of Health and Human Services, the Department of Agriculture, and the Department of Education, and are therefore subject to Title IX.

158. By offering Health Plans to their employees with categorical exclusions for gender-confirming care, Defendants UNC, NCSU, and UNCG have and continue to discriminate on the basis of sex against NCSHP enrollees who require gender-confirming care, or whose dependents require gender-confirming care.

159. In offering Health Plans that categorically exclude coverage of gender-confirming health care on the basis of sex, Defendants UNC, NCSU, and UNCG deny enrollees who require gender-confirming care, or whose dependents require gender-

confirming care, the benefits of and subject them to discrimination in educational programs and activities. This impermissible discrimination based on sex, including sex characteristics, nonconformity with sex stereotypes, transgender status, and gender transition, violates Title IX.

160. By knowingly and intentionally offering health insurance that denies coverage to Plaintiffs on the basis of sex, Defendants UNC, NCSU, and UNCG harm Plaintiffs by: stigmatizing them; treating them as a secondary class compared to other non-transgender enrollees who have access to the same care for themselves or their non-transgender dependents; and causing the transgender health plan participants mental and physical health complications due to their inability to access medically necessary health care.

161. By knowingly and intentionally offering a compensation package that denies fringe benefits to Plaintiffs on the basis of sex, Defendants UNC, NCSU, and UNCG have intentionally violated Title IX, for which Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

162. Defendants UNC, NCSU, and UNCG fund the health plans offered through the NCSHP by making direct financial contributions for covered employees.

163. As “employing units,” Defendants UNC, NCSU, and UNCG play an active role in collecting payments owed to the NCSHP, N.C. Gen. Stat. § 135-48.37A(b), and in settling claims regarding health benefits, *id.* § 135-48.46.

164. Without injunctive relief from Defendants’ discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT III
Violation of the Patient Protection and Affordable Care Act
42 U.S.C. § 18116

(All Plaintiffs Against Defendant North Carolina State Health Plan for Teachers and State Employees)

165. Plaintiffs re-allege and incorporate by reference each allegation of the prior paragraphs as though fully set forth herein.

166. Section 1557 of the ACA, 42 U.S.C. § 18116, provides, in relevant part that, “an individual shall not, on the ground prohibited under ... title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, et seq.)”—which prohibits discrimination “on the basis of sex”—“be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance.”

167. Discrimination on the basis of sex characteristics, gender, nonconformity with sex stereotypes, transgender status, and gender transition are all encompassed by the prohibition of discrimination on the basis of sex under Section 1557.

168. Upon information and belief, Defendant NCSHP receives federal financial assistance such that it is a “covered entity” for purposes of Section 1557 of the ACA. Indeed, Defendant NCSHP has acknowledged in its publicly available Policies and Procedures, effective July 15, 2016, that it “receives funding from the [federal] Department

of Health and Human Services” and “is subject to Section 1557 of the Affordable Care Act (42 U.S.C. [§] 18116) and its implementing regulations at 45 CFR Part 92.”

169. A covered entity, such as Defendant NCSHP, cannot provide or administer health care insurance coverage which contains a categorical Exclusion from coverage for gender-confirming health care, or otherwise impose limitations or restrictions on coverage for specific health services related to gender transition if such limitation or restriction results in discrimination against a transgender individual.

170. Because Defendant NCSHP receives federal funding that flows to health programs or activities, Plaintiffs have a right under Section 1557 to receive health insurance through the NCSHP free from discrimination on the basis of sex, sex characteristics, gender, nonconformity with sex stereotypes, transgender status, or gender transition.

171. Defendant NCSHP has discriminated against Plaintiffs on the basis of sex in violation of Section 1557 and has thereby denied Plaintiffs the full and equal participation in, benefits of, and right to be free from discrimination in a health program or activity.

172. By categorically excluding all coverage for medically necessary “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation,” and “[t]reatments or studies to or in connection with sex changes or modifications and related care,” Defendant NCSHP has drawn a classification that has unlawfully discriminated—and continues to discriminate—against Plaintiffs based on sex, in violation of Section 1557.

173. As a result of the Exclusion, Plaintiffs have suffered harm, including but not limited to financial harm. By knowingly and intentionally offering health care coverage to Plaintiffs that discriminates on the basis of sex, Defendant NCSHP has intentionally violated the ACA, for which Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

174. Without injunctive relief from Defendants' discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT IV
Violation of Title VII of the Civil Rights Act of 1964
42 U.S.C. § 2000e, *et seq.*

(Plaintiff Maxwell Kadel against Defendant University of North Carolina at Chapel Hill; Plaintiffs Julia McKeown and Sam Silvaine against Defendant North Carolina State University; Plaintiff Dana Caraway against Defendant State of North Carolina, Department of Public Safety; Plaintiff Dana Caraway against Defendant North Carolina State Health Plan for Teachers and State Employees)

175. Plaintiffs re-allege and incorporate by reference each allegation of the prior paragraphs as though fully set forth herein

176. Title VII provides that it is “an unlawful employment practice for an employer” to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex” or to “limit, segregate, or classify [its] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

adversely affect his status as an employee, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a).

177. Plaintiffs Kadel, McKeown, Silvaine, and Caraway are, or were, each an "employee" within the meaning of Title VII. Plaintiffs Kadel, McKeown, Silvaine, and Caraway timely bring this claim after exhausting administrative remedies with the U.S. Equal Employment Opportunity Commission and receiving notices of their right to sue.

178. Defendants University of North Carolina at Chapel Hill; North Carolina State University; and State of North Carolina, Department of Public Safety are each an "employer" within the meaning of Title VII.

179. Government entities that participate in the NCSHP, including the Department of Public Safety, have delegated significant control over employee health benefits to the NCSHP.

180. In establishing the scope of insurance coverage and administering that coverage, the NCSHP is an agent of all employers under Title VII who participate in NCSHP, including but not limited to the Department of Public Safety.

181. Additionally, the NCSHP is a joint employer with participating government employers under Title VII, including but not limited to the Department of Public Safety. Those government employers contract with NCSHP for the provision of health coverage to their employees. By determining whether to exclude gender-confirming health care, the NCSHP shares responsibility for essential terms and conditions of employment for those employees, and exercises significant control over those employees by determining

components of their “compensation, terms, conditions, or privileges of employment” under Title VII.

182. An employer-sponsored health plan is part of the “compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1).

183. The denial of medically necessary health care coverage also “adversely affects [one’s] status as an employee.” 42 U.S.C. § 2000e-2(a)(2).

184. Under Title VII, discrimination “because of ... sex” includes discrimination on the basis of transgender status, gender nonconformity, gender identity, and gender transition.

185. Plaintiffs have a right under Title VII to compensation, terms, conditions, or privileges of employment, including an employer-sponsored health plan, free from discrimination because of their sex, transgender status, gender nonconformity, gender identity, or gender transition.

186. By offering coverage that excludes “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation” and “[t]reatment or studies leading to or in connection with sex changes or modifications and related care,” Defendants subject Plaintiffs to discrimination because of their sex in the compensation, terms, conditions, and privileges of their employment.

187. As a result of the Exclusion, Plaintiffs have suffered harm, including but not limited to financial and emotional harm. By knowingly and intentionally offering health care coverage to Plaintiffs that discriminates because of their sex, Defendants have

intentionally violated Title VII, for which Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

188. Without injunctive relief from Defendants' discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs who continue to receive health coverage through NCSHP will continue to suffer irreparable harm in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants on all claims, as follows:

A. Enter a declaratory judgement that Defendants, including through enforcement of the North Carolina State Health Plan for Teachers and State Employees' categorical Exclusion of treatment for gender-confirming care, violated Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment, Title IX, the ACA, and Title VII; and that the North Carolina State Health Plan for Teachers and State Employees' categorical Exclusion of gender-confirming health care discriminates on its face and as applied against transgender state employees and enrollees because of sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment, and on the basis of sex in violation of Title IX, the ACA, and Title VII;

B. Preliminarily and permanently enjoin Defendants, their agents, employees, successors, and all others acting in concert with them, from administering or offering health coverage that categorically excludes coverage for gender-confirming health care;

C. Award compensatory and consequential damages in an amount that would fully compensate Plaintiffs for their financial harm, emotional distress and suffering, embarrassment, humiliation, pain and anguish, violations of their dignity, and other damages that have been caused by Defendant's conduct in violation of Title IX, the ACA, and Title VII;

D. Award pre- and post-judgement interest;

E. Award of Plaintiffs' costs, expenses, and reasonable attorneys' fees incurred in this action pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k), and any other applicable laws;

F. Other legal and equitable or injunctive relief as this Court deems just and appropriate; and

G. The declaratory relief requested in this action is also sought against Defendants' officers, agents, servants, employees, and attorneys, as well as any other persons who are in active concert or participation with them.

* * *

Dated: March 9, 2021

Respectfully submitted,

/s/ Amy E. Richardson

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* Appearing by special appearance pursuant to L.R. 83.1(d).

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: March 9, 2021

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL, *et al.*;

Plaintiffs,

v.

1:19-cv-00272-LCB-LPA

DALE FOLWELL, in his official capacity
as State Treasurer of North Carolina, *et al.*,

Defendants.

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* THE
AMERICAN MEDICAL ASSOCIATION AND SEVEN ADDITIONAL
HEALTH CARE ORGANIZATIONS IN SUPPORT OF PLAINTIFFS**

Pursuant to LR 7.5(b), *Amici Curiae* seek leave to file an *amicus curiae* brief in support of Plaintiffs' Motion for Summary Judgment against Defendants Dale Folwell, *et al.* Proposed *Amici Curiae* are eight leading medical organizations: the American Academy of Pediatrics, American College of Obstetricians and Gynecologists, the American Medical Association, American Psychiatric Association, the Endocrine Society, the North American Society for Pediatric and Adolescent Gynecology, National Association of Nurse Practitioners in Women's Health, and the Society of OB/GYN Hospitalists.

IDENTITY OF *AMICI CURIAE*

Amici curiae are eight leading medical, mental health, and other health care organizations. Collectively, *amici* represent hundreds of thousands of physicians and

mental-health professionals, including specialists in family medicine, mental health treatment, internal medicine, endocrinology, obstetrics and gynecology, and thousands of nurses.

Amicus the American Academy of Pediatrics (“AAP”) represents 67,000 primary care pediatricians, pediatric medical subspecialists, and surgical specialists who are committed to the attainment of optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. In its dedication to the health of all children, the AAP strives to improve health care access and eliminate disparities for children and teenagers who identify as lesbian, gay, bisexual, transgender, or for those questioning their sexual or gender identity.

Amicus the American College of Obstetricians and Gynecologists (“ACOG”) is a national organization of more than 62,000 women’s health care physicians and medical professionals. ACOG’s membership represents more than 90 percent of all board-certified obstetrician-gynecologists (ob-gyns) in the United States. ACOG advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women’s health care. ACOG has appeared as *amicus curiae* in courts throughout the country. ACOG’s briefs and medical practice guidelines have been cited by numerous authorities, including the U.S. Supreme Court.

Amicus the American Medical Association (“AMA”) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA’s policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including North Carolina.

Amicus American Psychiatric Association (“APA”), with more than 37,400 members, is the Nation’s leading organization of physicians who specialize in psychiatry. The American Psychiatric Association has participated in numerous cases in the Supreme Court and in the United States Courts of Appeals. The American Psychiatric Association opposes all public and private discrimination against transgender and gender-diverse individuals, including in health care. See Jack Drescher *et al.*, Am. Psychiatric Ass’n, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* 1 (2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender->

Diverse-Individuals.pdf [hereinafter “Am. Psychiatric Ass’n, *Position Statement on Discrimination*”].

Amicus the Endocrine Society is the oldest and largest global professional membership organization representing the field of endocrinology. The Endocrine Society’s more than 18,000 members care for patients and are dedicated to advancing hormone research and excellence in the clinical practice of endocrinology, focusing on diabetes, obesity, osteoporosis, infertility, rare cancers, and thyroid conditions.

Amicus the North American Society for Pediatric and Adolescent Gynecology (“NASPAG”) is dedicated to providing multidisciplinary leadership in education, research and gynecologic care to improve the reproductive health of youth. Its focus is to serve and be recognized as the lead provider in PAG education, research and clinical care, conduct and encourage multidisciplinary and inter-professional programs of medical education and research in the field of PAG, and advocate for the reproductive well-being of children and adolescents and the provision of unrestricted, unbiased and evidence based practice of PAG.

Amicus the National Association of Nurse Practitioners in Women’s Health (“NPWH”) is a national professional membership organization. NPWH is the nation’s leading voice for courageous conversations about women’s health. NPWH represents nearly 12,000 certified women’s health nurse practitioners in the United

States. In its clinics and in its culture, women's health nurse practitioners champion state-of-the-science healthcare that holistically addresses the unique needs of women across their lifetimes. NPWH elevates the health issues others overlook and compel attention on women's health from providers, policymakers, and researchers.

Other advanced practice registered nurses rely on NPWH for authoritative resources and education that improve women's health and wellness through evidence-based practice. NPWH pioneers policies to address gender disparities and forges strategic partnerships that advance health equity and holistic models of care. NPWH's mission is to ensure the provision of quality primary and specialty healthcare to women of all ages by women's health and women's health-focused nurse practitioners and includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

Since its inception in 1980, NPWH has been a trusted source of information on nurse practitioner education, practice, and women's health issues. NPWH works with a wide range of individuals and groups within nursing, medicine, the healthcare industry, and the women's health community.

Amicus the Society of OB/GYN Hospitalists ("SOGH") is a national organization of more than 1,500 women's healthcare physicians and medical professionals and is the only national medical subspecialty organization whose

members specialize in inpatient obstetrics and gynecologic care. The SOGH is committed to improving outcomes for hospitalized women and to patient safety and quality care for all women. As frontline, hospital-based providers of women's healthcare, the SOGH is uniquely positioned to advocate for justice and tolerance through evidence-based care, research, and policy development. The SOGH rejects discriminatory practices that jeopardize patient care.

INTEREST OF AMICI CURIAE

All *amici* share a commitment to improving the physical and mental health of all Americans—regardless of gender identity—and to informing and educating lawmakers, the judiciary, and the public regarding the public-health impacts of laws and policies. *Amici* submit this brief to inform the Court of the medical consensus regarding what it means to be transgender; the protocols for the treatment of gender dysphoria, which include living in accordance with one's gender identity in all aspects of life; and the predictable harms to the health and well-being of transgender individuals who are denied access to necessary medical treatments to do so.

SERVICE TO THE COURT

Amici feel a responsibility to inform this Court about the nearly-universally agreed upon best practices when treating transgender individuals for gender dysphoria and providing gender-conforming care. *Amici*, as leading healthcare providers both within the State of North Carolina and beyond, are in a unique

position to inform the Court about the proper treatments for people experiencing gender dysphoria, the negative health outcomes when gender dysphoria is left untreated, and other health concerns that could arise from lack of coverage by State health care plans. *Amici* believe that the information contained in their proposed brief will assist the Court in its deliberations on the present motion by presenting a complete and accurate description of the medical conditions and treatments at issue in the pending case.

Proposed *Amici Curiae* therefore respectfully request that the Court grant them permission to file an *amicus curiae* brief in support of Plaintiffs, Mr. Maxwell Kadel, *et al.*, in support of their motion for summary Judgment against Defendants Folwell, *et al.* A proposed order is attached.

Counsel for *Amici Curiae* reached out to the parties to seek consent to file this motion. Counsel for Plaintiffs consented to the filing of the amicus brief, and counsel for the Defendants did not.

Respectfully submitted, this the 30th day of November, 2021.

/s/ Sarah M. Saint

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's Electronic Filing System to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

Respectfully submitted, this the 30th day of November, 2021.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to LR 7.5(e) I certify that all *amici curiae* are non-profit organizations. They do not have parent corporations and do not issue stock.

Dated: November 30, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-272-LCB

MAXWELL KADEL; JASON FLECK;
CONNOR THONEN-FLECK; JULIA
MCKEOWN; MICHAEL D.
BUNTING, JR.; C.B., *by his next*
friends and parents, MICHAEL D.
BUNTING, JR. and SHELLEY K.
BUNTING; SAM SILVAINE, and
DANA CARAWAY.

Plaintiffs,

v.

DALE FOLWELL, *in his official*
capacity as State Treasurer of North
Carolina; DEE JONES, *in her official*
capacity as Executive Administrator of
the North Carolina State Health Plan
for Teachers and State Employees;
NORTH CAROLINA STATE
HEALTH PLAN FOR TEACHERS
AND STATE EMPLOYEES; NORTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY.

Defendants.

**STATE HEALTH PLAN DEFENDANTS’
MOTION FOR PARTIAL SUMMARY JUDGMENT
(ORAL ARGUMENT REQUESTED)**

Defendants, the North Carolina State Health Plan for Teachers and
State Employees (“the State Health Plan”), Dale Folwell (*in his official capacity*

as State Treasurer of North Carolina); and Dee Jones (*in her official capacity as Executive Administrator of the State Health Plan*), by and through undersigned counsel, do hereby move for partial summary judgment on Count III (the Affordable Care Act claim) and Count IV (the Title VII claim) on the grounds that there are no genuine issues of material fact as to these Counts and Defendants are therefore entitled to judgment as a matter of law.

In support of this motion, the State Health Plan Defendants rely on their memoranda of law and the declarations, deposition testimony, and exhibits filed herewith.

WHEREFORE, The State Health Plan Defendants respectfully request that this Court Grant its motion for partial summary judgment and enter judgment for Defendant State Health Plan regarding Count III (the Affordable Care Act claim) and Count IV (the Title VII claim).

The State Health Plan Defendants believe that oral argument is warranted in this case and would be helpful to the Court and therefore respectfully request, pursuant to L.R. 7.3(c), the opportunity to present oral arguments on this Motion.

Respectfully submitted, this the 30th day of November, 2021.

/s/ John G. Knepper

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will provide electronic notification to all counsel of records in this matter.

This the 30th day of November, 2021.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-00272

MAXWELL KADEL; JASON
FLECK; CONNOR THONEN-
FLECK; JULIA MCKEOWN;
MICHAEL D. BUNTING, JR.; C.B.,
by his next friends and parents,
MICHAEL D. BUNTING, JR. and
SHELLEY K. BUNTING; SAM
SILVAINE, and DANA CARAWAY.

Plaintiffs,

v.

DALE FOLWELL, *in his official*
capacity as State Treasurer of North
Carolina; DEE JONES, *in her*
official capacity as Executive
Administrator of the North Carolina
State Health Plan for Teachers and
State Employees; NORTH
CAROLINA STATE HEALTH
PLAN FOR TEACHERS AND
STATE EMPLOYEES; NORTH
CAROLINA DEPARTMENT OF
PUBLIC SAFETY.

Defendants.

**STATE HEALTH PLAN DEFENDANTS' MEMORANDUM
IN SUPPORT OF PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

NATURE OF THE MATTER BEFORE THIS COURT 1

FACTS IN EVIDENCE..... 4

1. The State Health Plan..... 4

2. Plan Implementation..... 5

 A. Plan Benefits..... 5

 B. Gender Dysphoria..... 7

 C. Plan Exclusions..... 8

 D. Plan Exclusions in Practice..... 9

3. Dana Caraway’s Title VII Claim 13

STANDARD OF REVIEW 19

ARGUMENT 20

1. The State Health Plan is Not Liable as Plaintiff Caraway’s “Employer”
under the Fourth Circuit’s Agency and Control Test..... 20

 A. The State Health Plan can only be liable to Caraway under Title VII if
the Plan and DPS are “joint employers.”..... 20

 B. Caraway has failed to show that DPS and the Plan are “joint
employers” under the Fourth Circuit’s hybrid test..... 21

2. The State Health Plan is not liable under Section 1557 of the Affordable
Care Act because it is explicitly excluded from Section 1557 liability by the
current U.S. Department of Health and Human Services Regulation. 28

CONCLUSION..... 32

CERTIFICATE OF WORD COUNT 34

TABLE OF AUTHORITIES

CASES

Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994)	21
Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep’t of Health & Hum. Servs., No.20-11297-PBS, 2021 WL 3667760 (D.Mass. Aug. 18, 2021).....	29
Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993)	1
Butler v. Drive Auto. Indus. of Am., 793 F.3d 404 (4th Cir. 2015)	passim
Callum v. CVS Health Corp., 137 F.Supp.3d 817 (D.S.C. 2015).....	30
Chevron v. NRDC, 467 U.S. 837 (1984)	30, 31
Crowder v. Fieldcrest Mills Inc., 569 F. Supp 825 (M.D.N.C. 1983).....	22
Currie v. Grp. Ins. Comm’n, 290 F.3d 1 (1st Cir. 2002).....	31
Fain v. Crouch, No. CV 3:20-740,2021 WL 2657274 (S.D.W.Va. June 28, 2021).....	30
Geduldig v. Aiello, 417 U.S. 484 (1974)	1, 3
Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562 (4th Cir. 2015)	19
Lange v. Houston Cnty., 499 F.Supp.3d 1258 (M.D.Ga. 2020)	2

Lissau v. Southern Food Service, Inc., 159 F.3d 177 (4th Cir. 1998)	20, 21
Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999)	31
New York v. U.S. Dep't of Health & Hum. Servs., No.1:20-cv-05583 (S.D.N.Y. Doc. No. 145, Aug. 23. 2021)	30
Othi v. Holder, 734 F.3d 259 (4th Cir. 2013)	30
Religious Sisters of Mercy v. Azar, 513 F.Supp.3d 1113 (D.N.D.2021)	30
Schafer v. Astrue, 641 F.3d 49 (4th Cir. 2011)	30
Union Pac. R.R. Employment Practices Litig., 479 F.3d 936 (8th Cir. 2007)	3
Victim Rts. L. Ctr. v. Cardona, 2021 WL 3185743 (CV 20-11104, D.Mass. July 28, 2021)	31
Walker v. Azar, No.20-cv-2834, 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020)	29
Wash. v. U.S. Dep't of Health & Hum. Servs., 482 F.Supp.3d 1104 (W.D.Wash. 2020)	29
Whitman-Walker Clinic v. U.S. Dep't of Health & Hum. Servs., 485 F.Supp.3d 1 (D.D.C.2020)	29
Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991)	4
Williams v. Hansen, 326 F.3d 569 (4th Cir. 2003)	3

STATUTES

42 U.S.C. §18116 (§1557 of the Affordable Care Act) 2, 28

42 U.S.C. §18116(c) (§1557 of the Affordable Care Act) 28, 31

42 U.S.C. §2000e(b)(Title VII) 20

42 U.S.C. §2000e-2(a)(1)(Title VII) 20

OTHER AUTHORITIES

FEDERAL TRADE COMMISSION, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF
MAIL-ORDER PHARMACIES (2005) at (i), available at <https://bit.ly/3d2fIGE> .. 6

Tricia Lee Wilkins, Prior Authorization and Utilization Management
Concepts in Managed Care Pharmacy, 25 J. MANAGED CARE & SPECIALTY
PHARMACY 641, 641 (2019)..... 6

REGULATIONS

§1557. 85 Fed. Reg. 37172-74..... 31

45 C.F.R. §92.3(b),(c) (2021) 2, 29

85 Fed. Reg. 37160 (June 19, 2020) Nondiscrimination in Health and Health
Education Programs or Activities, Delegation of Authority 29

81 Fed. Reg. 31376, 31467 (May 18, 2016)Nondiscrimination in Health
Programs and Activities) 28

NATURE OF THE MATTER BEFORE THIS COURT

The Equal Protection Clause does not allow individuals to sue for more generous state-sponsored insurance. State-run benefit programs must protect all members against the same risks. But the “asserted underinclusiveness of the set of risks that the State has selected to insure,” *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), does not violate equal protection even when an excluded risk falls disproportionately upon a protected class, *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271-72 & n.3(1993)(discussing *Aiello*). To prove a constitutional violation, plaintiffs must show a “[d]iscriminatory purpose” underlying the program’s operation. *Bray*, 506 U.S. at 271-72.

The North Carolina State Health Plan (the “Plan”) Defendants seek partial summary judgment, dismissing two of Plaintiffs’ claims. First, Title VII claims may only be brought against a plaintiff’s employer. Acts by an employer’s agent can create liability for the employer, but relief is generally not available against the agent. A plaintiff can sue multiple defendants under Title VII only when they are ‘joint employers.’ The Fourth Circuit applies its ‘hybrid test’ in such circumstances. Plaintiff Dana Caraway, a 27-year employee of the Department of Public Safety (“DPS”), provides no evidence to satisfy the Fourth Circuit’s ‘hybrid test’ for joint employers. Under this test,

the State Health Plan is not Caraway's joint employer and her Title VII claim should be dismissed.

Second, Plaintiffs' claims under §1557 of the Affordable Care Act, 42 U.S.C. §18116, should be dismissed because the federal rule interpreting §1557 explicitly excludes the State Health Plan from the provision's scope. In 2020, the U.S. Department of Health and Human Services ("HHS") concluded §1557 *does not* reach "an entity principally or otherwise engaged in the business of *providing health insurance*." 45 C.F.R. §92.3(c)(2021) (emphasis added). Although the 2020 rule has been challenged in court, and other provisions of the rule are enjoined, this specific portion of the rule remains in effect. The Court should defer to HHS's interpretation and dismiss Plaintiffs' §1557 claim.

In contrast, Plaintiffs' equal protection claims remain for trial. The Plan protects against the risk of certain medical conditions, but it is not required to and has chosen not to protect against the risk of every medical condition. That the Plaintiffs seek treatment that is outside of the Plan's coverage does not constitute discrimination. The lack of facial discrimination remains true even if one assumes, incorrectly, that only transgender individuals suffer from gender dysphoria. Plaintiffs cannot prevail only with assertions that gender dysphoria disproportionately affects members of a protected class. *See Lange v. Houston Cnty.*, 499 F.Supp.3d 1258, 1275-77 (M.D.Ga.2020) (insurance

exclusion for gender dysphoria not facially discriminatory). The Supreme Court held in *Aiello* that the exclusion of pregnancy from a state insurance program was not a “sex-based” classification even though only natal females can become pregnant. 417 U.S. at 496 n.20. “The proper comparator is the provision of the medical benefit in question,” not each beneficiary’s medical needs. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936,944 (8th Cir.2007).

Plaintiffs could still prevail by showing that the “facially neutral” benefits plan, even “neutrally applied,” is motivated by “discriminatory animus.” *Williams v. Hansen*, 326 F.3d 569,584 (4th Cir.2003). But the Plan’s coverage decisions result from changing federal regulations. When a 2016 federal rule required the Plan to expand benefits, the Plan did so. When the 2016 rule was enjoined nationwide, the Plan allowed the federally-required coverage to lapse. Plaintiffs allege that this lapse stemmed from discriminatory animus against transgender individuals. The Plan Defendants are confident that the factfinder will conclude otherwise. Nevertheless, summary judgment “is seldom appropriate in cases wherein particular states of mind are decisive

as elements of a claim or defense,” *Williams v. Griffin*, 952 F.2d 820, 826 (4th Cir.1991), so Plaintiffs’ claim should proceed to trial.¹

FACTS IN EVIDENCE

1. The State Health Plan

The Plan is the largest purchaser of healthcare and pharmaceuticals in North Carolina, (Ex.1.Folwell.Dep.35:9-12), funding healthcare for more than 740,000 teachers, legislators, state and local government employees, retirees, and their dependents. (Ex.2.Jones.Dep.74:3-5;16:24-17:9). Until 2018, Plan members paid *no* premiums for their own health coverage, and enacting the current premium scheme “was a herculean effort.” (Ex.2.Jones.105:25-106:5). The North Carolina General Assembly appropriates money for the remaining costs, but the appropriation currently increases by only 4% per year while healthcare costs rise 7% per year. (Ex.2.Jones.102:22-24).

Members can purchase coverage for spouses and children, but this benefit is not subsidized by the General Assembly. For the 80/20 Plan, adding children raises the premium to \$305/month, adding a spouse costs \$700/month,

¹ The Count I claims of Maxwell Kadel and Sam Silvaine must be dismissed. Count I seeks prospective relief only and these Plaintiffs have left State employment. Amd.Comp.¶¶7,11. Neither has presented evidence of future plans to be a state employee or participate in the State Health Plan. These individuals therefore lack standing to assert Count I.

and adding a spouse and children costs \$720/month. (Ex.3.PLANDEF.154817). For the 70/30 Plan, adding children costs \$218/month, adding a spouse is \$590/month, and adding a spouse and children costs \$598/month. *Id.* For employees who elect family coverage, “a whole lot of” them must “work one week out of a month just to cover their Health Plan for their family.” (Ex.2.Jones.105:22-24).

2. Plan Implementation

A. Plan Benefits

The Plan does not cover every medically necessary procedure, and no law has ever required the Plan to do so. (Ex.2.Jones.58:6-7;72:4-6). For each Plan coverage option, a benefit booklet describes the covered and non-covered services. (Ex.2.Jones.104:7-8). For services covered by the Plan, Blue Cross/Blue Shield of North Carolina (“BCBS”)—the Plan’s Third-Party Administrator—implements the booklet using the national billing practices and medical coding system of the healthcare industry. (Ex.4.BCBS.Decl.¶¶6-7,11).

Every provider submits a claim using a standardized form, which requires at least one diagnosis code, at least one procedure code, the insured’s name, the provider’s name, and the patient’s age and sex. A diagnosis code identifies the reason for medical treatment. (Ex.4.BCBS.Decl.¶7).

International Classification of Diseases (“ICD”) diagnosis codes used by BCBS are uniform across the healthcare industry. Each medical service or procedure also has a unique Current Procedural Terminology (“CPT”) code. When BCBS receives a claim, it reviews whether the claim is for a Plan member with a covered diagnosis and covered procedure. If so, Blue Cross pays for the treatment. If a claim does not include a covered ICD code and a covered CPT code, or one code is missing entirely, the claim is denied. (Ex.4.BCBS.Decl.¶9).

CVS/Caremark is the Plan’s pharmacy benefit manager (“PBM”). (Ex.1.Folwell.119:9-10). PBMs manage prescription drug benefits. FEDERAL TRADE COMMISSION, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (2005) at (i), *available at* <https://bit.ly/3d2fIGE>. PBMs reduce costs by using networks of retail pharmacies, identifying which drugs will be used to treat each medical condition, and providing incentives to use specific drugs. *Id.* PBMs also offer prior authorization and other protocols to manage and potentially reduce use of unnecessary high-risk or high-cost drugs. Tricia Lee Wilkins, *Prior Authorization and Utilization Management Concepts in Managed Care Pharmacy*, 25 J. MANAGED CARE & SPECIALTY PHARMACY 641, 641 (2019) (noting that prior authorization helps “optimiz[e] patient outcomes and reduc[e] waste, error, unnecessary drug use, and cost”)(Ex.5).

B. Gender Dysphoria

Plaintiffs allege that the Plan denies “coverage for treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual’s gender identity and sex assigned at birth,” and that the failure to provide this coverage is unlawful discrimination. Amd.Comp.¶1. According to the Plaintiffs’ expert testimony, medical professionals distinguish between gender dysphoria as a symptom and the diagnosed psychiatric illness of gender dysphoria. (Ex.6.Karasic.Dep.18:5-15). The medical diagnosis of the psychiatric illness requires not only the symptom of ‘gender dysphoria’ (“distress about the difference between one’s identified or lived gender and one’s assigned gender”) but also the provider’s conclusion that this symptom causes “impairment of social occupational functioning or clinically significant distress.” (Ex.6.Karasic.18:19-19:2).

Critically, not all transgender individuals suffer from gender dysphoria. (Ex.7.Ettner.Dep.28:11-13;Ex.8.Levine.Dep.241:24-242:14). In addition, “there may be people who have symptoms of gender dysphoria, but they personally don’t identify as transgender.” (Ex.6.Karasic.27:25-28:17;Ex.8.Levine.242:15-243:20). Plaintiffs have not provided any evidence that would allow a factfinder to determine what proportion of transgender individuals suffer from gender

dysphoria: “no one knows the answer to that [question].”
(Ex.9.Brown.Dep.92:17-25).

C. Plan Exclusions

The Plan does not and is not required to cover all medical treatments. The benefit booklet accordingly alerts and advises participants that the Plan does not cover “[a]nything specifically listed in this benefits booklet as not covered or excluded, regardless of medical necessity.” *See, e.g.*, 2020 Booklet for 80/20 Plan (Ex.3.PLANDEF-120625). The Plan excludes coverage in four circumstances that potentially affect treatment for gender dysphoria. (Ex.2.Jones.15:20-16:9;117:10-118:5).

Cosmetic services, which include the removal of excess skin from the abdomen, arms or thighs, skin tag excisions, cryotherapy or chemical exfoliation for active acne scarring, superficial dermabrasion, injection of dermal fillers, services for hair transplants, electrolysis and surgery for psychological or emotional reasons, except as specifically covered by the *Plan*. (Ex.3.PLANDEF-120627).

Psychological assessment and psychotherapy treatment in conjunction with proposed gender transformation.
(Ex.3.PLANDEF-120632).²

² While the benefit booklets indicate that the Plan does not cover counseling related to gender dysphoria, the Plan’s behavioral health program does not consider a patient’s diagnosis. Therefore, since at least 1990, this language in the booklet has had no effect on the benefits actually available to Plan participants. (Ex.4.BCBS.Decl.¶27). The Board of Trustees of the State Health Plan has eliminated this language from Plan benefit booklets, effective January 1, 2022.

Treatment or studies leading to or in connection with sex changes or modifications and related care. (Ex.3.PLANDEF-120636).

The following drugs or medications: ... *Experimental* medication or any medication or device not approved by the Food and Drug Administration (FDA) for the applicable diagnosis or treatment. (Ex.3.PLANDEF-120628).³

D. Plan Exclusions in Practice.

1. Surgical Claims

Neither the Plan nor BCBS identifies whether a participant is transgender. (Ex.2.Jones.87:20-22;Ex.4.BCBS.Decl.¶¶14,28). The Plan asks each member whether he or she is male or female, but that person decides what information to provide and can change his or her sex at any time. (Ex.2.Jones 85:10-87:22). When a claim is submitted to BCBS, the provider submits only the name of the plan participant, the name of the provider, the age and sex of the participant, the ICD diagnosis code, and the CPT procedure code. BCBS does not consider a patient's sex when reviewing claims connected to gender dysphoria, and BCBS does not code or track whether a Plan participant is transgender, cisgender, non-binary or otherwise. (Ex.4.BCBS.Decl.¶¶22,28). BCBS identifies the following procedures as not covered by the Plan, regardless

³ The fourth limitation does not apply to (1) prescription medication used in covered clinical trials or (2) medication approved by the FDA for cancer treatment when prescribed to treat a different form of cancer than that approved by FDA. (Ex.3.PLANDEF-120628).

of diagnosis code, because industry coding indicates these procedures are used only for treatment of gender dysphoria:

CPT Code	Description of Surgery
55970	Intersex Surgery, Male to Female
55980	Intersex Surgery, Female to Male
57335	Vaginoplasty for Intersex State
56805	Clitoroplasty for Intersex State

(Ex.4.BCBS.Decl.¶20). The following CPT codes are not covered when their procedures are performed to treat one of two diagnosis codes: F64.0 (Transsexualism) or Z87.890 (Personal history of sex reassignment). These ICD codes are not created by the Plan, and BCBS identifies them as the diagnosis codes for treatment of the psychiatric diagnosis of gender dysphoria.

CPT Code and Description of Surgery

54400	Insertion of Penile Prosthesis; non-inflatable (semi-rigid)
C1813	Prosthesis, Penile, Inflatable
54401	Insertion of Penile Prosthesis; inflatable (self-contained)
54405	Insertion of multi-component, inflatable penile prosthesis, including placement of pump, cylinders, and reservoir
54406	Removal of multi-component Inflatable Penile

54408	Repair Components(s) multi-component, Inflatable Penile
54410	Removal and replacement of all components(s) of a multi-component, inflatable penile prosthesis at the same operative session
54411	Removal and replacement of all components of a multi-component inflatable penile prosthesis through an infected field at the same operative session, including irrigation and debridement of infected tissue
54415	Removal non-inflatable (semi-rigid) /inflatable
54416	Removal and replacement of non-inflatable (semi-rigid) or inflatable (self-contained) penile prosthesis at the same operative session
54417	Removal and replacement of a non-inflatable (semi-rigid) or inflatable (self-contained) penile prosthesis through an infected field at the same operative session, including irrigation and debridement of infected tissue
54660	Insertion of Testicular Prosthesis (separate procedure)
55175	Scrotoplasty (simple)
55180	Scrotoplasty (complicated)
56800	Plastic Repair of Introitus
57291	Construction of artificial vagina (without graft)
57292	Construction of artificial vagina (with graft)
19316	Mastopexy
19318	Breast Reduction

57295	Revision (including removal) of prosthetic vaginal graft
57296	Revision (including removal) of prosthetic vagina graft
19325	Breast Augmentation with implant
17380	Electrolysis Epilation, each .5 hour

(Ex.4.BCBS.Decl.¶21). If an otherwise proper claim included either diagnosis code above with a different CPT code, the Plan would pay it. The Plan's exclusion of certain surgeries that Plaintiffs might seek is based on diagnosis and medical coding and not transgender identity. (Ex.4.BCBS.Decl.¶28). Further, BCBS does not approve cosmetic procedures for any Plan participant, regardless of diagnostic code. (Ex.4.BCBS.Decl.¶25).

2. Prescription Medication

For prescription drugs, CVS/Caremark reviews claims on the Plan's behalf. When a prescription drug is not subject to prior authorization, CVS reviews four questions: whether the beneficiary is an eligible Plan participant, whether the drug is covered for any purpose in the Plan formulary, whether the pharmacy is in-network, and whether the prescription is within quantity limits. CVS never inquires, for any participant, whether the individual is transgender. If a drug is not subject to prior authorization, CVS never learns the patient's diagnosis. (Ex.10.Korn Decl.¶¶ 4-5;PLANDEF-205466-67). CVS

and the Plan do not know whether a prescription is to treat gender dysphoria or another condition and accordingly, some medications Plaintiffs seek (*e.g.* estrogen or spironolactone) are covered by the Plan.

Some medications, however, are expensive or subject to abuse. For these medicines, CVS requires prior approval before filling a prescription. The treating physician must initiate the prior authorization process, and CVS approval is based on the diagnosis that justifies the prescription. Seven medications used for treatment of gender dysphoria require prior authorization. None of the medications are FDA-approved for treatment of gender dysphoria, and CVS denies coverage for these medications when prescribed for this purpose. (Ex.11.Neuberger.Decl.¶¶4-5;PLANDEF-205468).

3. Dana Caraway's Title VII Claim

In 1994, Caraway applied to be a corrections officer at Marion Correctional Institute, a Department of Public Safety facility. (Ex.12.Caraway.Dep.90:15-21). Caraway interviewed with multiple DPS employees, including an administrative assistant, the assistant warden, and the warden. (Ex.12.Caraway.91:9-13). These DPS employees “were in charge of the facility” and “seeing that it was employed and staffed.” (Ex.12.Caraway.91:14-18). Within DPS, the “hiring process is handled by each individual DPS facility[,]” (Ex.13.DPS.Dep.39:16-18), and each prison facility

has a regional employment office where it submits its hiring paperwork. (Ex.13.DPS.40:1-4). The regional DPS employment offices report to DPS's Central Human Resources department. (Ex.13.DPS.40:5-14).

Exhibit 4 to Caraway's deposition includes documents related to her DPS onboarding, including her acknowledgment of the DPS policy on secondary employment; tax forms; acknowledgment of DPS memoranda titled "Conditions of Continued Employment" and "Department of Corrections Disciplinary and Grievance Policy and Procedure;" and acknowledgment that DPS prohibits employees from soliciting donations or receiving gifts or favors. (Ex.12.Caraway.Dep.Ex.4).

Caraway served as a Corrections Officer ("CO") at Marion Correctional for five years. (Ex.12.Caraway.19:18-21:2). DPS then employed Caraway as a CO at its Western Youth Institute. (Ex.12.Caraway.21:3-8). In 2006, DPS promoted Caraway to Correctional Sergeant and transferred her to Alexander Correctional Institute. (Ex.12.Caraway.22:7-10). In 2010, Caraway returned to Western Youth until DPS closed the facility in 2013, at which point she served again at Alexander Correctional. (Ex.12.Caraway.27:8-19, 28:12-14). In 2014, DPS transferred Caraway to Foothills CI, where she is currently employed. (Ex.12.Caraway.28:19-21).

All DPS “employees are expected to participate in” mandatory DPS training—which is conducted at DPS facilities—or face discipline. (Ex.13.DPS.37:12-23;48:8-13; Ex.12.Caraway.97:13-25). Caraway has received more than a thousand hours of DPS training in her career, (Ex.12.Caraway.98:21-99:6), but has not identified any training she has received from the State Health Plan.

As of 2021, Mr. Badgett, a DPS “[c]orrectional housing unit manager,” monitors and supervises Caraway’s job performance. (Ex.12.Caraway.99:25-100:14). DPS employee discipline is handled by DPS’s “investigation process.” (Ex.12.Caraway.101:6-10). “If there’s wrongdoing,” Caraway’s DPS supervisor “could actually give you a coaching session or something within those guidelines, but with actual disciplinary action, it would go to our facility head, to region, then to DPS headquarters in Raleigh.” (Ex.12.Caraway.101:13-21). The disciplinary process involves DPS employees exclusively; the Plan has no role in DPS discipline. (Ex.12.Caraway.101:22-102:11).

The decision to fire a DPS employee starts with the employee’s DPS supervisor and “then go[es] up through the chain of command through the warden and superintendent.” (Ex.13.DPS.34:4-8). Final approval for a termination comes from the Employee Relations Section of DPS’s Central Human Resources. (Ex.13.DPS.34:1-24).

“Post orders” list specific duties that each DPS employee is “expected to carry out on a daily basis in your position.” (Ex.12.Caraway.103:22-104:4). Post orders are established by DPS correctional management (*e.g.*, warden or assistant warden) and failure to follow post orders “could be a basis for discipline.” (Ex.12.Caraway.104:6-15.) Since 2014, Caraway has followed the post orders describing her “responsibilities as a sergeant at Foothills Correctional Institution.” (Ex.12.Caraway.104:21-24). Caraway has not identified any orders or directives that she has received from the State Health Plan.

If Caraway experiences an issue with her paycheck, which has happened “several times in [her] career,” she contacts the DPS “personnel in human resources in our facility.” (Ex.12.Caraway.107:3-12). Her pay stubs reflect employment by DPS. (Ex.12.Caraway.109:6-14).

Correctional Sergeants and COs must wear DPS uniforms, which are issued by and are the property of DPS. (Ex.13.DPS.44:23-45:8;Ex.12.Caraway.110:23-111:3). Correctional Sergeants and COs must also use DPS equipment: handcuffs, handcuff holster, pepper spray, pepper spray holster, baton, baton holster ... firearm, firearm holster, ammunition.” (Ex.13.DPS.45:9-23). (Ex.12.Caraway.111:4-14). DPS supplies Caraway’s

equipment; she is not allowed to use equipment from other sources. (Ex.12.Caraway.111:16-23).

DPS provides health coverage to approximately 90% of its employees through the State Health Plan. (Ex.13.DPS.9:20-11:2). DPS employees choose whether to sign-up for coverage. They are not required to do so, and some employees are ineligible. (Ex.13.DPS.17:15-17,10:19-24). The Plan determines the amount it charges per employee each year, and the Office of the State Comptroller pays that amount. (Ex.13.DPS.10:4-11:8). DPS does not determine the health risks that the Plan will protect against or the benefits available to those who elect to participate. (Ex.13.DPS.29:22-24). DPS has had no “communications with the State Health Plan regarding” exclusion of certain gender dysphoria treatments. (Ex.13.DPS.30:14-17).

DPS requires its employees to obtain pre-approval before accepting secondary employment, and failure to do so can result in discipline. (Ex.13.DPS.51:9-22) Caraway confirmed that she understands this policy and has followed it since 1994. (Ex.12.Caraway.93:7-16). Caraway testified that, other than a recent secondary job with a clothing store, “[t]he only employer I worked for in the last 27 was ... the Department of Corrections, Department of Public Safety.” (Ex.12.Caraway.93:7-16). DPS further testified about the degree of control the State Health Plan exercises over Caraway:

Q. Does the Department of Public Safety employ Sergeant Caraway?

A. Yes -- to my knowledge.

Q. Does the State Health Plan employ Sergeant Caraway?

A. Not that I'm aware of.

Q. Does the State Health Plan have the authority to hire or fire Sergeant Caraway?

A. Not that I'm aware of.

Q. Does the State Health Plan have the authority to supervise Sergeant Caraway?

A. Not that I'm aware of.

Q. Does the State Health Plan have the authority to discipline Sergeant Caraway?

A. Not that I'm aware of.

Q. Does the State Health Plan furnish the equipment or the place of work for Sergeant Caraway?

A. Not that I'm aware of.

Q. Does the State Health Plan have custody over Sergeant Caraway's personnel file?

A. No. Not that I'm aware of.

...

Q. Does DPS provide corrections officers with formal and informal training?

A. Yes.

...

Q. And to the best of your knowledge, Sergeant Caraway only provides services to the Department of Public Safety?

A. Yes -- to the best of my knowledge.

Q. And if Sergeant Caraway provided, had a second employer, the department's policy is that she needed to get that approved prior to assuming that second task or second job?

A. Yes. That's correct.

Q. And a failure to do so is a basis for discipline by the Department of Public Safety?

A. Yes. That's correct.

(Ex.13.DPS.63:12-66:7).

STANDARD OF REVIEW

“A district court ‘shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562,568 (4th Cir.2015)(quoting Fed.R.Civ.P.56(a)). “A dispute is genuine if a [factfinder] could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law.” *Id.* (citations and quotations omitted).

ARGUMENT

1. The State Health Plan is Not Liable as Plaintiff Caraway’s “Employer” under the Fourth Circuit’s Agency and Control Test.

Title VII, 42 U.S.C. §2000e-2(a)(1), provides that “[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Title VII defines an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. §2000e(b). “The statute[, however,] does not define the term ‘agent.’” *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177,180 (4th Cir.1998).

A. The State Health Plan can only be liable to Caraway under Title VII if the Plan and DPS are “joint employers.”

The State Health Plan is not independently and individually liable as an “agent” of DPS. In the Fourth Circuit, agents do not incur Title VII liability because “an entity can be held liable in a Title VII action **only if it is an ‘employer’ of the complainant.**” *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404,408 (4th Cir.2015) (emphasis added). This unequivocal holding is in accord with the Fourth Circuit’s prior decisions in *Lissau v. Southern Food*

Service, Inc., 159 F.3d 177 (4th Cir.1998) and *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507,510 (4th Cir.1994).

In *Birkbeck*, the Fourth Circuit interpreted an ADEA provision that is identical to the relevant Title VII language and explicitly rejected liability for an agent of an employer. Rather, the reference to ‘agent’ in the Title VII definition of employer is “an unremarkable expression of *respondeat superior*—that discriminatory personnel actions taken by an employer’s agent may create liability **for the employer.**” *Birkbeck*, 30 F.3d at 510 (emphasis added).

In *Lissau*, the Fourth Circuit applied *Birkbeck* to reject efforts to hold “agents” separately and independently liable under Title VII. *Lissau*, 159 F.3d at 180-81. Congress’s inclusion of the word “agent” in Title VII’s definition of “employer” did not signal an intent to make the agent separately liable. Rather, the word was included “simply to establish a limit on an employer’s liability for its employees’ actions.” *Lissau*, 30 F.3d at 180 (quoting *Birkbeck*, 30 F.3d at 510-11). *Lissau* reiterated that “Congress only intended **employers** to be liable for Title VII violations.” *Id.* at 181 (emphasis added).

B. Caraway has failed to show that DPS and the Plan are “joint employers” under the Fourth Circuit’s hybrid test.

In *Butler*, the Fourth Circuit observed that “[o]ther courts have found that two parties can be considered joint employers and therefore both be liable

under Title VII if they share or co-determine those matters governing the essential terms and conditions of employment.” *Butler*, 793 F.3d at 408 (quotation omitted). The “joint employment doctrine captures instances in which multiple entities control an employee.” *Id.* at 409. “Given Title VII’s remedial intent, employers should not be able to avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship[,]” and “[t]he joint employment doctrine thus prevents those who effectively employ a worker from evading liability by hiding behind another entity.” *Id.* at 410 (punctuation omitted). *Butler* conclusively established that “the joint employment doctrine is the law of this Circuit” and “the doctrine’s emphasis on determining which entities actually exercise control over an employee is consistent with Supreme Court precedent interpreting Title VII’s definitions. The “the common law element of control, drawn from the law of agency, is the principal guidepost.”⁴ *Id.* at 409 (citations and quotations omitted).⁵

⁴ Whether DPS is independently liable under Title VII is irrelevant.

⁵ This Court’s nearly forty-year-old decision in *Crowder v. Fieldcrest Mills Inc.*, 569 F. Supp 825,827-29 (M.D.N.C.1983) considered, in dicta, the hypothetical application of the economic realities test to an insurance provider. *Butler* subsequently merged the “economic realities test” with the “control test” to form the “hybrid test,” and thus *Crowder* is inapplicable. Nor are cases from circuits without the “hybrid test.”

Courts within the Fourth Circuit apply the *Butler* test when, as here, it is alleged that multiple entities “exercise significant control over the same employees.” *Butler*, 793 F.3d at 408; see Amd.Comp.¶¶178-81. To analyze when an agency relationship creates Title VII liability as a “joint employer,” the Fourth Circuit combined the “control test” with the “economic realities test,” instructing district courts to use a “hybrid test.” *Id.* at 412-14. The hybrid test factors for the district court to consider in this case are:

- (1) Whether the State Health Plan has “authority to hire and fire [Caraway];”
- (2) Whether the State Health Plan has “day-to-day supervision of [Caraway]including employee discipline;”
- (3) “[W]hether the putative employer [the State Health Plan] furnishes the equipment used and the place of work;”
- (4) Whether the State Health Plan has “possession of and responsibility over [Caraway’s] employment records, including payroll, insurance, and taxes;”
- (5) “[T]he length of time during which [Caraway] has worked for the putative employer [the State Health Plan];”
- (6) “[W]hether the putative employer [the State Health Plan] provides [Caraway] with formal or informal training;
- (7) “[W]hether [Caraway’s] duties are akin to” the regular duties of a State Health Plan employee;
- (8) “[W]hether [Caraway] is assigned solely to [work for the State Health Plan];” and finally,

(9) “[W]hether [Caraway] and [the State Health Plan] intended to enter into an employment relationship.”

Butler, 793 F.3d at 414. Though “none of these factors are dispositive” and “the common-law element of control remains the principal guidepost in the analysis,” the first three factors are the “most important.” *Id.*

Caraway, a 27-year veteran of DPS, presents no facts to suggest she has ever been employed by the Plan.

First, Caraway has no evidence the Plan has ever had authority to hire or fire her. As both she and DPS testified, Caraway was hired by DPS after interviewing with the warden and assistant warden at Marion Correctional Institute (two DPS employees). (Ex.12.Caraway.91:9-13;Ex.13.DPS.39:16-18). The Plan played no role in hiring, and Caraway presents no evidence the Plan could have a role in her termination if that ever were to happen. (Ex.13.DPS.34:4-21). As the Fourth Circuit explained, “which entity or entities have the power to hire and fire the putative employee, is important to determining ultimate control.” *Butler*, 793 F.3d at 414. The State Health Plan exercises no control over whether DPS hires, retains, promotes, demotes, or fires Caraway. The absence of any evidence to prove this “important” hybrid-test factor demonstrates that the Plan does not exercise sufficient control over Caraway’s employment. *Id.*

Second, Caraway has no evidence the Plan exercises control over her employment by supervising her in any way. Caraway’s “post orders” describe the duties she “is expected to carry out on a daily basis,” and these are issued by DPS managers (*e.g.* the warden or assistant warden). (Ex.12.Caraway.104:1-11;105:20-25). There is no evidence Caraway has ever been supervised by, or reported to, anyone at the State Health Plan. Further, Caraway testified that failure to follow DPS “post orders” “could be a basis for discipline.” (Ex.12.Caraway.104:12-15). Yet she offered no evidence suggesting the Plan plays any role in DPS discipline. (Ex.12.Caraway.101:22-102:11) Discipline is handled by DPS’s “investigation process.” (Ex.12.Caraway.101:6-10). The second factor—“to what extent [Caraway] is supervised [by the State Health Plan—]is useful for determining the day-to-day, practical control of the employee.” *Butler*, 793 F.3d at 414-15. The absence of any evidence for this second “important” hybrid-test factor further demonstrates the Plan does not significantly control Caraway’s employment and is not her “employer,” joint or otherwise.

Third, Caraway has no evidence that she ever performed work at the Plan offices, nor has she used Plan equipment to accomplish her job duties as a Correctional Sergeant. To the contrary, Caraway testified: “I don’t work in Raleigh. I just work in my facility.” (Ex.12.Caraway.102:9-10). Nor did she

identify any resource furnished by the Plan that she has ever used to perform her job duties. At each facility, DPS supplies her uniform and equipment. (Ex.12.Caraway.111:4-23;Ex.12.DPS.45:9-23). “The third factor, where and how the work takes place, is valuable for determining how similar the work functions are compared to those of an ordinary employee.” *Butler*, 793 F.3d at 414-15. Caraway’s failure to produce evidence of this “important” hybrid-test factor further proves the State Health Plan does not have “ultimate control” over Caraway and is thus not her “employer,” joint or otherwise. *Id.* at 414.

Though *Butler* holds the first “[t]hree factors are the most important” in the hybrid test, *id.*, and Caraway has no evidence in support of any of them, the remaining six *Butler* factors reinforce that Caraway is not, and never has been, employed by the Plan. There is no evidence the Plan possesses any of Caraway’s employment records nor that it has ever provided her job training. (Ex.12.Caraway.95:22-96:7;99:21-24;Ex.13.DPS.48:8-13;37:12-23). Caraway thus has no evidence to support the fourth and sixth hybrid-test factor.

Regarding the seventh hybrid-test factor, Caraway offers no evidence that her duties are similar to the duties of actual Plan employee. Caraway follows “post orders” prepared by the warden and management of her correctional facility. (Ex.12.Caraway104:6-11;105:20-25). In contrast, Plan employees manage implementation of the State Health Plan.

(Ex.2.Jones.69:23-25). None of Caraway's orders, nor anything she does while at work, benefits the State Health Plan. This factor weighs in favor of the Plan.

Regarding the eighth hybrid-test factor, Caraway has never been assigned to perform work for the Plan. (Ex.12.Caraway.93:7-16). There is no evidence that Caraway ever performed work to help the State Health Plan accomplish its mission of providing specific and defined health benefits to mitigate against certain health risks. This hybrid-test factor weighs against Caraway.

Finally, there is no evidence the Plan or Caraway "intended to enter into an employment relationship." *Butler*, 793 F.3d at 414. None of Caraway's initial employment documents refer to the Plan. (Ex.12.Caraway.19:15-17;89:21-25). Her monthly salary statement only shows employment with DPS. (Ex.12.Caraway.109:9-11). DPS has no evidence, regarding the fifth and ninth hybrid-test factors, that Caraway is now, or has been, employed by the Plan. (Ex.13.DPS.63:12-66:7). As Caraway explained, other than a secondary job with a clothing store, "[t]he only employer I worked for in the last 27 years was...the Department of Corrections, Department of Public Safety." (Ex.12.Caraway.93:7-16.)

Caraway fails to offer any evidence that would satisfy the Fourth Circuit's hybrid test and show that the State Health Plan exercises sufficient

control over her employment such that the Plan could be liable as a “joint employer” under Title VII. Instead, Caraway asserts that DPS has delegated “significant control over [DPS] employee health benefits” to the Plan, and the Plan’s exercise of “significant control over those employees by determining” Plan benefits creates Title VII liability. *Amd.Comp.* ¶¶178-81. This is not the law in the Fourth Circuit. Under controlling precedent, summary judgment should be granted for the Plan, and Caraway’s Title VII claim should be dismissed.

2. The State Health Plan is not liable under Section 1557 of the Affordable Care Act because it is explicitly excluded from Section 1557 liability by the current U.S. Department of Health and Human Services Regulation.

When Plaintiffs brought suit in 2019, the U.S. Department of Health and Human Services (HHS) interpreted the statutory term “health program or activity” in §1557 to include third-party health care payors, such as the State Health Plan. *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31376, 31467 (May 18, 2016) (promulgating 45 C.F.R. §92.4). HHS has authority to promulgate regulations to implement §1557, *see* 42 U.S.C. §18116(c), and the 2016 definition included all operations of an entity “principally engaged” in “the provision or administration of ... health-related coverage.” 81 Fed. Reg. 31467.

In June 2020, the Department revised its rules, effective August 18, 2020. *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37160 (June 19, 2020). The Department re-defined “health program or activity” to explicitly exclude entities such as the State Health Plan. The phrase “health care program or activity” currently includes only those entities “engaged in the business of providing healthcare” and, further, “an entity principally or otherwise engaged in the business of providing health insurance **shall not**, by virtue of such provision, be considered to be principally engaged in the business of providing healthcare.” 45 C.F.R. §92.3(b),(c)(2021)(emphasis added).

While the 2020 rule has been challenged in five federal district courts, and other provisions of that have been enjoined, **this provision remains in effect**. Of the district courts considering the 2020 rule, three courts concluded the plaintiffs lacked standing to challenge this portion of the regulation. *Whitman-Walker Clinic v. U.S. Dep’t of Health & Hum. Servs.*, 485 F.Supp.3d 1,31-33 (D.D.C.2020); *Walker v. Azar*, No.20-cv-2834, 2020 WL 6363970, at *3 (E.D.N.Y. Oct. 29, 2020); *Wash. v. U.S. Dep’t of Health & Hum. Servs.*, 482 F.Supp.3d 1104,1121 (W.D.Wash.2020). Two courts have allowed a challenge, but neither court has issued an injunction and both cases are stayed. *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep’t of Health &*

Hum. Servs., No.20-11297-PBS, 2021 WL 3667760, at *9 (D.Mass. Aug. 18, 2021); *Boston Alliance v. HHS*, No.20-11297-PBS (Oct. 29, 2021) (denying Motion to Remand but staying further proceedings). *See also New York v. U.S. Dep't of Health & Hum. Servs.*, No.1:20-cv-05583 (S.D.N.Y. Doc. No.145, Aug. 23, 2021). *But see Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113,1149 (D.N.D.2021) (granting injunction to *prevent* changes to 2020 rule that are irrelevant here).

The interpretation in the HHS rule is entitled to deference under the familiar *Chevron* test. *Chevron v. NRDC*, 467 U.S. 837 (1984). Under *Chevron* step one, this court must determine whether Congress “has directly spoken to the precise question at issue” or whether, instead, the statutory term is ambiguous. *Othi v. Holder*, 734 F.3d 259,265 n.4 (4th Cir.2013). When a statutory phrase is ambiguous, *Chevron* step two asks only whether the interpretation “is based on a permissible construction of the statute.” *Schafer v. Astrue*, 641 F.3d 49,54 (4th Cir.2011).

Section 1557 does not define “health program or activity,” and two district courts in the Fourth Circuit have reached differing conclusions. *Compare Callum v. CVS Health Corp.*, 137 F.Supp.3d 817,849-50 (D.S.C.2015)(ambiguous) *with Fain v. Crouch*, No. CV 3:20-740,2021 WL 2657274, at *2-4 (S.D.W.Va. June 28, 2021)(unambiguous). This disagreement

alone demonstrates the term’s ambiguity. Moreover, other courts have deferred to agency interpretations that define the term ‘program or activity’ in other civil rights statutes. *See Victim Rts. L. Ctr. v. Cardona*, CV 20-11104, 2021 WL 3185743, at *12 (D.Mass. July 28, 2021)(agency has authority to interpret “education program or activity” under Title IX); *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459,467-68 (1999)(citing regulations defining scope of Title IX).⁶

Noting the complexity of the health insurance market, and recognizing the agency’s distinction elsewhere between “health insurance” and “healthcare,” HHS concluded in 2020 that entities like the Plan are not subject to §1557. 85 Fed. Reg. 37172-74. Under *Chevron*, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” *Id.* at 844. Section 1557 explicitly gave authority to HHS to “promulgate regulations to implement this section,” 42 U.S.C.

⁶ A court cannot find the same statutory term ambiguous in one case and not another. If this Court concludes “health program or activity” is unambiguous, it is also holding that HHS can never interpret that phrase, and the agency was wrong to do so in both 2016 and 2020. Moreover, any future rulemaking on the subject would be invalid. Agency regulations can limit the reach of a statute, as here, but they can also expand the statutory scheme. *Currie v. Grp. Ins. Comm’n*, 290 F.3d 1,6-7 (1st Cir.2002) (DOJ rule extending Title II of the ADA to include employment within the scope of “public services, programs, activities”).

§18116(c), and this Court should defer to the current regulation and grant summary judgment, dismissing Plaintiffs' §1557 claims.

CONCLUSION

The Fourth Circuit has repeatedly and conclusively held that Title VII claims can only be brought against a plaintiff's employer, though multiple entities can be liable as joint employers. Here, however, there is no genuine dispute as to any material fact when the Fourth Circuit's hybrid test is applied, and summary judgment for the State Health Plan on Count IV is required. Further, the current and controlling rule from the U.S. Department of Health and Human Services explicitly excludes the State Health Plan from liability under §1557. Summary judgment and the dismissal of Count III is therefore required.

Respectfully submitted, this the 30th day of November, 2021.

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CERTIFICATE OF WORD COUNT

Pursuant to L.R. 7.3(d)(1), the undersigned certifies that this Brief complies with the Court's word limit as calculated using the word count feature of the word processing software. Specifically, this Brief contains less than 6,250 words. This count includes the body of the brief and headings, but does not include the caption, signature lines, this certificate or the certificate of service.

This the 30th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will provide electronic notification to all counsel of records in this matter.

This the 30th day of November, 2021.

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, et al.,)
)
Plaintiffs,)
) No. 1:19-cv-272-LCB-LPA
V.)
)
DALE FOLWELL, et al.,)
)
Defendants.)
_____)

DEPOSITION
OF
DALE FOLWELL

AUGUST 12, 2021

THIS TRANSCRIPT IS NOT COMPLETE
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AFTER REVIEW OF TRANSCRIPT BY ATTORNEYS WITHIN 30
DAYS OF DATE OF DEPOSITION PER PROTECTIVE ORDER

NORTH CAROLINA STATE HEALTH PLAN
3200 Atlantic Avenue, First Floor
Raleigh, North Carolina

Reported by: Michelle Maar, RDR, RMR, FCRR

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DEPOSITION OF DALE FOLWELL

Page 32

1 Q. What are your responsibilities as Treasurer?

2 A. Well, there are lots.

3 Q. Let me rephrase that because I understand -- what
4 are your main responsibilities?

5 A. To put this in context, the, the State
6 Treasurer's Office of North Carolina, as of this week, is,
7 manages nearly a quarter of a trillion dollars. That's
8 almost 250 million billion dollars. And just the Pension
9 Plan is the 26th largest pool of public money in the entire
10 world.

11 So I'm sometimes asked if I signed the one dollar
12 bill. That's where people see the word treasurer. And it's
13 an obvious question. But I don't do that. But we manage
14 one of the largest pools of that, those in the world.

15 And to put that in context, that is 10 times
16 larger than the state budget that's being debated as we sit
17 here.

18 So I would be glad to go down and answer your
19 question if I may.

20 Q. Please do.

21 A. Okay. I would say that, that it includes the
22 State Pension Plan, which manages the pension assets for
23 nearly 1 out of 10 adult North Carolinians, those that
24 teach, protect, and otherwise serve, with nearly 900,000
25 participants.

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Page 33

1 That Pension Plan is considered one of the
2 best-funded pension plans in the United States. I'm not
3 sure where you're from, but I can probably compare ours to
4 wherever you are from.

5 And the Pension Plan has, as well-funded as it is,
6 which should give you a little bit of fear of how some of
7 these other pension plans are doing, as well-funded as we
8 are, it has tremendous headwinds.

9 And most of these headwinds that I'll mention to
10 you are blessings. Zero interest rates is a blessing when
11 you're investing in your life or buying a house or buying a
12 car or starting a business. It's not a blessing for pension
13 plans.

14 Increased life expectancies, that's obviously a
15 blessing on the face of it.

16 When I was in high school in 1977, there were
17 about 300 people over the age of 90 who were getting a
18 pension check. Last week, it was 7000 people over the age
19 of 90.

20 And then somewhere along the way of the last 35
21 years, the minimum retirement age was taken out of the
22 Pension Plan.

23 So this is not political or emotional, it's
24 mathematical -- especially for the certain life
25 expectancies. We're now in the situation that, because

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Page 34

1 people can retire when they're 50 years old, we have the
2 majority of our members who are going to be receiving more
3 retirement checks than paychecks. And the plan was never
4 really designed for that.

5 So all of our focus and the number one
6 responsibility has to do with my pledge to the participants
7 in these plans because of my fiduciary responsibility, which
8 includes being loyal and exercising a duty of care to
9 preserve, strengthen, but figure out how to sustain this
10 plan for this and the next generation of public service
11 workers.

12 The Plan is paying out nearly 550 million dollars
13 gross every 30 days. The amount of gross dollars leaving
14 the plan is twice as high as the state debt. So it's kind
15 of a big deal and a big responsibility.

16 The second is the Defined Contribution Plan, which
17 has over 15 billion dollars in it today. Just this week, we
18 received two national awards.

19 Both of these plans have recently been designated
20 being in the zero percentile -- which is where I spent most
21 of my school career, which is not a good thing.

22 But when it comes to scoring it, the efficiency of
23 a Pension Plan, it's a great thing.

24 And so the Defined Benefit Plan, as well as the
25 Defined Contribution Plan have, are getting national

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DEPOSITION OF DALE FOLWELL

Page 35

1 accolades for what we've tried to do to simplify these plans
2 and to cut expenses.

3 The Defined Contribution Plan is made up of a 401,
4 457, and a 403. And it, I think the 457 Plan is not as
5 large in total dollars as the California plan is, but it has
6 more enrollees.

7 So when you go from the Pension Plan, the Defined
8 Contribution Plan, then the next level would be the State
9 Health Plan, which is the largest purchaser of healthcare in
10 North Carolina, and the State Pharmaceutical Plan, which is,
11 for public service workers, also the largest in North
12 Carolina.

13 When I was sworn in as keeper of the public purse,
14 that was, I inherited a broke and broken State Health Plan.

15 And the broke part is something that was brought
16 to my attention in 1993 actually, before -- if you can
17 believe it's been that long.

18 And I'll be glad to explain why if you like.

19 Q. Please do.

20 A. A person that is considered by most around these
21 parts to be possibly the best banker in history is a fellow
22 by the name of John Medlin.

23 Now, I'm sure I've cleaned John Medlin's toilets
24 at a gas station or I've pumped gas in his car or cooked
25 food for him at Mayberry's. But I didn't know who he was.

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DEPOSITION OF DALE FOLWELL

Page 118

1 A. The most important person in the whole place.

2 Q. I will agree with you generally because most
3 executive assistants are.

4 And we already know who Ms. Crabtree is, right?
5 We've talked about her.

6 A. I don't dispute this timeline or this time stamp.
7 I'm just surprised that Sam Hayes was working here in
8 February of 2017, but that's what it says.

9 I thought Blake stayed here until April or May of
10 that year.

11 It's not here nor there -- I'm just -- I thought
12 Blake was here for several months as the interim General
13 Counsel, which means Sam would not have been working here.

14 Q. Right. And it may have been habit, I know people
15 type in e-mails after they --

16 A. This person didn't even work for -- anyway,
17 mental curiosity.

18 Q. Getting back to Exhibit 7 -- so Ms. Moon is
19 e-mailing you.

20 A. Yes.

21 Q. And the first line says you've asked several
22 times for a list of requirements associated with the Plan's
23 participation in the federal Retiree Drug Subsidy (RDS)
24 Program.

25 Do you see that?

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DEPOSITION OF DALE FOLWELL

Page 119

1 A. I do.

2 Q. Why were you asking for a list of requirements
3 associated with the Plan's participation in the RDS
4 Program?

5 A. I believe I was asking regarding matters that had
6 nothing to do with the basis of this case.

7 That is, that, at that point, the previous
8 treasurer had flipped the PBM, prescription drug benefit
9 manager, on January 1, 2017 from Express Scripts to CVS
10 Caremark.

11 So as you can imagine, when people have been,
12 retirees especially, have been on Express Script for many,
13 many years, that when they're flipping over to a new
14 manager, there's different tiering, there's different this,
15 there's different formulas, there's different all these
16 things that none of us like regarding drug costs or
17 figuring out what they pay for.

18 I was asking this question specifically in
19 relation to a notion that I got -- was the State Health
20 Plan participating in what we, I think is known as the 40B
21 Program.

22 The 40B Program, it's my understanding, is a
23 program that allows the, other governmental entities to get
24 the same drug prescription rates as the Federal Government
25 negotiates through CMS and EA.

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, et al.,)
)
Plaintiffs,)
) No. 1:19-cv-272-LCB-LPA
V.)
)
DALE FOLWELL, et al.,)
)
Defendants.)
_____)

DEPOSITION
OF
DEE JONES

IN HER INDIVIDUAL CAPACITY
and
30(b)(6) DESIGNEE FOR NC STATE HEALTH PLAN

AUGUST 3, 2021

THIS TRANSCRIPT IS NOT COMPLETE
PORTIONS OF THIS TRANSCRIPT AND/OR EXHIBITS
MAY BE DESIGNATED CONFIDENTIAL/ATTORNEYS EYES ONLY
AFTER REVIEW OF TRANSCRIPT BY ATTORNEYS WITHIN 30
DAYS OF DATE OF DEPOSITION PER PROTECTIVE ORDER

PNC PLAZA DOWNTOWN
301 Fayetteville Street, Suite 1700
Raleigh, North Carolina

Reported by: Michelle Maar, RDR, RMR, FCRR

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DEPOSITION OF DEE JONES

Page 15

1 Q. And in 2016, did the Plan's benefits coverage
2 provide for blanket exclusions for treatment of gender
3 dysphoria?

4 A. Yes.

5 Q. I would like to show you what I'm marking as
6 Plaintiffs' Exhibit 1.

7 (Exhibit 1 is marked for identification.)

8 MS. RAVI: I'll give you a moment to review the
9 document. I know it's lengthy.

10 MR. RULEY: You've seen it before.

11 THE WITNESS: I've seen it once or twice.

12 BY MS. RAVI:

13 Q. Do you recognize this document?

14 A. I do.

15 Q. What is this?

16 A. It is the 80/20 PPO Plan Benefits Booklet for the
17 period January 1 through December 31 of 2016.

18 Q. Would you turn to the page marked as PLAN
19 DEF2711.

20 In the 2016 Plan Year, did the Plan exclude from
21 coverage treatment or studies leading to or in connection
22 with sex changes or modifications and related care?

23 A. Yes.

24 Q. If you could turn to the page marked PLAN
25 DEF2699.

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Page 16

1 In the 2016 Plan Year, did the Plan exclude from
2 coverage psychological assessment and psychotherapy
3 treatment in conjunction with proposed gender
4 transformation?

5 A. Yes.

6 Q. If I refer to these two exclusions from coverage
7 today as the exclusions, will you know what I'm talking
8 about?

9 A. Yes.

10 Q. All right. When was this exclusion language
11 added to the Plan documents?

12 A. As I understand it, back into the '90s in some
13 capacity.

14 Q. And with the exception of Plan Year 2017, has the
15 exclusion been in place continuously since it was
16 introduced?

17 A. As I understand it, yes.

18 Q. And is that correct for the 80/20 PPO Plan?

19 A. Yes.

20 Q. Is that also correct for the 70/30 PPO Plan?

21 A. Yes.

22 Q. And for the High-Deductible Health Plan?

23 A. Yes.

24 Q. Who is eligible to enroll in the State Health
25 Plan?

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DEPOSITION OF DEE JONES

Page 17

1 A. State employees, teachers, public school
2 teachers, employees of the University Systems of North
3 Carolina, employees of the Community College System,
4 lawmakers, and former lawmakers, some charter schools, some
5 municipalities, and, of course, state agencies.

6 Q. Okay. And by that, you mean employees of charter
7 schools, municipalities, and state agencies?

8 A. Yes.

9 Q. Anyone else?

10 A. No.

11 Q. And what is the plan year?

12 A. January 1 through December 31st.

13 Q. All right. Can you generally describe the
14 process by which the Plan determines benefits for a
15 subsequent plan year?

16 A. We start with the existing benefits. And unless
17 there are any material, or changes that the Plan has
18 decided to add, it will be the same booklet or same
19 benefits going forward.

20 Q. How does the Plan decide whether to make changes
21 going forward?

22 A. Starting with the overarching goal of providing
23 healthcare for its members, and recognizing that we are a
24 government plan, and recognizing that we have limited
25 funding all provided by taxpayers, we start with that.

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DEPOSITION OF DEE JONES

Page 58

1 Q. Did you discuss this recommendation with the
2 State Treasurer?

3 A. No.

4 Q. Is it correct that care must be medically
5 necessary to be covered by your Plan?

6 A. Yes. But the Plan does not cover all medically
7 necessary treatment.

8 Q. At the time of this draft resolution, was it the
9 Plan's position that gender transition services were
10 medically necessary care?

11 MR. RULEY: Objection, form.

12 THE WITNESS: Again, a lot of things are
13 medically necessary that the Plan doesn't cover. And a lot
14 is not, it's maybe a little bit of a loaded word. But that
15 is what it says here.

16 BY MS. RAVI:

17 Q. I'm sorry -- could you clarify when you say that
18 is what it says here?

19 A. It says here in the resolution that the board
20 approve medically necessary coverage.

21 Q. Medically necessary coverage of gender transition
22 services?

23 A. Yes.

24 Q. Regarding the position on whether or not gender
25 transition services are medically necessary coverage, has

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DEPOSITION OF DEE JONES

Page 69

1 A. That is correct.

2 Q. What was the basis for that reference?

3 A. This is the Treasurer's words. I'm not aware of
4 what he was referring to. I don't disagree with it. But
5 these are his words.

6 Q. All right. Are you aware of the Treasurer's
7 basis for this statement?

8 A. No.

9 Q. Does the Plan believe the treatment for gender
10 dysphoria is medically uncertain?

11 A. Yes.

12 Q. When did this view develop?

13 A. Please repeat.

14 Q. When did this view develop?

15 A. I would say over several years. In 2016, it's
16 very clear that while the presentations had a lot of
17 supporting documentation, the basis of the sunseting or
18 the removal of the exclusion was based on the 1557 Rule and
19 the need to keep the federal funding.

20 And the Plan at the time, the staff used and put
21 forth all sorts of other information when we just went
22 through.

23 But since that time, we have new staff, we have a
24 small staff, we manage contracts, and we have limited
25 clinical staff.

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DEPOSITION OF DEE JONES

Page 70

1 But the people we work with, and as I already
2 mentioned the journals or whatever that I have reviewed and
3 discussions we've had with current and former board
4 members, there's a lot of uncertainty on whether or not the
5 treatments are effective. And in some cases, maybe they
6 are. But there's discussion in the space of the, more the
7 psychological effects and how much it's important there
8 versus the surgery, the transition surgery.

9 Q. And what was the basis for Treasurer Folwell's
10 statement regarding the medical uncertainty?

11 MR. RULEY: Objection, form.

12 THE WITNESS: I don't know.

13 BY MS. RAVI:

14 Q. Did Treasurer Folwell discuss this statement with
15 you?

16 A. No.

17 Q. Did Treasurer Folwell discuss this statement with
18 anyone at the Plan?

19 A. I'm not aware of any conversations he had with
20 anybody at the Plan.

21 Q. And does this statement from October 25th reflect
22 the views of the State Health Plan?

23 A. Parts of it might, such as the legal and medical
24 uncertainty.

25 The Franciscan Alliance opinion came out in

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DEPOSITION OF DEE JONES

Page 71

1 December of 2016. And we know there were various cases in
2 Texas I believe.

3 So, again, I think there's legal uncertainty. I
4 think there's medical uncertainty. And our thoughts kind
5 of went down that direction.

6 Plus the fact that this is such, as we already
7 went through, the Blue Cross spreadsheet that was part of
8 the record, where it's such a small part of the Plan
9 membership that this benefit would apply to. It's a niche.
10 I call that a niche, a small population of people.

11 And the Plan can't cover every requested benefit
12 for every single niche that comes forward, niche
13 population. It happens all the time.

14 You know, I have to turn down parents who want a
15 special feeding benefit for their infant children who can't
16 process food normally.

17 I have to turn down hearing aids for a much
18 larger population of people because they're so expensive.
19 There's plenty of efficacy there, right? It helps people
20 hear. But the fact that they have to change hearing aids
21 every five to six years or more frequently, I can't afford
22 that as a Plan.

23 Because if I -- I have to serve a whole entire
24 population with a very finite amount of money. And so the
25 only thing I can really cover is the current state of

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DEPOSITION OF DEE JONES

Page 72

1 benefits and any benefits that might apply to a broad swath
2 of the population with a not guaranteed but a strong
3 proponent of lower costs in the future.

4 And so that's where legal and medical uncertainty
5 -- I don't have to cover medically necessary treatment. We
6 cover a lot of it. But in this case, we don't.

7 Q. Prior to this statement coming out on October 25,
8 2018, did Plan staff discuss the legal uncertainty that's
9 referenced here?

10 A. Yes.

11 Q. Did Plan staff discuss the medical uncertainty
12 that's referenced here?

13 A. Yes.

14 Q. Let's turn back to Exhibit 5. And if you can
15 turn to Page 10 of this document.

16 Plaintiffs' Interrogatory Number 3 asks the Plan
17 to discuss the factual basis for each governmental interest
18 that the Plan contends supports the exclusion.

19 Is that right?

20 A. Yes.

21 Q. And is it correct, turning to the next page, the
22 Plan states that the Plan has not identified any valid,
23 reliable, peer-reviewed longitudinal studies that support
24 the efficacy of the plaintiffs' desired treatment?

25 A. I'm sorry -- where are you?

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DEPOSITION OF DEE JONES

Page 73

1 Q. I am at the bottom of Page 11, last paragraph.

2 A. Okay.

3 That would be true.

4 Q. Is a peer-reviewed, longitudinal study that
5 supports the efficacy of treatment a prerequisite for the
6 Plan to cover a proposed benefit?

7 A. Not necessarily. When we evaluate, as I think we
8 said earlier, it's a holistic review. There's no single
9 pathway to coverage. It has to be a broad swath of
10 membership, that there's a benefit for multiple people.

11 There's a cost component to it. There's a
12 downstream cost component to it. There's got to be some
13 common -- not experimental for sure.

14 There's got to be some common understanding in
15 the medical community that it is a treatment that will
16 produce a downstream effect that's positive.

17 So, you know, it's very difficult to come back
18 and say well, peer-reviewed, longitudinal studies -- I'm
19 not a clinician and I'm not a researcher, so it's, you
20 know -- but to the extent that we have not found any real
21 evidence that it's absolutely black and white, this
22 particular issue.

23 You know, I think it goes, well, it should go
24 without saying this is not a personal issue for me. I
25 don't get, I have no personal opinion about this.

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DEPOSITION OF DEE JONES

Page 74

1 Because I walk through the front door at the
2 office, and I'm a fiduciary. This is all about the cost
3 and maintaining this benefit for 740,000 people who expect
4 it every single day and the retirees that have an
5 expectation of the benefit when they retire.

6 And so every decision I make -- and I'm speaking
7 for myself -- is about that. It's all about that every
8 day.

9 It breaks my heart 9 times out of 10 when I have
10 to decline a benefit, 9 times out of 10.

11 When I see people that need hearing aids, I would
12 love to give them a hearing aid, I would love to.

13 I have nothing against transgender people. I
14 would be more than happy to provide the benefit. But it's
15 not my decision. I'm a fiduciary first. And I'm
16 responsible for 740,000 people. This is not personal.
17 This is all about money very simply put.

18 I've been charged with reducing the costs of the
19 Plan to operate since the day I started. And we have done
20 just that.

21 You know, there's some discussions about how much
22 money the Plan has saved. Well, it's because we've worked
23 really hard to do that. We've taken out all extraneous
24 benefits.

25 We used to cover benefits for a small population

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DEPOSITION OF DEE JONES

Page 85

1 A. Yes.

2 Q. So looking at all enrollees in the Plan, 15
3 percent of those enrollees account for 85 percent of the
4 cost of treatment?

5 A. Correct.

6 Q. Can an individual enrolled in the State Health
7 Plan request that the State Health Plan change the pronoun
8 associated with that enrollee?

9 A. Please rephrase.

10 Q. Can an individual that's enrolled in the State
11 Health Plan request that the Plan change in its records the
12 pronoun that's associated with that individual?

13 A. The member can change his or her own pronoun.

14 Q. How does that process occur?

15 A. The member logs in to eBenefits or calls into the
16 call center, benefit-focused call center, and either
17 changes it him or herself, or requests that it be changed.

18 Q. Okay.

19 A. It's not validated.

20 Q. What does that mean for it not to be validated?

21 A. You could put in whatever you want. There's two
22 options, male or female.

23 And if I were female and put in female, I could
24 do that. Or if I wanted to put in male, I can do that. If
25 I make an error, I can do that too.

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DEPOSITION OF DEE JONES

Page 86

1 Q. And you said an individual can either log in and
2 change that themselves or they can make a request that the
3 Plan make that change?

4 A. No. They call into the call center, talk to a
5 call center rep who will record the call. And then they
6 can be requested to make that change.

7 Q. To whom is that request made?

8 A. The call center rep.

9 Q. If a call center rep gets that kind of request,
10 what happens next?

11 A. They comply with the request.

12 Q. And how does that process occur?

13 A. They go into the system and check yes or no or
14 male or female or exactly -- I guess it's male or female.

15 Q. And prior to going into the system, is any
16 validation requested?

17 A. Absolutely. Whatever -- like the member would
18 call in, and there would be validation questions from the
19 call center rep back to the member to confirm any number of
20 demographic statistics.

21 Q. What are those validation questions?

22 A. I don't know them specifically. But it's
23 something that would be similar to what we all do, which is
24 your address, your full name, possibly your Social Security
25 number, you know, phone numbers, whatever, to try to --

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DEPOSITION OF DEE JONES

Page 87

1 they're a vendor. I don't tell them how to do their job.
2 I just tell them they have to validate it. It's not my
3 obligation how to exactly do it.

4 Q. So is it fair to say that validation is with
5 respect to making sure that the person calling in and
6 making this request is who they say they are?

7 A. Yes.

8 Q. Does the Plan require proof of any enrollee's
9 chromosomes before it goes into the system and complies
10 with that question?

11 A. No.

12 Q. Does it require proof of an enrollee's anatomy?

13 A. No.

14 Q. And does it require proof of an enrollee's DNA?

15 A. No.

16 Q. Everything we just talked about with regard to
17 changing the pronoun in the system, does that also apply to
18 a request to change an individual enrollee's gender marker
19 in the system?

20 A. We don't track gender markers in the system other
21 than male or female. We only have but two options right
22 now.

23 Q. Is participation in the Plan required for state
24 agency employees?

25 A. No. They have a choice. I mean the benefit

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DEPOSITION OF DEE JONES

Page 102

1 role, but I would say we have two people, we have a real
2 actuary, Charles Seifert. And we have a financial analyst,
3 Tamera McNeal.

4 Q. And you said it's a different perspective with
5 regard to how issues are approached with current Plan
6 staff --

7 A. Uh-huh.

8 Q. -- as opposed to Plan staff in 2016.

9 A. Uh-huh.

10 Q. Can you clarify that?

11 A. In 2016, there was Mona and Lotta and Caroline.
12 And they seemed to make all the decisions and were
13 supported by staff and maybe some of the clinical
14 perspective that -- they actually had more clinicians back
15 in those days.

16 Today, we are a flatter staff. And we have a very
17 diverse group of experience and background and skill sets.
18 And so we bring them all to the table.

19 And we work through -- again, our focus, at the
20 direction of the Treasurer, is about making sure the Plan is
21 in existence tomorrow, in five years, in ten years.

22 And that's really hard to do when we're being
23 funded at a 4 percent or better or less level, and our trend
24 rates are at 7 percent. The math just doesn't work.

25 Q. With regard to the Plan's current staff, is there

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DEPOSITION OF DEE JONES

Page 104

1 not personal. This is not something that I get to make a
2 choice about. Because if I had every single group that
3 comes in to ask for a benefit, if I covered that, then I
4 would be completely, completely avoiding my fiduciary
5 responsibility to cover basic health. That's what the Plan
6 Benefits Booklet says, right?

7 The Plan Benefits Booklet identifies every single
8 thing I cover. And it provides healthcare. We want every
9 member of the Plan to have good healthcare. We want the --
10 and the reality is we have a lot of members who have
11 diabetes. We have a lot of members who have orthopedic
12 issues. We have a lot of members who have RA. We have
13 really a lot of members who have cancer. And they want to
14 be, they want to be covered.

15 And so it's really difficult for me to just say,
16 you know, I can take this group of 25 and this group of 10
17 and these -- if you add all that up -- I'll, I'll totally
18 admit that the cost of this benefit is not going to break
19 the Plan, never was, never will.

20 But it -- I can't do it for that group and not do
21 it for the group that wants it for their infants, for, you
22 know, for a certain feeding formula for that infant group,
23 and I can't do it for the hearing aid group, and I can't do
24 it for the group that really wants acupuncture.

25 Because once you start adding those, then I have

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DEPOSITION OF DEE JONES

Page 105

1 to keep going. Everybody who comes in and wants a benefit,
2 I'll have to do it because I can't discriminate.

3 I'm not discriminating. This is about what the
4 Plan can afford in the environment that we're in today --
5 which is I have a General Assembly that's funding me at 4
6 percent when my trend rate is 7 plus. And that's not even
7 absolutely certain.

8 I have a 28.8 billion unfunded liability for
9 retiree healthcare that I, myself, am ready to have in a few
10 years.

11 And so, you know, this is all about being a
12 government plan. And I don't get to, I don't get to pick
13 and choose. I'm not a commercial plan.

14 So let's start with that. A commercial plan, they
15 have revenues, right? You go out and sell widgets, and you
16 sell a lot of widgets, and then you decide how much you want
17 to put into the benefit. And you can have your member, your
18 staff, your employees pay.

19 I would bet most employers -- I was paying 100
20 bucks when I was at Time Warner. I was paying for the
21 family, and I wasn't fully subsidized.

22 At the State Health Plan, we've got people who, a
23 whole lot of employees have to work one week out of a month
24 just to cover their Health Plan for their family.

25 And the effort to just institute a 25 dollar

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DEPOSITION OF DEE JONES

Page 106

1 premium for the 70/30 Plan and a 50 dollar premium for the
2 80/20 Plan was a herculean effort. They had never paid
3 anything until 2018. Employees had never paid anything
4 until 2018 -- which is crazy. I mean I get that.

5 But we can't just keep adding costs to the Plan.

6 And the General Assembly, in the 2016 budget, I
7 think it's 2016-94, something like that, said you got to
8 stop, you've got to control your costs, you're not getting
9 more than 4 percent, and you can't go over.

10 So what happens when I spend more than I've got?
11 I've got to charge employees. And I got to charge employees
12 who, you know, read the, you know employees don't make
13 market rates. They just don't.

14 And so it is a very tight -- I mean I live in a
15 box. And there's not a lot of room in the box to move
16 because I have the General Assembly describing what I can
17 do. You know, it's all -- eligibility, it's all in statute.
18 My funding is all in statute, in the budget bill. And
19 that's one box.

20 I work with vendors who I have to make them work
21 together. And, quite frankly, as big as we are, I got at
22 least one vendor that's not real cooperative. And it's
23 really annoying. But it doesn't matter -- apparently, to
24 some vendors, it doesn't matter that we're the biggest
25 Health Plan, you know, one of the biggest in the nation.

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DEPOSITION OF DEE JONES

Page 117

1 -- if that's okay.

2 MS. RAVI: Alan, I think we're taking another 5
3 to 10 minute break, and then we'll be back.

4 (Off the record)

5 MR. RULEY: I have just a few follow-up questions
6 for you.

7

8 EXAMINATION

9 BY MR. RULEY:

10 Q. Would you find Exhibit 1 please. Would you turn
11 to Page 50 please.

12 Page 50 is titled What Is Not Covered? Is that
13 right?

14 A. That is correct.

15 Q. And are these basically exclusions, a list of
16 exclusions?

17 A. Yes.

18 Q. And would you look at the fourth bullet point.

19 A. Yes.

20 Q. What is that exclusion?

21 A. Any experimental drug or any drug or device not
22 approved by the Food and Drug Administration (FDA) for the
23 applicable diagnosis or treatment.

24 Q. Then turning the page to Page 51, the fourth
25 bullet point from the bottom, what is that exclusion?

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DEPOSITION OF DEE JONES

Page 118

1 A. Surgical procedures for psychological or
2 emotional reasons.

3 Q. And would those exclusions also potentially apply
4 to coverage for gender dysphoria?

5 A. Yes.

6 Q. Earlier, you mentioned HBRs. What are they again
7 please?

8 A. Health Benefit Representatives. They are
9 actually defined in statute. And they work at the various
10 employing units. I mentioned there are 408. They are
11 liaisons to the Plan. So the Plan teaches them, keeps them
12 apprised of the benefits being offered. But they're
13 responsible for their employer's employees and getting them
14 enrolled and making sure they understand the processes.

15 Q. So are they employed by the State Health Plan or
16 by others?

17 A. By the others.

18 Q. All right. Thank you.

19 On costs -- would you get Exhibits 6 and 7 please.

20 Looking at Exhibit 6, for example, look at the
21 first e-mail on Exhibit 6, Page DEF61647, the January 22,
22 2017 e-mail.

23 A. Yes.

24 Q. And that reports, as of 1-21, a total paid of
25 287.57.

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80/20 and 70/30 Plans

2021 Recommendation

- **Base Premiums:**
 - Base premiums would not change for 2021.
 - Tobacco Attestation wellness surcharge kept flat at \$60.
- **Dependent Tiers:**
 - Premiums for the dependent tiers would not change for 2021.
 - The "Subscriber + Family" and "Subscriber + Children" tiers are frozen at the same level since 2018.

Coverage & Tiers	2020 Rates	2021 Rates
80/20 Employees *		
Subscriber Only	\$50.00	\$50.00
Subscriber + Child(ren)	\$305.00	\$305.00
Subscriber + Spouse	\$700.00	\$700.00
Subscriber + Family	\$720.00	\$720.00
80/20 Retirees / Non-Med Dependents		
Subscriber Only	\$50.00	\$50.00
Subscriber + Child(ren)	\$305.00	\$305.00
Subscriber + Spouse	\$700.00	\$700.00
Subscriber + Family	\$720.00	\$720.00

*Assumes "Yes" completion of tobacco attestation

Actuarial Value
80/20 Active & Non-Medicare Plans
70/30 Active & Non-Medicare Plans
70/30 Medicare Plan

82.2%
77.7%
86.6%

Coverage & Tiers	2020 Rates	2021 Rates
70/30 Employees *		
Subscriber Only	\$25.00	\$25.00
Subscriber + Child(ren)	\$218.00	\$218.00
Subscriber + Spouse	\$590.00	\$590.00
Subscriber + Family	\$598.00	\$598.00
70/30 Retirees/Non-Med Dependents		
Subscriber Only	\$0.00	\$0.00
Subscriber + Child(ren)	\$218.00	\$218.00
Subscriber + Spouse	\$590.00	\$590.00
Subscriber + Family	\$598.00	\$598.00
70/30 Retirees/Med Dependents		
Subscriber Only	\$0.00	\$0.00
Subscriber + Child(ren)	\$155.00	\$155.00
Subscriber + Spouse	\$425.00	\$425.00
Subscriber + Family	\$444.00	\$444.00

*Assumes "Yes" completion of tobacco attestation

JA177



WHAT IS NOT COVERED?

Exclusions for a specific type of service are stated along with the benefit description in "Covered Services." Exclusions that apply to many services are listed in this section, starting with general exclusions and then the remaining exclusions are listed in alphabetical order. To understand all of the exclusions that apply, read "Covered Services," "Summary of Benefits" and "What Is Not Covered?" **The Plan does not cover services, supplies, medications or charges for:**

- Anything specifically listed in this benefits booklet as not covered or excluded, regardless of *medical necessity*.
- Any condition, disease, ailment, injury, or diagnostic service to the extent that benefits are provided or persons are eligible for coverage under Title XVIII of the Social Security Act of 1965, including amendments, except as otherwise required by federal law.
- Conditions that federal, state or local law requires to be treated in a public facility.
- Any condition, disease, illness, or injury that occurs in the course of employment, if the *member*, employer or carrier is liable or responsible for the specific medical charge (1) according to a final adjudication of the claim under a state's workers' compensation laws, or (2) by an order of a state Industrial Commission or other applicable regulatory agency approving a settlement agreement.
- Basic life or work-related or medical disability examinations.
- Benefits that are provided by any governmental unit except as required by law.
- Services that are ordered by a court that are otherwise excluded from benefits under this Plan.
- Any condition suffered as a result of any act of war or while on active or reserve military duty.
- Services in excess of any *benefit period maximum* or *lifetime maximum*.
- Received prior to the *member's effective date*.
- Received after the coverage termination date, regardless of when the treated condition occurred, and regardless of whether the care is a continuation of care received prior to the termination.
- Received from a dental or medical department maintained by or on behalf of an employer, a mutual benefit association, labor union, trust or similar person or group.
- Services provided at request of patient in a location other than physician's office which are normally provided in the physician's office.
- Day care services, chore services, attendant care services, homemaker services, companion care services, foster care services.
- Hair analysis, excluding arsenic.
- Transportation of portable X-ray equipment and personnel to home or nursing home, transportation of portable EKG to facility or other location.
- *Emergency* response systems.
- *Alternative medicine* services, which are unproven preventive or treatment modalities, also described as alternative, integrative, or complementary medicine, whether performed by a physician or any *other provider*.

In addition, the *Plan* does not cover the following services, supplies, medications or charges:

- A**
 - **Acupuncture** and **acupressure**.
 - **Administrative** charges billed by a *provider*, including, but not limited to charges for failure to keep a scheduled visit, completion of a claim form, obtaining medical records, late payments, shipping and handling, taxes and telephone charges.
 - Costs in excess of the **allowed amount** for services usually provided by one *doctor*, when those services are provided by multiple *doctors* or *medical care* provided by more than one *doctor* for treatment of the same condition.



incurred, except in the absence of legal capacity of the *member*.

Clinical Trials exclusions include:

- Non-health care services, such as services provided for data collection and analysis.
- Early feasibility, safety and pilot states of device trials
- CMS Investigational Device Exemption (IDE) Category A devices
- *Investigational* medications and devices and services that are not for the direct clinical management of the patient.
- Side effects and **complications** of non-covered services, except for *emergency services* in the case of an *emergency*.
- **Convenience** items such as, but not limited to, devices and equipment used for environmental control, urinary incontinence devices (including bed wetting devices) and equipment, heating pads, hot water bottles, ice packs and personal hygiene items.
- **Cosmetic** services, which include the removal of excess skin from the abdomen, arms or thighs, skin tag excisions, skin tone enhancements, cryotherapy or chemical exfoliation for active acne scarring, superficial dermabrasion, injection of dermal fillers, services for hair transplants, electrolysis and surgery for psychological or emotional reasons, except as specifically covered by the *Plan*.
- Services received either before or after the **coverage** period of the Plan, regardless of when the treated condition occurred, and regardless of whether the care is a continuation of care received prior to the termination.
- **Custodial care** designed essentially to assist an individual with activities of daily living, with or without routine nursing care and the supervisory care of a *doctor*. While some skilled nursing services may be provided, the patient does not require continuing skill services 24 hours daily. The individual is not under specific medical, surgical, or psychiatric treatment to reduce a physical or mental disability to the extent necessary to enable the patient to live outside either the institution or the home setting with substantial assistance and supervision, nor is there reasonable likelihood that the disability will be reduced to that level even with treatment. *Custodial care* includes, but is not limited to, help in walking, bathing, dressing, feeding, preparation of special diets and supervision over medications that could otherwise be self-administered. Such services and supplies are custodial as determined by the *Plan* without regard to the place of service or the *provider* prescribing or providing the services.
- **Camisoles**, or other clothing, post-mastectomy.
- **Communication** boards or alternative communication devices.
- **Contraception** for males

D

- **Dental services**
 - provided in a *hospital*, except as specifically covered by the *Plan*.
 - *Treatment for the following conditions*:
 - Injury related to chewing or biting.
 - Preventive dental care, diagnosis or treatment of or related to teeth or gums.
 - Periodontal disease or cavities and disease due to infection or tumor.



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- Primary treatment of a psychiatric disorder in a *residential treatment center* (RTC) unless the RTC is licensed as a psychiatric RTC.
 - Primary treatment of a *substance abuse* or *substance abuse* disorder in a *residential treatment center* (RTC) unless the RTC is licensed as a *substance abuse* or substance abuse RTC.
 - Services by *providers* not currently licensed in the state in which services are provided.
 - Psychotherapy as part of artificial means of conception.
 - Psychological assessment and psychotherapy treatment in conjunction with proposed gender transformation.
 - Psychological testing for those persons with a *substance abuse* diagnosis until 30 consecutive days of abstinence are obtained.
 - Therapeutic boarding schools as a psychiatric residential treatment center (RTC) unless the program is licensed for psychiatric RTC in the state in which services are provided, has *registered nurses* who are present on-site 24-hours per day, and holds current national accreditation by a national health care accrediting body approved by the *Mental Health Case Manager*.
 - Therapeutic boarding schools as a *substance abuse* or *substance abuse* residential treatment center (RTC) unless the program is licensed as a *substance abuse* RTC in the state in which services are provided and has licensed supervision of all residents 24 hours per day, seven days per week.
 - Wilderness camps, wilderness “step-down” components of a residential program, and stand-alone outdoor treatment programs or outdoor “step-down” components of a residential program are not covered as a psychiatric RTC unless the program is licensed for psychiatric residential treatment in the state in which services are provided, has *registered nurses* who are present on-site 24-hours per day, and holds current national accreditation by a national health care accrediting body approved by the *Mental Health Case Manager*.
 - Wilderness camps and stand-alone outdoor treatment programs are not covered as *substance abuse* or *substance abuse* RTC programs.
 - Academic education during *residential treatment* when charged separately.
 - Administrative psychiatric services (e.g., expert testimony, report writing, medical records review and maintenance, case management or case coordination, chart review, etc.)
 - Consultation with a mental health professional for adjudication of marital, child support, and custody cases.
 - Evaluations, consultations, testing or therapy for educational, professional training, or for investigation purposes relating to employment, insurance, judicial or administrative proceedings.
 - Training analysis.
 - Treatment for personal or professional growth, development, training or professional *certification*.
 - Aversive Treatment.
 - Treatment programs based solely on the 12-step Model.
 - Erhard Seminar Training (EST) or similar motivational services.
 - Bioenergetic, carbon dioxide, confrontational, hyperbaric or normobaric oxygen, marathon, megavitamin, orthomolecular, primal, rebirthing, or sleep therapies.
 - Expressive therapies (art, poetry, movement, psychodrama), guided imagery, or stress and relaxation therapy when billed separately.
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- Occlusal (bite) adjustments.
 - Extractions.
 - The following types of **therapy**:
 - Applied Behavior Analysis (ABA) therapy except as specifically identified by the *Plan*.
 - Music therapy, recreational or activity therapy, and all types of animal therapy. Remedial reading and all forms of special education and supplies or equipment used similarly, except as specifically covered by the *Plan*.
 - Massage therapy.
 - Alternative therapy.
 - Hypothermia therapy.
 - Cognitive therapy.
 - Speech therapy for stammering, stuttering, or developmental delay.
 - Treatment of speech, language, voice, communication and/or auditory processing disorder.
 - Pulmonary rehabilitation group sessions.
 - Peripheral arterial disease rehabilitation.
 - Community or work integration training, work hardening or conditioning.
 - **Thermography** or **thermograph** examination.
 - **Transplant** exclusions include:
 - The purchase price of the organ or tissue if any organ or tissue is sold rather than donated to the recipient *member*.
 - The procurement of organs, tissue, bone marrow or peripheral blood stem cells or any other donor services if the recipient is not a *member*.
 - *Transplants*, including high dose chemotherapy, considered *experimental* or *investigational*.
 - Services for or related to the transplantation of animal or artificial organs or tissues.
 - **Travel**, whether or not recommended or prescribed by a *doctor* or other licensed health care professional, except as specifically covered by the *Plan*.
 - **Treatment** or studies leading to or in connection with sex changes or modifications and related care.
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V

- The following **vision** services:
 - Radial keratotomy and other refractive eye *surgery*, and related services to correct vision except for surgical correction of an eye injury. Also excluded are premium intraocular lenses or the services related to the insertion of premium lenses beyond what is required for insertion of conventional intraocular lenses, which are small, lightweight, clear disks that replace the distance-focusing power of the eye's natural crystalline lens.
 - Routine eye examination services except as specifically covered by the *Plan*.
 - Eyeglasses or contact lenses, except as specifically covered in "*Prosthetic appliances*."
 - Orthoptics, vision training, and low vision aids.
 - For over-the-counter and non-federal legend **Vitamins**, food supplements or replacements, nutritional or dietary supplements, formulas, or special foods of any
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- And except as specifically stated as covered:
 - Dental implants or root canals
 - Dentures
 - Dental appliances except when medically necessary for the treatment of temporomandibular joint disease or obstructive sleep apnea
 - Orthodontic braces or devices.
 - Palatal expanders
 - Removal of teeth and intrabony cysts.
 - Procedures performed for the preparation of the mouth for dentures.
 - Crowns, bridges, dentures or in-mouth appliances.
 - Evaluation and treatment of **developmental dysfunction** and/or learning disability.
 - **Diabetes related services including:**
 - Diabetic shoes, including accessories, fittings, and associated services and supplies.
 - Glasses.
 - The following drugs or medications:
 - Injections by a health care professional of injectable *prescription medications* which can be self-administered, unless medical supervision is required.
 - Medications associated with conception by artificial means.
 - For prescribed *sexual dysfunction* medications.
 - Take home medications furnished by a *hospital* or *non-hospital facility*.
 - **Experimental medication or any medication or device not approved by the Food and Drug Administration (FDA) for the applicable diagnosis or treatment.** However, this exclusion does not apply to *prescription medications* used in covered phases I, II, III and IV clinical trials, or medications approved by the FDA for treatment of cancer, if prescribed for the treatment of any type of cancer for which the medication has been approved as effective and accepted in any one of the following nationally recognized medication reference guides:
 - The American Medical Association Drug Evaluations;
 - The American *Hospital Formulary* Service Drug Information;
 - The United States Pharmacopoeia Drug Information;
 - The National Comprehensive Cancer Network Drugs & Biologics Compendium;
 - The Thomson Micromedex DrugDex;
 - The Elsevier Gold Standard's Clinical Pharmacology; or
 - Any other authoritative compendia as recognized periodically by the United States Secretary of Health and Human Services.
 - **Durable Medical Equipment** including:
 - Appliances or devices that serve no medical purpose or that are primarily for comfort or convenience.
 - Repair or replacement of equipment due to abuse or desire for new equipment.
 - Heel or elbow protectors.
 - Batteries, except as required for operation of *medically necessary* equipment prescribed by a *provider*.
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, *et al.*,

Plaintiffs,

v.

No. 1:19-cv-272-LCB

DALE FOLWELL, in his official capacity as
State Treasurer of North Carolina; DEE
JONES, in her official capacity as Executive
Administrator of the North Carolina State
Health Plan for Teachers and State Employees;
**NORTH CAROLINA STATE HEALTH
PLAN FOR TEACHERS AND STATE
EMPLOYEES**; and **STATE OF NORTH
CAROLINA, DEPARTMENT OF PUBLIC
SAFETY**,

Defendants.

DECLARATION OF BLUE CROSS BLUE SHIELD OF NORTH CAROLINA

I, AIMEE FOREHAND, on behalf of Blue Cross and Blue Shield of North
Carolina ("BCBSNC"), state that to the best of my knowledge and based on a review
of BCBSNC's records, the following is true and accurate:

1. BCBSNC is a non-profit medical services corporation, which is organized and
existing under the laws of the State of North Carolina. BCBSNC is headquartered
in Durham, North Carolina.
2. BCBSNC is the Third-Party Administrator ("TPA") of the North Carolina State
Health Plan for Teacher and State Employees (the "State Health Plan" or the "Plan").

3. The State Health Plan is a self-funded customer of BCBSNC, which means that, in addition to deciding what benefits the Plan will provide to Plan participants each year, the Plan is also solely responsible for paying for all the benefits it has agreed to provide.

4. As TPA for the Plan, BCBSNC has a contract with the Plan to provide administrative services on behalf of the Plan. More specifically, after a participating, in-network healthcare provider provides a medical service to a Plan participant, the medical provider submits a claim to BCBSNC which processes the claim according to the terms of Plan and determines the amount of reimbursement that the healthcare provider will receive by the Plan for that service based on the terms of the Plan and the network participation agreement between BCBSNC and the participating provider.

5. The contract between the Plan and BCBSNC is an Administrative Services Only (hereafter "ASO") contract, which means that BCBSNC provides only administrative services that relate to the processing of the claims. BCBSNC has provided these services to the Plan for more than 30 years.

6. In addition to serving as a TPA for the Plan and other customers, BCBSNC also sells private health insurance to groups and individuals. BCBSNC uses its claims processing system and standards in the same manner for both its private health insurance business and its work as the TPA for the Plan. In both

circumstances, the BCBSNC operates in the manner accepted as the industry standard for the provision of healthcare benefits.

7. In accordance with industry practice, BCBSNC uses industry-standard procedural codes and diagnostic codes to determine whether a claim submitted to it by a healthcare provider for a specific medical treatment is compensable by the Plan. These diagnostic and procedural codes are not created by BCBSNC, but are uniform across the American health care, health benefits plan, and health insurance industries. Diagnostic codes are classification of diseases as provided by the ICD ("International Classification of Diseases"). Medical services and procedures are identified by a distinctive alphanumeric code known as CPT code ("Current Procedural Terminology"). Every medical service has its own unique CPT Code.

8. In order to request reimbursement for the medical service provided to a Plan participant, an in-network health care provider submits a claim to BCBSNC on an established industry form (either a CMS-1500 or UB-04 form depending on the type of provider; copies attached) or through an electronic billing agreement which requires the same information.

9. To receive reimbursement, a healthcare provider must submit a claim that contains both a diagnostic code and a corresponding procedural code (or, for facilities, a revenue code rather than a procedural code), among other information. This is the standard requirement across the national health insurance industry. Failure to submit both a diagnostic code and a corresponding procedural code results in denial of the claim.

10. When BCBSNC receives a claim for reimbursement from a provider, BCBSNC's automated claims systems reviews the claim to determine whether it is for a benefit covered by the Plan. If the medical treatment is a covered treatment, BCBSNC authorizes reimbursement to the healthcare provider by the Plan.

11. Each year, the State Health Plan creates a benefits booklet, which describes the benefits and reimbursement levels offered to eligible Plan participants. As TPA, BCBSNC receives and reviews the final Plan benefit booklet each year. BCBSNC is responsible for implementation of the benefits outlined in the benefit booklet. Because the benefits booklet does not contain or identify either procedural or diagnostic codes, BCBSNC—in consultation with the Plan staff—implements the coding for the benefits covered by the Plan.

12. When a healthcare provider performs a service for a Plan participant, the provider submits a claim to BCBSNC for reimbursement (as a benefit provided by the Plan). For more than 90% of claims submitted to BCBSNC for Plan beneficiaries, the process is automated, meaning it is processed electronically without being separately reviewed by a person.

13. As part of the claim submission, BCBSNC receives the name of the Plan participant, the name of the healthcare provider, the age and sex of the Plan participant, the ICD diagnostic code, and the CPT procedural Code, among other information. This is the industry-standard information required for claims submitted to insurance providers for reimbursement of expenses for medical services, and this information is submitted by the physician or other healthcare provider where the

physician or healthcare provider is a participating, in-network provider. BCBSNC has a publicly available manual for healthcare providers that advises them on what information must accompany a claim, and how to properly submit a claim.

14. As part of the claim submission process, BCBSNC does not request or require that the healthcare provider identify the transgender status of any person seeking medical care. The BCBSNC claim submission process does not include any method for the healthcare provider to submit this information, and the transgender status of any person is not recorded within the BCBSNC databases.

15. Certain claims require approval by BCBSNC before the medical service is provided to the Plan participant. BCBSNC and the State Health Plan jointly decide which claims will be subject to this preauthorization requirement. All inpatient surgical procedures require preauthorization. There is no separate or unique preauthorization requirement for claims submitted on behalf of individuals who identify as transgender.

16. Further, in determining whether to approve or deny a claim, BCBSNC does not consider whether the Plan participant identifies as transgender. More specifically, BCBSNC does not track whether any specific Plan participant identifies as transgender, cisgender, gender non-binary, etc. Thus, the transgender status of any person—or whether any person identifies as transgender—is not a fact that BCBSNC uses at any time to determine whether BCBSNC will approve a claim for benefits for State Health Plan participants.

17. BCBSNC processes claims for medical services provided to an individual who identifies as transgender in the exact same manner as BCBSNC processes claims for medical services provided to an individual who does not identify as transgender. BCBSNC process claims for medical services for gender non-binary individuals in the exact same manner as BCBSNC processes claims for medical services for an individual who identifies as neither transgender nor gender non-binary.

18. As noted above, in excess of 90% of submitted claims are approved by BCBSNC's claims-processing software. Claims not approved in this fashion because, for example, the software has identified a potential duplicate bill, are manually processed by BCBSNC employees. After this employee review, claims are approved or denied. Reasons to deny a claim include: incorrect coding (diagnosis or procedure), duplicative billing, failure to obtain prior authorization when required, or other reasons.

19. BCBSNC will not approve a claim, or preauthorization, for a service not covered by the Plan.

20. To the best of my knowledge, prior to January 1, 2017, in its implementation of the Plan Benefit Booklet, BCBSNC denied preauthorization for 4 specific surgeries, regardless of the diagnostic code.

Table 1

CPT Code	Description of Surgery
55970	Intersex Surgery, Male to Female
55980	Intersex Surgery, Female to Male

57335	Vaginoplasty for Intersex State
56805	Clitoroplasty for Intersex State

21. To best of my knowledge, prior to January 1, 2017, BCBSNC either denied preauthorization or reimbursement for claims for the following procedures when the procedural code is for treatment of one of two diagnostic codes: F64.0 (Transsexualism) or Z87.890 (Personal history of sex reassignment):

Table 2

CPT Code	Description of Surgery
54400	Insertion of Penile Prosthesis; non-inflatable (semi-rigid)
C1813	Prosthesis, Penile, Inflatable
54401	Insertion of Penile Prosthesis; inflatable (self-contained)
54405	Insertion of multi-component, inflatable penile prosthesis, including placement of pump, cylinders, and reservoir
54406	Removal of multi-component Inflatable Penile
54408	Repair Component(s) multi-component, Inflatable Penile
54410	Removal and replacement of all components(s) of a multi-component, inflatable penile prosthesis at the same operative session
54411	Removal and replacement of all components of a multi-component inflatable penile prosthesis through an infected field at the same operative session, including irrigation and debridement of infected tissue
54415	Removal non-inflatable (semi-rigid) /inflatable
54416	Removal and replacement of non-inflatable (semi-rigid) or inflatable (self-contained) penile prosthesis at the same operative session
54417	Removal and replacement of a non-inflatable (semi-rigid) or inflatable (self-contained) penile prosthesis through an infected field at the same operative session, including irrigation and debridement of infected tissue
54660	Insertion of Testicular Prosthesis (separate procedure)
55175	Scrotoplasty (simple)
55180	Scrotoplasty (complicated)
56800	Plastic Repair of Introitus
57291	Construction of artificial vagina (without graft)
57292	Construction of artificial vagina (with graft)
19316	Mastopexy
19318	Breast Reduction
57295	Revision (including removal) of prosthetic vaginal graft

57296	Revision (including removal) of prosthetic vagina graft
19325	Breast Augmentation with implant
17380	Electrolysis Epilation, each .5 hour

22. Although the industry-standard medical claim form requires a healthcare provider to identify the sex of the Plan participant, BCBSNC does not use the sex of the Plan participant to evaluate whether claims for the benefits identified above are covered by the Plan. This is true whether the claim is processed automatically or manually. Approval or denial of a claim is based solely on the procedural and diagnostic codes identified above.

23. Beginning on January 1, 2017, the Plan directed BCBSNC to approve claims when submitted with the procedures listed in Table 1—without regard to the diagnostic code—and in Table 2, when submitted with the two identified diagnostic codes.

24. Beginning on January 1, 2018, at the direction of the Plan, BCBSNC returned to its 1990-2016 claims processing rules, and thereafter denied claims for the above-referenced procedures because they were not included as benefits provided by the Plan.

25. BCBSNC would not approve a claim for cosmetic procedures for any Plan participant, regardless of the diagnostic code. The State Health Plan benefit booklet defines cosmetic services as not covered, and the Plan does not cover cosmetic surgeries. Accordingly, the following procedures, which, under the 1990-2016 claims processing rules described above, are considered cosmetic procedures, are not covered: shoulder shaping, chin contouring and implants, face lifts (unless as a

medically necessary part of other facial procedures), facial bone osteoplasty, forehead reduction and contouring, mandible reduction, mandible contouring or mandible augmentation, and chondrolaryngoplasty (tracheal shave).

26. BCBSNC does not process claims for the vast majority of pharmaceuticals or hormones, although it does process claims for the administration of some pharmaceuticals, e.g. intravenous infusions.

27. BCBSNC has never implemented the portion of the Plan's benefit booklets that excludes "surgery for psychological or emotion reasons." More specifically, BCBSNC does not have diagnostic codes or procedural codes connected to this language from the Plan's benefits book that would prevent any claim from being approved, without regard to whether the Plan participant identified as cisgender, transgender, gender non-binary, or otherwise.

28. BCBSNC processes all claims for behavioral health treatment to be potentially reimbursed by the Plan. For behavioral health treatment, healthcare provider payment requests are not screened by diagnosis. Rather, notwithstanding the language contained in the Plan's benefits book, BCBSNC authorizes payment for all behavioral health services, if they are otherwise within the Plan's benefits, regardless of the submitted diagnosis code. This has been true since at least 1990. BCBSNC claims processing does not distinguish between an individual diagnosed with gender dysphoria or another psychiatric diagnosis. Plan participants with claims for behavioral health treatment are not denied because the submitted claim identified gender dysphoria as the diagnosis.

29. BCBSNC, as TPA of the State Health Plan does not code or track whether Plan participants identify as transgender, cisgender, gender non-binary, or otherwise, and BCBSNC's implements the benefit booklets of the State Health Plan without denying coverage for any healthcare service on the basis of a Plan participant's identification as transgender, cisgender, gender non-binary, or otherwise.

I declare and verify under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2021.



Aimee Forehand (Nov 30, 2021 12:14 EST)

Aimee Forehand
Director, State Health Plan
Blue Cross and Blue Shield of North Carolina



HEALTH INSURANCE CLAIM FORM

APPROVED BY NATIONAL UNIFORM CLAIM COMMITTEE (NUCC) 02/12

PICA										PICA									
1. MEDICARE MEDICAID TRICARE CHAMPVA GROUP HEALTH PLAN FECA BLK LUNG OTHER (Medicare#) (Medicaid#) (ID#/DoD#) (Member ID#) (ID#) (ID#) (ID#)										1a. INSURED'S I.D. NUMBER (For Program in Item 1)									
2. PATIENT'S NAME (Last Name, First Name, Middle Initial)										3. PATIENT'S BIRTH DATE SEX MM DD YY M F									
5. PATIENT'S ADDRESS (No., Street) CITY STATE ZIP CODE TELEPHONE (Include Area Code)										6. PATIENT RELATIONSHIP TO INSURED Self Spouse Child Other 7. INSURED'S ADDRESS (No., Street) CITY STATE ZIP CODE TELEPHONE (Include Area Code)									
9. OTHER INSURED'S NAME (Last Name, First Name, Middle Initial)										10. IS PATIENT'S CONDITION RELATED TO: a. EMPLOYMENT? (Current or Previous) YES NO b. AUTO ACCIDENT? YES NO PLACE (State) c. OTHER ACCIDENT? YES NO 10d. CLAIM CODES (Designated by NUCC)									
a. OTHER INSURED'S POLICY OR GROUP NUMBER										a. INSURED'S DATE OF BIRTH SEX MM DD YY M F									
b. RESERVED FOR NUCC USE										b. OTHER CLAIM ID (Designated by NUCC)									
c. RESERVED FOR NUCC USE										c. INSURANCE PLAN NAME OR PROGRAM NAME									
d. INSURANCE PLAN NAME OR PROGRAM NAME										d. IS THERE ANOTHER HEALTH BENEFIT PLAN? YES NO If yes, complete items 9, 9a, and 9d.									
12. PATIENT'S OR AUTHORIZED PERSON'S SIGNATURE I authorize the release of any medical or other information necessary to process this claim. I also request payment of government benefits either to myself or to the party who accepts assignment below. SIGNED DATE										13. INSURED'S OR AUTHORIZED PERSON'S SIGNATURE I authorize payment of medical benefits to the undersigned physician or supplier for services described below SIGNED									
14. DATE OF CURRENT ILLNESS, INJURY, or PREGNANCY (LMP) QUAL MM DD YY										15. OTHER DATE QUAL MM DD YY									
17. NAME OF REFERRING PROVIDER OR OTHER SOURCE										16. DATES PATIENT UNABLE TO WORK IN CURRENT OCCUPATION FROM MM DD YY TO MM DD YY 18. HOSPITALIZATION DATES RELATED TO CURRENT SERVICES FROM MM DD YY TO MM DD YY									
19. ADDITIONAL CLAIM INFORMATION (Designated by NUCC)										20. OUTSIDE LAB? \$ CHARGES YES NO									
21. DIAGNOSIS OR NATURE OF ILLNESS OR INJURY Relate A-L to service line below (24E) ICD Ind. A. B. C. D. E. F. G. H. I. J. K. L.										22. RESUBMISSION CODE ORIGINAL REF. NO. 23. PRIOR AUTHORIZATION NUMBER									
24. A. DATE(S) OF SERVICE From To B. PLACE OF SERVICE C. D. PROCEDURES, SERVICES, OR SUPPLIES (Explain Unusual Circumstances) E. DIAGNOSIS POINTER F. \$ CHARGES G. DAYS OR UNITS H. EPSPOT Family Plan I. ID. QUAL J. RENDERING PROVIDER ID. # MM DD YY MM DD YY EMG CPT/HCPCS MODIFIER																			
25. FEDERAL TAX I.D. NUMBER SSN EIN										26. PATIENT'S ACCOUNT NO. 27. ACCEPT ASSIGNMENT? (For govt. claims, see back) YES NO									
28. TOTAL CHARGE \$										29. AMOUNT PAID \$ 30. Rsvd for NUCC Use									
31. SIGNATURE OF PHYSICIAN OR SUPPLIER INCLUDING DEGREES OR CREDENTIALS (I certify that the statements on the reverse apply to this bill and are made a part thereof.) SIGNED DATE										32. SERVICE FACILITY LOCATION INFORMATION a. b.									
										33. BILLING PROVIDER INFO & PH # () a. b.									

NUCC Instruction Manual available at: www.nucc.org

PLEASE PRINT OR TYPE

APPROVED OMB-0938-1197 FORM 1500 (02-12)

BECAUSE THIS FORM IS USED BY VARIOUS GOVERNMENT AND PRIVATE HEALTH PROGRAMS, SEE SEPARATE INSTRUCTIONS ISSUED BY APPLICABLE PROGRAMS.

NOTICE: Any person who knowingly files a statement of claim containing any misrepresentation or any false, incomplete or misleading information may be guilty of a criminal act punishable under law and may be subject to civil penalties.

REFERS TO GOVERNMENT PROGRAMS ONLY

MEDICARE AND TRICARE PAYMENTS: A patient's signature requests that payment be made and authorizes release of any information necessary to process the claim and certifies that the information provided in Blocks 1 through 12 is true, accurate and complete. In the case of a Medicare claim, the patient's signature authorizes any entity to release to Medicare medical and nonmedical information and whether the person has employer group health insurance, liability, no-fault, worker's compensation or other insurance which is responsible to pay for the services for which the Medicare claim is made. See 42 CFR 411.24(a). If item 9 is completed, the patient's signature authorizes release of the information to the health plan or agency shown. In Medicare assigned or TRICARE participation cases, the physician agrees to accept the charge determination of the Medicare carrier or TRICARE fiscal intermediary as the full charge and the patient is responsible only for the deductible, coinsurance and non-covered services. Coinsurance and the deductible are based upon the charge determination of the Medicare carrier or TRICARE fiscal intermediary if this is less than the charge submitted. TRICARE is not a health insurance program but makes payment for health benefits provided through certain affiliations with the Uniformed Services. Information on the patient's sponsor should be provided in those items captioned in "Insured"; i.e., items 1a, 4, 6, 7, 9 and 11.

BLACK LUNG AND FECA CLAIMS

The provider agrees to accept the amount paid by the Government as payment in full. See Black Lung and FECA instructions regarding required procedure and diagnosis coding systems.

SIGNATURE OF PHYSICIAN OR SUPPLIER (MEDICARE, TRICARE, FECA AND BLACK LUNG)

In submitting this claim for payment from federal funds, I certify that: 1) the information on this form is true, accurate and complete; 2) I have familiarized myself with all applicable laws, regulations, and program instructions, which are available from the Medicare contractor; 3) I have provided or will provide sufficient information required to allow the government to make an informed eligibility and payment decision; 4) this claim, whether submitted by me or on my behalf by my designated billing company, complies with all applicable Medicare and/or Medicaid laws, regulations, and program instructions for payment including but not limited to the Federal anti-kickback statute and Physician Self-Referral law (commonly known as Stark law); 5) the services on this form were medically necessary and personally furnished by me or were furnished incident to my professional service by my employee under my direct supervision except as otherwise expressly permitted by Medicare or TRICARE; 6) for each service rendered incident to my professional service, the identity (legal name and NPI license #, or SSN) of the primary individual rendering each service is reported in the designated section. For services to be considered "incident to" a physician's professional services: 1) they must be rendered under the physician's direct supervision by his/her employee; 2) they must be an integral, although incidental part of a covered physician service; 3) they must be of kinds commonly furnished in physician's offices; and 4) the services of non-physicians must be included on the physician's bills.

For TRICARE claims, I further certify that I (or any employee) who rendered services am not an active duty member of the Uniformed Services or a civilian employee of the United States Government or a contract employee of the United States Government, other civilian or military (refer to 5 USC 5536). For Black Lung claims, I further certify that the services performed were for a Black Lung-related disorder.

No Part B Medicare benefits may be paid unless this form is received as required by existing law and regulations (42 CFR 424.32).

NOTICE: Any one who misrepresents or falsifies essential information to receive payment from Federal funds requested by this form may upon conviction be subject to fine and imprisonment under applicable Federal laws.

NOTICE TO PATIENT ABOUT THE COLLECTION AND USE OF MEDICARE, TRICARE, FECA, AND BLACK LUNG INFORMATION (PRIVACY ACT STATEMENT)

We are authorized by CMS, TRICARE and OWCP to ask you for information needed in the administration of the Medicare, TRICARE, FECA, and Black Lung programs. Authority to collect information is in section 205(a), 1862, 1872 and 1874 of the Social Security Act as amended, 42 CFR 411.24(a) and 424.5(a) (6), and 44 USC 3101.41 CFR 101 et seq and 10 USC 1079 and 1086; 5 USC 8101 et seq; and 30 USC 901 et seq; 38 USC 613; E.O. 9397.

The information we obtain to complete claims under these programs is used to identify you and to determine your eligibility. It is also used to decide if the services and supplies you received are covered by these programs and to insure that proper payment is made.

The information may also be given to other providers of services, carriers, intermediaries, medical review boards, health plans, and other organizations or Federal agencies, for the effective administration of Federal provisions that require other third parties payers to pay primary to Federal program, and as otherwise necessary to administer these programs. For example, it may be necessary to disclose information about the benefits you have used to a hospital or doctor. Additional disclosures are made through routine uses for information contained in systems of records.

FOR MEDICARE CLAIMS: See the notice modifying system No. 09-70-0501, titled, 'Carrier Medicare Claims Record,' published in the Federal Register, Vol. 55 No. 177, page 37549, Wed. Sept. 12, 1990, or as updated and republished.

FOR OWCP CLAIMS: Department of Labor, Privacy Act of 1974, "Republication of Notice of Systems of Records," Federal Register Vol. 55 No. 40, Wed Feb. 28, 1990, See ESA-5, ESA-6, ESA-12, ESA-13, ESA-30, or as updated and republished.

FOR TRICARE CLAIMS: PRINCIPLE PURPOSE(S): To evaluate eligibility for medical care provided by civilian sources and to issue payment upon establishment of eligibility and determination that the services/supplies received are authorized by law.

ROUTINE USE(S): Information from claims and related documents may be given to the Dept. of Veterans Affairs, the Dept. of Health and Human Services and/or the Dept. of Transportation consistent with their statutory administrative responsibilities under TRICARE/CHAMPVA, to the Dept. of Justice for representation of the Secretary of Defense in civil actions, to the Internal Revenue Service, private collection agencies, and consumer reporting agencies in connection with recoupment claims; and to Congressional Offices in response to inquiries made at the request of the person to whom a record pertains. Appropriate disclosures may be made to other federal, state, local, foreign government agencies, private business entities, and individual providers of care, on matters relating to entitlement, claims adjudication, fraud, program abuse, utilization review, quality assurance, peer review, program integrity, third party liability, coordination of benefits, and civil and criminal litigation related to the operation of TRICARE.

DISCLOSURES: Voluntary; however, failure to provide information will result in delay in payment or may result in denial of claim. With the one exception discussed below, there are no penalties under these programs for refusing to supply information. However, failure to furnish information regarding the medical services rendered or the amount charged would prevent payment of claims under these programs. Failure to furnish any other information, such as name or claim number, would delay payment of the claim. Failure to provide medical information under FECA could be deemed an obstruction.

It is mandatory that you tell us if you know that another party is responsible for paying for your treatment. Section 1128B of the Social Security Act and 31 USC 3801-3812 provide penalties for withholding this information.

You should be aware that P.L. 100-503, the "Computer Matching and Privacy Protection Act of 1988", permits the government to verify information by way of computer matches.

MEDICAID PAYMENTS (PROVIDER CERTIFICATION)

I hereby agree to keep such records as are necessary to disclose fully the extent of services provided to individuals under the State's Title XIX plan and to furnish information regarding any payments claimed for providing such services as the State Agency or Dept. of Health and Human Services may request.

I further agree to accept, as payment in full, the amount paid by the Medicaid program for those claims submitted for payment under that program with the exception of authorized deductible, coinsurance, co-payment or similar cost-sharing charge.

SIGNATURE OF PHYSICIAN (OR SUPPLIER): I certify that the services listed above were medically indicated and necessary to the health of this patient and were personally furnished by me or my employee under my personal direction.

NOTICE: This is to certify that the foregoing information is true, accurate and complete. I understand that payment and satisfaction of this claim will be from Federal and State funds, and that any false claims, statements, or documents, or concealment of a material fact, may be prosecuted under applicable Federal or State laws.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0938-1197. The time required to complete this information collection is estimated to average 10 minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. If you have any comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: CMS, 7500 Security Boulevard, Attn: PRA Reports Clearance Officer, Mail Stop C4-26-05, Baltimore, Maryland 21244-1850. This address is for comments and/or suggestions only. DO NOT MAIL COMPLETED CLAIM FORMS TO THIS ADDRESS.

UB-04 CMS-1450 APPROVED OMB NO. 0938-0997 THE CERTIFICATIONS ON THE REVERSE APPLY TO THIS BILL AND ARE MADE A PART HEREOF.

UB-04 NOTICE: THE SUBMITTER OF THIS FORM UNDERSTANDS THAT MISREPRESENTATION OR FALSIFICATION OF ESSENTIAL INFORMATION AS REQUESTED BY THIS FORM, MAY SERVE AS THE BASIS FOR CIVIL MONETARY PENALTIES AND ASSESSMENTS AND MAY UPON CONVICTION INCLUDE FINES AND/OR IMPRISONMENT UNDER FEDERAL AND/OR STATE LAW(S).

Submission of this claim constitutes certification that the billing information as shown on the face hereof is true, accurate and complete. That the submitter did not knowingly or recklessly disregard or misrepresent or conceal material facts. The following certifications or verifications apply where pertinent to this Bill:

1. If third party benefits are indicated, the appropriate assignments by the insured /beneficiary and signature of the patient or parent or a legal guardian covering authorization to release information are on file. Determinations as to the release of medical and financial information should be guided by the patient or the patient's legal representative.
2. If patient occupied a private room or required private nursing for medical necessity, any required certifications are on file.
3. Physician's certifications and re-certifications, if required by contract or Federal regulations, are on file.
4. For Religious Non-Medical facilities, verifications and if necessary re-certifications of the patient's need for services are on file.
5. Signature of patient or his representative on certifications, authorization to release information, and payment request, as required by Federal Law and Regulations (42 USC 1935f, 42 CFR 424.36, 10 USC 1071 through 1086, 32 CFR 199) and any other applicable contract regulations, is on file.
6. The provider of care submitter acknowledges that the bill is in conformance with the Civil Rights Act of 1964 as amended. Records adequately describing services will be maintained and necessary information will be furnished to such governmental agencies as required by applicable law.
7. For Medicare Purposes: If the patient has indicated that other health insurance or a state medical assistance agency will pay part of his/her medical expenses and he/she wants information about his/her claim released to them upon request, necessary authorization is on file. The patient's signature on the provider's request to bill Medicare medical and non-medical information, including employment status, and whether the person has employer group health insurance which is responsible to pay for the services for which this Medicare claim is made.
8. For Medicaid purposes: The submitter understands that because payment and satisfaction of this claim will be from Federal and State funds, any false statements, documents, or concealment of a material fact are subject to prosecution under applicable Federal or State Laws.
9. For TRICARE Purposes:
 - (a) The information on the face of this claim is true, accurate and complete to the best of the submitter's knowledge and belief, and services were medically necessary and appropriate for the health of the patient;
 - (b) The patient has represented that by a reported residential address outside a military medical treatment facility catchment area he or she does not live within the catchment area of a U.S. military medical treatment facility, or if the patient resides within a catchment area of such a facility, a copy of Non-Availability Statement (DD Form 1251) is on file, or the physician has certified to a medical emergency in any instance where a copy of a Non-Availability Statement is not on file;
 - (c) The patient or the patient's parent or guardian has responded directly to the provider's request to identify all health insurance coverage, and that all such coverage is identified on the face of the claim except that coverage which is exclusively supplemental payments to TRICARE-determined benefits;
 - (d) The amount billed to TRICARE has been billed after all such coverage have been billed and paid excluding Medicaid, and the amount billed to TRICARE is that remaining claimed against TRICARE benefits;
 - (e) The beneficiary's cost share has not been waived by consent or failure to exercise generally accepted billing and collection efforts; and,
 - (f) Any hospital-based physician under contract, the cost of whose services are allocated in the charges included in this bill, is not an employee or member of the Uniformed Services. For purposes of this certification, an employee of the Uniformed Services is an employee, appointed in civil service (refer to 5 USC 2105), including part-time or intermittent employees, but excluding contract surgeons or other personal service contracts. Similarly, member of the Uniformed Services does not apply to reserve members of the Uniformed Services not on active duty.
 - (g) Based on 42 United States Code 1395cc(a)(1)(j) all providers participating in Medicare must also participate in TRICARE for inpatient hospital services provided pursuant to admissions to hospitals occurring on or after January 1, 1987; and
 - (h) If TRICARE benefits are to be paid in a participating status, the submitter of this claim agrees to submit this claim to the appropriate TRICARE claims processor. The provider of care submitter also agrees to accept the TRICARE determined reasonable charge as the total charge for the medical services or supplies listed on the claim form. The provider of care will accept the TRICARE-determined reasonable charge even if it is less than the billed amount, and also agrees to accept the amount paid by TRICARE combined with the cost-share amount and deductible amount, if any, paid by or on behalf of the patient as full payment for the listed medical services or supplies. The provider of care submitter will not attempt to collect from the patient (or his or her parent or guardian) amounts over the TRICARE determined reasonable charge. TRICARE will make any benefits payable directly to the provider of care, if the provider of care is a participating provider.

SEE <http://www.nubc.org/> FOR MORE INFORMATION ON UB-04 DATA ELEMENT AND PRINTING SPECIFICATIONS

PROCEEDINGS

Prior Authorization and Utilization Management Concepts in Managed Care Pharmacy

SUMMARY

Formularies that include prior authorization and utilization management are widely used by managed care organizations (MCOs), including health plans and pharmacy benefit management companies. Utilization management criteria are essential to optimizing patient outcomes and reducing waste, error, unnecessary drug use, and cost. The Academy of Managed Care Pharmacy (AMCP) Professional Practice Committee has developed the following 9 specific concepts for effective prior authorization practices by MCOs: (1) patient safety and appropriate medication use, (2) clinical decision making, (3) evidence-based review criteria, (4) automated decision support, (5) transparency and advanced notice, (6) emergency access, (7) provider collaboration, (8) need for timeliness and avoiding disruptions in therapy, and (9) cost-effectiveness and value. AMCP supports these concepts to allow for further collaboration between prescribers and payers in order to ensure that patients receive appropriate and timely access to drugs, devices, and other therapeutic agents.

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Formularies that include prior authorization and utilization management are widely used by managed care organizations (MCOs), including health plans and pharmacy benefit management companies. Utilization management criteria are essential to optimizing patient outcomes and reducing waste, error, unnecessary drug use, and cost. The safety and clinical appropriateness of medication therapy selection for a covered population is the primary goal of formularies. A thorough review of clinical evidence is the cornerstone of managed care formulary decisions.^{1,2} For individuals who require medications and treatments not included on formularies, prescribers and health plans can work together through exceptions and appeals processes to provide appropriate access to therapy. Health plans, employers, and government-sponsored health care programs focus on optimizing patient outcomes through the use of medications that have established evidence of efficacy and safety, while providing the highest value. Prior authorization (PA) is a utilization management tool that enables plans to implement patient-focused goals of safe and appropriate medication use. Also known as coverage determinations in the Medicare Part D program, PA coverage criteria are centered on patients' clinical needs and therapeutic rationale.

The Academy of Managed Care Pharmacy (AMCP) Professional Practice Committee has developed the following 9 specific concepts for effective PA practices by MCOs. AMCP supports these concepts to allow for further collaboration between prescribers and payers in order to ensure that patients

receive appropriate and timely access to drugs, devices, and other therapeutic agents. Additionally, these concepts are timely, given recent attention and proposed reforms to PA.³

Concept 1: Patient Safety and Appropriate Medication Use

Using clinically sound, evidence-based principles, PA guides safe and appropriate medication therapy for patients. MCOs work with prescribers to ensure that treatment goals are met, while considering the health plan benefit design and all statutory and regulatory requirements. For example, PA can be used to support careful patient selection and manage ongoing medication use for medications with a high potential for misuse or abuse, or those with unknown long-term safety or durability of effect.

Concept 2: Clinical Decision Making

PA guidelines are designed by MCOs to efficiently improve the use of clinically appropriate, affordable medications and therapies. This is especially useful for classes of medications that include multiple agents of varying effectiveness, for which PAs are an additional way to encourage the use of appropriate formulary alternatives. MCOs should regularly confirm that agents on the formulary provide appropriate care across the membership of a plan and that the plan's coverage requirements align with standards of relevant accreditation bodies and quality organizations.

Concept 3: Evidence-Based Review Criteria

Medication utilization management criteria based on an evaluation of clinical trials, peer-reviewed literature, and consensus guidelines are a common part of PA programs. These criteria are developed by a pharmacy and therapeutics (P&T) committee that includes health care providers (e.g., pharmacists, nurses, and physicians) and administrators, quality-improvement managers, and others involved with the medication use process.⁴ The P&T committee reviews the safety and efficacy evidence of a medication in comparison with therapeutic alternatives to render a clinical determination for drug formulary placement.^{4,5} Furthermore, the P&T committee considers subgroups or special populations of patients for whom the evidence indicates a drug may have differing effectiveness or adverse effect incidence. The P&T committee evaluates all pertinent, accessible medication trial data when making formulary decisions. While cost is an evaluated component, it is used as a comparator when the alternative is therapeutically equivalent or shown to produce similar results. In order of priority, formulary decisions are derived first from safety and efficacy, followed by cost considerations.^{4,5}

Prior Authorization and Utilization Management Concepts in Managed Care Pharmacy

The intent of a formulary and utilization management is to encourage the use of medically appropriate and cost-effective drug-related products that meet the needs of patient populations.⁴ Formularies and utilization management criteria should be updated regularly to keep pace with changes in clinical practice, clinical guidelines, new drugs, evolving health plan designs, and the reality that patients may change health plan coverage.^{4,5}

Concept 4: Automated Decision Support

Provider burden and/or dissatisfaction with approval processes has been documented in the literature.^{6,7} Health information technology solutions should be used to reduce paperwork and waste, standardize data and processes for utilization management, and improve the patient and clinician experience.⁸ For example, adoption of electronic PA (ePA) allows for secure, electronic transmission of patient information to complete a PA review, thus, decreasing the administrative burden for prescribers and MCOs and improving the turnaround time for the benefit of patients.⁹⁻¹¹ According to a national ePA technology vendor, providers who use electronic solutions spend an average of 2.5 fewer hours on PA per week.¹² Best practice guidelines or state regulations should be followed as the industry continues to develop uniform, national industry standards for the electronic exchange of health information. An effective ePA process includes automation at the point of care, point of sale, or any point where a PA originates. To support the decision-making process for patients and providers, the patient's financial responsibility, as well as any potential less costly therapeutic alternatives, should be displayed at the point of care.

Concept 5: Transparency and Advanced Notice

MCOs should provide advanced notice of formulary changes to the provider and patient. Advanced notice is vital to avoid disruptions in care.

MCOs should make current formulary and utilization management requirements available and transparent in a manner that is easily accessible and understandable to patients. Members and providers should be able to easily identify a particular formulary and any changes made, as well as search for drug-utilizing tools such as medication search tools and formulary guides. Details of utilization management criteria should be presented, including required documentation that supports the request for authorization or a formulary exception, the volume of requests, and the approval and denial rates.

Concept 6: Emergency Access

In emergency situations, access to medication therapy without impediments is imperative. This includes situations in which care is sought outside of standard business hours. PA criteria are not applied to medications used in inpatient or emergency care settings. Utilization management tools should not cause delay of care or have an effect on medical treatment during emergency care situations. MCOs should avoid broad or

inflexible PA requirements for drug therapies commonly used as part of emergency care.

Concept 7: Provider Collaboration

MCOs should collaborate and communicate clearly with providers throughout the PA process. Utilization reviews should provide detailed explanations for PA denials, including an indication of any missing information. The PA process should support health plan transparency and multidisciplinary collaboration to obtain the best outcomes for the member/patient and the best value for the health care system. Additionally, PA criteria should be subject to continuous improvement, revisions, and, where necessary, removal. This requires dynamic discussion and partnership with providers to ensure that patients are receiving appropriate care without unnecessary hurdles. All PA denials should include the clinical rationale for each determination (e.g., national medical specialty society guidelines and peer-reviewed clinical literature), provide the plan's covered alternative treatment, and detail the appeal process.

In cases where different providers are not aware of all the medications or treatments a patient is receiving, the MCO may act as the care coordinator when reviewing medication regimens or PAs. Ensuring that all providers are aware of the medications being prescribed to a patient can lead to discontinuation of duplicate medications or modifications that optimize the medication regimen. MCOs need to continue bridging any gaps in medication coordination between providers.

MCOs should monitor utilization of medications across the medical and pharmacy benefit, including those administered in a physician's office or outpatient treatment facility. Coverage of medical and pharmacy benefit drugs, devices, or therapies should be coordinated to enable more cost-effective therapy selection and streamlined medication management.

Concept 8: Need for Timeliness and Avoiding Disruptions in Therapy

MCOs should allow for timely PA approval for medically necessary exceptions and for timely handling of denial appeals. When requesting nonurgent care, PAs should be reviewed and acted upon promptly and within statutory and regulatory timelines and accreditation standards. When a provider and the MCO do not agree on the utilization management criteria used for approval of a therapy or a coverage decision for a member, a provider should have access to a peer-to-peer clinical discussion to resolve the matter.

Patients newly enrolled in plans who are stabilized on therapy should be allowed sufficient time for therapy continuation during the PA review process, sometimes referred to as a grandfathering or transition period. Transitional coverage promotes coordinated care and prevents unnecessary therapy changes or gaps in care.

Prior Authorization and Utilization Management Concepts in Managed Care Pharmacy

Concept 9: Cost-Effectiveness and Value

As MCOs and providers enter into risk-based arrangements, use of PA as a tool to ensure delivery of affordable, high-quality, patient-centered care must evolve to facilitate shared decision making. When there is shared risk involved in contracts between providers and payers, PA can be a tool to ensure alignment of providers around evidence-based care. The evolution of PA should be a partnership between payers, providers, and administrators of health care contracts to include alignment of incentives, clinical approach, and operational capabilities. As noted in the American Medical Association Reform Principles,³ collaboration among stakeholders is necessary to achieve cost-effective and value-based care.^{13,14}

Conclusions

MCOs should focus on ensuring access to appropriate, evidence-based, and cost-effective medications for their members. These concepts provide a framework to ensure that PA and utilization management are timely, transparent, and collaborative, which is ultimately synonymous with patient-centered care. MCOs have the responsibility and opportunity to incorporate clinical and technology advancements into these processes with a constant goal of improving health outcomes and cost-effectiveness.

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DISCLOSURES

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-00272

MAXWELL KADEL, et al.,)

)

Plaintiffs,)

)

vs.)

)

DALE FOLWELL, in his official)

capacity as State Treasurer of)

North Carolina, et al.,)

)

Defendants,)

)

DEPOSITION OF DAN H. KARASIC, M.D.

Remote

September 20, 2021

9:00 a.m. Pacific Time

Prepared by:

Vicki L. O'Ceallaigh Champion, CR

Certificate No. 50534

Prepared for:

(Certified copy)

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DEPOSITION OF DAN H. KARASIC, M.D.

Page 18

1 A. No.

2 Q. Have you served as a principal investigator
3 on any private grants?

4 A. No.

5 Q. Dr. Karasic, what is gender dysphoria?

6 MR. HASKEL: Objection to the form.

7 A. So gender dysphoria -- well, first of all,
8 there are a couple gender dysphorias. There is the
9 gender dysphoria, the symptom. You might say small
10 letter "G," small letter "D."

11 There is also gender dysphoria, capital "G,"
12 capital "D," the DSM-5 diagnosis. If for gender
13 dysphoria the symptom, it is distress about the
14 difference between one's identified or lived gender
15 and one's assigned gender.

16 BY MR. KNEPPER:

17 Q. Okay. And then what is the diagnosis of
18 gender dysphoria?

19 A. So the diagnosis of gender dysphoria is a
20 diagnosis that the American Psychiatric Association
21 has put in DSM-5. That includes the presence of
22 persistent gender dysphoria along with -- well, it
23 lists various manifestations of that, but it also --
24 as potential symptoms and also has that the symptoms
25 cause social or occupational -- impairment of social

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DEPOSITION OF DAN H. KARASIC, M.D.

Page 19

1 occupational functioning or clinically significant
2 distress.

3 Q. Is it clinically significant distress?

4 A. Distress.

5 Q. And how is that distinguished from the
6 distress identified as a symptom? You described it
7 as little-G-little-D dysphoria.

8 MR. HASKEL: Object to form.

9 A. So the gender dysphoria as a symptom was --
10 or has been something that has been described in
11 people long before there was -- the DSM-5 came out
12 in 2013, but for example, WPATH Standards of Care 7
13 refers to gender dysphoria, not capitalized, and not
14 as -- not as an APA diagnosis, but as this symptom
15 of distress.

16 BY MR. KNEPPER:

17 Q. So what -- let me just -- if an
18 individual -- and this is what I'm trying to
19 understand: If an individual suffers from gender
20 dysphoria, little-G-little-D, does that mean that
21 they suffer from gender dysphoria, the psychiatric
22 diagnosis?

23 MR. HASKEL: Objection to form, foundation.
24 You can answer.

25 A. Not necessarily. I would say very often

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DEPOSITION OF DAN H. KARASIC, M.D.

Page 27

1 actually a question. I think you were
2 characterizing his testimony, which I don't know if
3 that's a question or you were going to ask a
4 question after --

5 MR. KNEPPER: Hold on. Hold on. I stopped,
6 because I wanted to let Dr. Karasic speak.

7 MR. HASKEL: Okay.

8 MR. KNEPPER: I absolutely will finish my
9 question, but I want to give the Witness -- when he
10 raised his finger and said he wanted to say
11 something, I wanted to give him an opportunity to
12 make sure that I was saying something correctly.

13 BY MR. KNEPPER:

14 Q. So go ahead, Dr. Karasic.

15 A. So on that last answer, I was saying in the
16 example I was giving was a "no" to the question of
17 do all transgender people also have a diagnosis of
18 gender dysphoria, and I was giving an example that
19 related to the difference between gender dysphoria
20 and gender incongruence of ICD-11, so just to
21 clarify my answer --

22 Q. Thank you. That does -- that does clarify
23 for me.

24 I'm going to ask you the converse question
25 now. Do all individuals -- are all individuals who

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DEPOSITION OF DAN H. KARASIC, M.D.

Page 28

1 suffer from gender dysphoria, the psychiatric DSM-5
2 diagnosis, transgender?

3 MR. HASKEL: Objection to form,
4 foundation.

5 A. So being transgender is an identity. So
6 there are -- you know, there are different ways to
7 define it. I think we tend to think about people
8 who identify as transgender and then to look at
9 that, you know, another -- if we are looking at
10 differences between the term "transgender" and
11 "gender dysphoria," that gender dysphoria is a
12 symptom or a diagnosis. Transgender is a
13 diagnosis -- I mean, an identity. I'm sorry -- an
14 identity.

15 And so there may be people who have symptoms
16 of gender dysphoria, but they personally don't
17 identify as transgender. Similarly, to give an
18 example, there can be people who have same-sex
19 attraction, but don't identify as either lesbian or
20 bisexual.

21 BY MR. KNEPPER:

22 Q. Are there any peer reviewed studies that
23 attempt to quantify that distinction between the
24 number of individuals who suffer from gender
25 dysphoria and the number of individuals who claim a

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, et al.,)
)
Plaintiffs,)
)
-vs-) Civil Action No.
) 1:19-cv-00272
DALE FOLWELL, in his official)
capacity as State Treasurer of)
North Carolina, et al.,)
)
Defendants.)

The videotaped videoconference deposition
of RANDI C. ETTNER, Ph.D., reported remotely by
JUNE M. FUNKHOUSER, CSR, RMR, and Notary Public,
pursuant to the Federal Rules of Civil Procedure
for the United States District Courts pertaining to
the taking of depositions, commencing at 9:35 a.m.
on October 15, 2021.

DEPOSITION OF RANDI C. ETTNER, Ph.D

Page 28

1 dysphoria?

2 A First I'd like to correct the statement
3 that the specific study done at the University of
4 Minnesota is upcoming.

5 Q Okay.

6 A It's already been published. It was
7 actually spoken about on Good Morning America. I'm
8 not an epidemiologist, so I cannot really give an
9 answer about prevalence or incidence of any medical
10 condition.

11 Q Do all transgender individuals suffer
12 from gender dysphoria?

13 A No.

14 Q Are all individuals suffering from gender
15 dysphoria transgender?

16 A Yes.

17 Q Is there an article that you would cite
18 to support that conclusion?

19 A Well, gender dysphoria by definition
20 includes a portion of the transgender or
21 gender-nonconforming population.

22 Q So we've used a couple of terms, and I
23 just would like you to define them as you used
24 them. So what does it mean to be -- the

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ATTORNEYS EYES ONLY

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, et al.,

Plaintiffs,

vs. Case No. 1:19-cv-272-LCB-LPA

DALE FOLWELL, in his official
capacity as State Treasurer of
North Carolina, et al.,

Defendants.

Video Deposition of
STEPHEN B. LEVINE, M.D.

September 10, 2021
9:05 a.m.

Taken at:
Veritext Legal Solutions
1100 Superior Avenue
Cleveland, Ohio

Tracy Morse, RPR

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DEPOSITION OF STEPHEN B. LEVINE, M.D.

ATTORNEYS EYES ONLY

Page 241

1 substance abuse, they didn't distinguish
2 between trans and -- statistically, but other
3 studies have indicated that everything else,
4 like suicide in the last thirty days, thinking
5 about suicide in the last thirty days, making a
6 suicide attempt, substance abuse, it's all
7 higher in the trans community.

8 It's not low in sexual minority
9 communities. Either is domestic violence in
10 either of those communities, but it's much less
11 in the trans -- in the lesbian and gay
12 community than it is in the straight -- in the
13 trans community. And it's even less in the
14 straight community, but obviously we have these
15 same problems in the straight community, the
16 cis gender community.

17 Q. Return to the question. Do you
18 consider surgery for the treatment of gender
19 dysphoria to be experimental?

20 MR. CHARLES: I object to form.

21 A. I have the same answer that I had
22 to the hormonal question and for the same
23 reasons.

24 Q. Do all transgender people suffer
25 from a gender dysphoria?

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DEPOSITION OF STEPHEN B. LEVINE, M.D.

ATTORNEYS EYES ONLY

Page 242

1 A. No.

2 Q. Are there any studies or
3 scientifically valid research that indicates
4 what percentage of transgender people suffer
5 from gender dysphoria?

6 MR. CHARLES: Object to form.

7 A. What percentage of transgender
8 people suffer from gender dysphoria? I don't
9 think -- I can't recall a study that asks that
10 question and use -- and had numbers to explain
11 the answer. People like myself get to see
12 individuals who are transgender but not
13 dysphoric or who are dysphoric but not
14 transgender.

15 Q. That was going to be my followup
16 question. Are there people who are dysphoric
17 who are not transgender?

18 A. Oh, yes. Oh, yes. Many years ago,
19 before I ever got involved with any lawyer
20 about these issues, I remember recommending to
21 a group of alcohol specialists that they ought
22 to look at the gender identity -- they ought to
23 ask questions about the sexual identity of the
24 people being treated for substance abuse and
25 alcoholism. Because in my limited clinical

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DEPOSITION OF STEPHEN B. LEVINE, M.D.

ATTORNEYS EYES ONLY

Page 243

1 experience, I've run into -- I keep running
2 into people who presented with substance abuse
3 and really dangerous degrees of substance abuse
4 that would get them hospitalized.

5 And then when I talked to them, they tell
6 me stories about their hidden gender dysphoria
7 or their struggles about -- let me just take a
8 man, for example -- the struggles about the
9 sense that they have that they're feminine and
10 they can't -- they have feminine interests,
11 they have feminine interests but social -- and
12 they have a sense of themselves as more
13 feminine than masculine and yet they are too
14 afraid to show it and then they drink
15 themselves into hepatitis or whatever.

16 Q. But you would not consider those
17 individuals to be transgender?

18 A. Well, they don't call themselves
19 transgender. They present themselves as cis
20 gender people.

21 MR. KNEPPER: That's all I have.
22 Carl, do you have any follow up?

23 MR. CHARLES: What time is your
24 flight?

25 MR. KNEPPER: 7:15.

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UNITED STATES DISTRICT COURT
NORTH CAROLINA MIDDLE DISTRICT

MAXWELL KADEL, et al.,
Plaintiffs,
vs. Case No. 1:19-cv-00272-LCB-LPA
DALE FOLWELL, et al.,
Defendants.

THE DEPOSITION OF GEORGE R. BROWN, M.D.

September 23, 2021

PORTIONS ATTORNEYS' EYES ONLY

Reported by:
PATRICIA A. NILSEN, RMR, CRR, CRC
Licensed Court Reporter 717 for the State of
Tennessee

DEPOSITION OF GEORGE R. BROWN, M.D.

Page 92

1 Foundation. Object to the extent it's outside the
2 scope of Dr. Brown's opinions.

3 A. So the short answer is no, but I also want
4 to point out that the presence of symptoms is --
5 also has to be considered at a particular -- in a
6 particular time frame. So it's not just a simple
7 matter of, does the person experience gender
8 dysphoria if they have transgender identity. They
9 could have last year; they might have it next year;
10 they don't have it today. It depends on where they
11 are in time, and a variety of other parameters
12 specific to the individual.

13 But it is true that there are transgender
14 people who, sitting here today, if they were
15 sitting here today, do not have gender dysphoria
16 with little G, little D or big G, big D.

17 Q. Are there studies that identify the
18 portion of -- the portion, prevalence, ratio of
19 gender dysphoria, the diagnosis in transgender
20 individuals?

21 MR. TISHYEVICH: Objection, to the
22 extent it's beyond the scope of Dr. Brown's
23 opinions.

24 A. The answer to that is, no one knows the
25 answer to that.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, *et al.*,

Plaintiffs,

v.

DALE FOLWELL, in his official
capacity as State Treasurer of
North Carolina, *et al.*,

Defendants.

Civil Action No.
1:19-cv-272-LCB-LPA

AFFIDAVIT OF ALINA NEUBERGER MD, MBA

I, Alina Neuberger, of full age, and pursuant to 28 U.S.C. § 1746, hereby state
as follows:

1. I have personal knowledge of the facts set forth in this Affidavit.
2. I am currently a Senior Medical Director in Medical Affairs for
CaremarkPCS Health, L.L.C, including CVS Health and its corporate affiliates
(collectively “Caremark”).
3. I have been employed by Caremark for approximately 5 years.

4. I am familiar with the FDA-approved indications for the testosterone products and hormonal therapies listed in the December 1, 2017 Clinical Plan Management document marked as “**Exhibit A**”.
5. None of these products and therapies are FDA approved for the treatment of gender dysphoria.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.

Executed this __29th__ day of September, 2021 at Chatham, New Jersey.

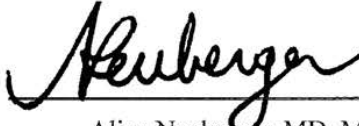

Alina Neuberger, MD, MBA

Exhibit A



Clinical Plan Management

The undersigned ("Client") and [CaremarkPCS Health, L.L.C. ("Caremark")] are parties to a Prescription Benefit Services Agreement, as amended from time to time ("Agreement"), pursuant to which Client has retained Caremark to provide certain prescription benefit management and related services with respect to Client's health benefit plan(s). Initially capitalized terms used herein and not expressly defined herein shall have the meanings given to such terms in the Agreement.

Included in the Services that may be provided by Caremark under the Agreement are certain core clinical services and programs and enhanced clinical programs and Services ("Clinical Services"). By executing and returning this Clinical Program Selection Form ("CPM"), Client confirms its election to have Caremark provide Clinical Services under the Agreement in accordance with this CPM.

This CPM is hereby incorporated by reference into the Agreement and shall form part of the Plan Design Document, defined by the Agreement and the prescription drug benefit under Client's applicable health benefit plan(s).

All Clinical Services shall be performed in accordance with the applicable criteria for such Clinical Service ("Criteria"). Unless Client elects below to use custom Criteria for one or more Clinical Services by so indicating on this CPM form, Caremark will provide each Clinical Service in accordance with its standard Criteria as in effect from time to time. Certain clinical services may only be used with standard criteria. The use of standard Criteria is part of the terms and conditions under which Caremark agrees to provide Clinical Services. Subject to the confidentiality provisions of the Agreement, such standard Criteria are proprietary and confidential information of Caremark. Such standard Criteria are not part of Client's health plan or the Plan Design Document. Caremark reserves the right to modify any such standard criteria at any time and from time to time. Modifications of Criteria will not be routinely shared with Client.

To the extent that Client elects to use custom Criteria with respect to one or more Clinical Services, client shall provide Caremark with a copy of such Criteria in writing and Caremark will provide the related Clinical Services in accordance with such written Criteria. In support of custom Criteria derived from plan benefit design or other sources available to Client, Caremark shall work with Client, when requested, in a consultative manner to review clinically-based custom Criteria for consistency with current standards of care. Client shall maintain custom Criteria to ensure alignment with plan benefit design, recommendations from other sources, and standards of care. Clients shall submit custom Criteria to Caremark for review and implementation. Frequency and timing of custom Criteria submission will be at Client's discretion. For clients that wish to implement custom UM edit(s) that have already been developed for another line of business, please indicate this within the following sections of this form.

- Special Instructions/Notes section
- Client Request-Custom section at the end of each UM edit type area

Within these sections, please indicate the following: [ENTER SPECIFIC XYZ Plan List NAME] for each of the custom edits to be implemented.

Client may elect to discontinue provision of any Clinical Service through written notice to Caremark.

By signing below, Client hereby accepts and adopts as its own the Criteria, as administered by Caremark. In the event Client elects to implement its own criteria, Client acknowledges Caremark will not evaluate and update such custom criteria for safety or efficacy and Client shall be responsible to notify Caremark of any changes to such criteria.

**I have reviewed the attached documentation and conclude all information to be correct.
(All signatures below are required)**

Client (Company) Name: North Carolina State Health Plan	Version
Client Signature:	Date: 12/06/17
Signatory Name: Client Does Not Sign CPM Form – Refer to Approval Email	
Signatory Title:	

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1

**RxClaim Only****Client hierarchy for utilization management appropriateness and SGM programs**

Carrier: 0274 and 0275

Carrier – Account:

Carrier – Account – Group:

Do the selected clinical programs apply to all members or specific groups of members?

☒ All members ☐ Specific groups (specified below)

Please specify details here:

Note: Not all dosage forms will accumulate across the entire class.*RxClaim Only****Client hierarchy for Formulary Alternatives program exclusion**

Formulary Alternatives provides alternatives via preferred product fields of claim response sent to pharmacies, and Real Time Benefits EHR transactions, shared with prescribers. Opting the client out will exclude the communication of alternatives through both of these communication channels.

Opt out client ☐

List Carrier – Account – Group for opt out (available at any level of CAG):

Please specify details here:

Caremark Internal Only – UM and SGM and PDPD DO NOT DELETE THIS TABLE! This is required information.**Additional Client Details and Caremark contacts**

Client FAF ID:

Client Rebate ID:

Client Type: ☒ Employer ☐ Stand Alone Specialty Client ☐ Health Plan ☐ TPA

-To ensure notifications from the Prior Authorization and Appeals department do not violate HIPAA or other privacy regulations, it is important to determine if the client or vendor is sending the member's Social Security Number (SSN) on the eligibility file. The standard process when generating notifications is to retrieve the member identification number from the Cross Walk ID on the eligibility file. If the Cross Walk ID contains the SSN, the Prior Authorization and Appeals department will need to ensure that the Member ID is on the eligibility file is being used for notifications. If the Member ID or Crosswalk ID field contains a SSN, the other field must contain a member Identification number to generate on notifications. Please ask the account manager or Eligibility Administrator the following questions.

Is the client or vendor sending the member's SSN on the eligibility file: Yes ☒ No ☐If yes, which field will the SSN be stored? Crosswalk ID ☒, Member ID ☐Standard Formulary Status: ☐ Opt-in with NDC Block ☒ Opt-in with PA Option ☐ Opt-out

As of 10/15/2015, Opt-in with NDC Block will require that clients provide an exception pathway for members so please note that the option to select that offering has been removed from the CPM form.

Client Company Name: North Carolina State Health Plan

(Please list client name as it should appear on PA and Appeal letters and fax forms.)

Client Address: 3200 Atlantic Avenue

City: Raleigh

State: NC

Zip: 27604

Total # of Plan Members*: 550,000

Clinical Advisor: Renee Jarnigan/Stephanie Morrison

SAE: Brian Hemreck

Account Manager: Bree Nelson/Karyn Donohoe/Jim Loveday

Account Executive:

Specialty-CRU:

Implementation Manager:

Benefits Relationship Manager (BRM)**: Drew Anderson

Benefits Consultation Center (BCC)**: ☒ BCC RxClaim☐ BCC Recap

Specialty Account Executive:

CRU Implementation Specialist:

Customer Care Provided by: ☒ Caremark ☐ Client

Customer Care Phone Number:

* Please provide Total # of Plan Members if known - this is used to project PA call volume

**** Clinical Advisor must either list a BRM contact or select a BCC mailbox before routing this CPM form**

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2

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For NON-Grandfathered Plans (80/20 and CDHP):

Applicable Laws – UM and SGM and PDPD DO NOT DELETE THIS TABLE! This is required information for the PA & Appeals department.	
1. What line of business is your client?	
☒ Commercial, HP Commercial, Self-Insured Employer Group, Third Party Administrator (TPA) or Coalitions	➡ Go to #2
☐ Exchange, Small Business Health Option Program (SHOP), or Fully-Insured, Individual, or Small Group Plans (Off-Exchange)	➡ Go to #6
☐ Managed Medicaid, HP Dual Demo	➡ Go to #7
☐ Medicare, EGWP	➡ No further information is needed
2. Is your client grandfathered or a retiree-only plan?	
☐ Yes	➡ Go to #3
☒ No	➡ Go to #4
3. If grandfathered or retiree-only, what laws are they subject to?	
☐ ERISA ONLY (e.g. Self-Insured Employer Plans, ASO [Administrative Services Only], Retiree-Only Self-Insured Employer Plans, Self-Insured Union Plans) ➡ Done	
☐ State Law ONLY (e.g. Fully-Insured Health Plan, Certain Self-Insured Government Plans) ➡ Go to #5	
☐ ERISA & State Law (e.g. Fully-Insured Employer Plans, Retiree-Only Fully-Insured Employer Plans) ➡ Go to #5	
☐ Other (e.g. Self-Insured Government Plans and Self-Insured Church Plans) ➡ Specify what requirements your client is subject to, including any contractual provisions relating to utilization review, prior authorization, appeals, external review: _____ ➡ Done	
4. If not grandfathered, what laws are they subject to?	
☐ ACA requirements applicable to non-grandfathered plans & ERISA (e.g. Self- Insured Employer Plan, ASO [Administrative Services Only], Self-Insured Union Plan) ➡ Done	
☐ ACA requirements applicable to non-grandfathered plans & State law (e.g. Fully- Insured Health Plan [including Fully-Insured Government and Church Plans] Certain Self-Insured Government Plans, Exchange Plans, Individual Off- Exchange Plans and Small Group Off-Exchange Plans) ➡ Go to #5	
☐ ACA requirements applicable to non-grandfathered plans, ERISA, & State Law (e.g. Fully-Insured Employer Plans, Fully-Insured Union Plans) ➡ Go to #5	
☐ ACA requirements applicable to non-grandfathered plans ONLY (e.g. Self- Insured Government and Self-Insured Church Plan). ➡ Done	
☒ ACA requirements applicable to non-grandfathered plans & Other (e.g. Self- Insured Government and Self-Insured Church Plan). ➡ Specify what laws your client is subject to, including any contractual provisions relating to utilization review, prior authorization, appeals, external review: _____ North Carolina _____ ➡ Done	
5. Is your client a fully-insured health plan that operates in multiple states and subject to State of Precedence (SOP) requirements?	
☐ Yes: Contract state. Please type state abbreviation(s): _____ ➡ Go To #7	
☒ No ➡ Go To #7	
** If Question #5 is answered "YES", then contact with Eligibility or the account team that handles eligibility will need to be notified as additional fields will need to be added to the members group profile information. This information will need to be obtained from the client and loaded into Rxclaim.**	
6. Is your client a multi-state plan regulated by Office of Personnel Management (OPM)?	
☐ Yes ➡ Go to #7	
☒ No ➡ Go to #7	
7. What state law does your client follow?	
☒ Please type state abbreviation: _____ NC _____ ➡ Go to #8	
8. Within the state law that was indicated above, does your client follow?	
☒ State Insurance Laws (e.g. Insure or PPO) ➡ Done	
☐ Managed Health Care Laws (e.g. HMO) ➡ Done	

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3

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- ☐ Managed Medicaid Requirements (e.g. State model contracts) ➡ Done
☐ Medicare Medicaid Plan/Dual demonstrations Plans (e.g. Three way contract between CMS, state, and plan) ➡ Done
 Other ➡ Done. If other, please specify what laws your client is subject to: _____

For Grandfathered Plans (70/30 and 70/30 MA):

Applicable Laws – UM and SGM and PDPD **DO NOT DELETE THIS TABLE! This is required information for the PA & Appeals department.**

1. What line of business is your client?

- ☒ Commercial, HP Commercial, Self-Insured Employer Group, Third Party Administrator (TPA) or Coalitions ➡ Go to #2
☐ Exchange, Small Business Health Option Program (SHOP), or Fully-Insured, Individual, or Small Group Plans (Off-Exchange) ➡ Go to #6
☐ Managed Medicaid, HP Dual Demo ➡ Go to #7
☐ Medicare, EGWP ➡ No further information is needed

2. Is your client grandfathered or a retiree-only plan?

- ☒ Yes ➡ Go to #3
☐ No ➡ Go to #4

3. If grandfathered or retiree-only, what laws are they subject to?

- ☐ ERISA ONLY (e.g. Self-Insured Employer Plans, ASO [Administrative Services Only], Retiree-Only Self-Insured Employer Plans, Self-Insured Union Plans) ➡ Done
☐ State Law ONLY (e.g. Fully-Insured Health Plan, Certain Self-Insured Government Plans) ➡ Go to #5
☐ ERISA & State Law (e.g. Fully-Insured Employer Plans, Retiree-Only Fully-Insured Employer Plans) ➡ Go to #5
☒ Other (e.g. Self-Insured Government Plans and Self-Insured Church Plans) ➡ Specify what requirements your client is subject to, including any contractual provisions relating to utilization review, prior authorization, appeals, external review:
 _____ North Carolina ➡ Done

4. If not grandfathered, what laws are they subject to?

- ☐ ACA requirements applicable to non-grandfathered plans & ERISA (e.g. Self- Insured Employer Plan, ASO [Administrative Services Only], Self-Insured Union Plan) ➡ Done
☐ ACA requirements applicable to non-grandfathered plans & State law (e.g. Fully- Insured Health Plan [including Fully-Insured Government and Church Plans] Certain Self-Insured Government Plans, Exchange Plans, Individual Off- Exchange Plans and Small Group Off-Exchange Plans) ➡ Go to #5
☐ ACA requirements applicable to non-grandfathered plans, ERISA, & State Law (e.g. Fully-Insured Employer Plans, Fully-Insured Union Plans) ➡ Go to #5
☐ ACA requirements applicable to non-grandfathered plans ONLY (e.g. Self- Insured Government and Self-Insured Church Plan). ➡ Done
☒ ACA requirements applicable to non-grandfathered plans & Other (e.g. Self- Insured Government and Self-Insured Church Plan). ➡ Specify what laws your client is subject to, including any contractual provisions relating to utilization review, prior authorization, appeals, external review: _____ North Carolina ➡ Done

5. Is your client a fully-insured health plan that operates in multiple states and subject to State of Precedence (SOP) requirements?

- ☐ Yes: Contract state. Please type state abbreviation(s): _____ ➡ Go To #7
☒ No ➡ Go To #7

**** If Question #5 is answered "YES", then contact with Eligibility or the account team that handles eligibility will need to be notified as additional fields will need to be added to the members group profile information. This information will need to be obtained from the client and loaded into Rxclaim.****

6. Is your client a multi-state plan regulated by Office of Personnel Management (OPM)?

- ☐ Yes ➡ Go to #7
☒ No ➡ Go to #7

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4

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7. What state law does your client follow?
☒ Please type state abbreviation: NC Go to #8

8. Within the state law that was indicated above, does your client follow?

- ☒ State Insurance Laws (e.g. Insure or PPO) Done
☐ Managed Health Care Laws (e.g. HMO) Done
☐ Managed Medicaid Requirements (e.g. State model contracts) Done
☐ Medicare Medicaid Plan/Dual demonstrations Plans (e.g. Three way contract between CMS, state, and plan) Done
 Other Done. If other, please specify what laws your client is subject to: _____

For clients that wish to implement custom UM edit(s) that have already been developed for another line of business, please indicate this within the following sections of this form.

- Special Instructions/Notes section below.
- Client Requested-Custom section at the end of each UM edit type area

Within these sections, please indicate the following: [ENTER SPECIFIC XYZ Plan List NAME] for each of the custom edits to be implemented.

Special Instructions/Notes

The purpose of this CPM is to (1) remove PA for testosterone products for transgender care, (2) add PA to testosterone products for non-transgender care, (3) exclude transgender care diagnoses for Hormonal Therapies SGM (Eligard, Luron Depot, Trelstar Dep/LA/Mix, Vantas, Zoladex, Supprelin LA), (4) change NC SHP custom SGM criteria for Lupron/leuprolide to exclude transgender care/gender dysphoria effective 1/1/18.

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5

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Prior Authorization Non-Specialty (Standard, Featured) continued

Category	Action	PA Renewal Notification	Criteria

Testosterone Products – Transgender Care Approvable

Select either 12-month or 36-month approval duration option.

Note: Oral testosterone agents are not approvable for transgender care. If PA on oral testosterone agents is desired, select either the 12-month or 36-month oral testosterone PA under the “Testosterone Products – No Coverage for Transgender Care” section.

36-month approval duration

Testosterone Products (Brand and Generic)	☐ Add ☒ Delete ☐ Change	☐ Accept ☐ Decline	☒ Testosterone Products TGC 1210-A (36-month DoA)
	Target Drugs: Enanthate injection, Cypionate injection, topical gel, topical cream, topical ointment, topical solution, transdermal patch, nasal gel, mucoadhesive buccal system, propionate implant pellets		

Testosterone Products – No Coverage for Transgender Care

Select either 12-month or 36-month approval duration option.

36-month approval duration

Testosterone Products (Brand and Generic)	☒ Add ☐ Delete ☐ Change	☐ Accept ☐ Decline	☒ Testosterone Products Non-TGC 1215-A (36-month DoA)
	Target Drugs: Enanthate injection, Cypionate injection, topical gel, topical cream, topical ointment, topical solution, transdermal patch, nasal gel, mucoadhesive buccal system, propionate implant pellets		

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6

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SGM Program Therapies (Standard)

Therapy		Drug	Total # of Existing patients	Add	Delete	Drug	Total # of Existing patients	Add	Delete
Hormonal Therapies	Select All			☐	☐	Previous PA with CMK or other vendor		☐ Yes	☐ No
	Aveed			☐	☐	Trelstar Dep/LA/Mix		☐	☐
	Eligard			☐	☐	Vantas		☐	☐
	Firmagon			☐	☐	Zoladex		☐	☐
	Natpara			☐	☐	Supprelin LA		☐	☐
	Leuprolide acetate			☐	☐	Lupaneta		☐	☐
	Lupron Depot			☐	☐	TRIPTODUR		☐	☐
	☑ Exclude these products for transgender care diagnoses: Eligard (Eff 07/03/2016), Lupron Depot, Trelstar Dep/LA/Mix (Eff 07/03/2016) , Vantas (Eff 07/03/2016), Zoladex (Eff 07/03/2016), Supprelin LA (Eff 07/03/2016).								
Comments:									

SGM Program Therapies (Client requested - Custom)

Lupron Depot Endometriosis- Fibroids NCSHP SGN 12-2016	Action: ☐ Add ☐ Delete ☒ Change
	Drugs In Class: Lupron Depot/Leuprolide
	Criteria: Custom SGM program for NCSHP – Update criteria to EXCLUDE coverage of TGC/gender dysphoria diagnoses.

Revised December 1, 2017

7

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, *et al.*,

Plaintiffs,

v.

DALE FOLWELL, in his official
capacity as State Treasurer of
North Carolina, *et al.*,

Defendants.

Civil Action No.
1:19-cv-272-LCB-LPA

AFFIDAVIT OF ADAM KORN

I, Adam Korn, of full age, and pursuant to 28 U.S.C. § 1746, hereby state as follows:

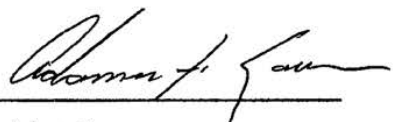
1. I have personal knowledge of the facts set forth in this Affidavit.
2. I am currently a Vice President of Client Services for CaremarkPCS Health, L.L.C, including CVS Health and its corporate affiliates (collectively "Caremark").
3. I have been employed by Caremark for approximately 4 years.
4. A discreet range of information is generally submitted to the Caremark PBM by retail pharmacies when filling prescriptions. Pharmacies should provide the PBM the same pieces of information, regardless of

whether or not the drug at issue is subject to a prior authorization requirement.

5. Caremark will automatically adjudicate pharmacy claims without additional interventions where the drug has no PA requirement, or where the PA requirement and all other plan provisions are satisfied (including eligibility, covered drug, pharmacy network and quantity limits).
6. Where a claim for a particular drug carries no PA requirement and meets the other criteria above, that claim will be paid or otherwise fully adjudicated as appropriate. Caremark will reject a drug claim despite all plan provisions being satisfied where a drug requires a valid Prior Authorization, but none exists.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.

Executed this __29th__ day of September, 2021 at Scottsdale, Arizona.


Adam Korn

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Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
3 Civil Action No. 1:19-cv-00272

4 MAXWELL KADEL, et al.,
5 Plaintiffs,

6 vs.

7 DALE FOLWELL, in his official
8 capacity as State Treasurer of
9 North Carolina, et al.,
10 Defendants.

11
12
13 * CONFIDENTIAL ATTORNEY EYES ONLY *

14
15 VIRTUAL ZOOM VIDEOTAPED DEPOSITION OF
16 SERGEANT DANA CARAWAY

17 (Taken by Defendants)
18 Morganton, North Carolina
19 Friday, September 17, 2021
20
21

22
23 Reported by Andrea L. Kingsley, RPR
24
25

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Page 19

1 Q. What were you studying at Piedmont
2 Community College?

3 A. Business law.

4 Q. You mentioned odd jobs. Just can you
5 describe those generally?

6 A. I worked for MDI Merchant Distributors,
7 Incorporated, filled orders for grocery stores.
8 Valdese Manufacturing and Lowes Hardware.

9 Q. When did you decide to apply to be a
10 correctional officer?

11 A. Sometime in 1993 I started applying.

12 Q. Why did you start applying?

13 A. For a career job.

14 Q. Do you know when you were hired?

15 A. My first day on duty was November 8,
16 1994. So it would have been retroactive dated back
17 to -- official hire date would be November 1, 1994.

18 Q. What was your first duty assignment as a
19 correctional officer?

20 A. Marion Correctional Institution, 3730 F
21 unit, second shift.

22 Q. What is F unit?

23 A. It was a housing unit for regular
24 population and a DART unit.

25 Q. DART, what is that?

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Page 21

1 A. My last assignment at Marion would have
2 been on segregation, restrictive housing.

3 Q. Where were you assigned after being
4 assigned to Marion?

5 A. Lateral transfer to Western Youth
6 Institution.

7 Q. Western what?

8 A. Western Youth Institution.

9 Q. Which I assume housed youth offenders?

10 A. We had youthful offenders from 14 and
11 inmates up to 24, 25 years old.

12 Q. What did you do there?

13 A. Correctional officer.

14 Q. Were you assigned to a particular unit?

15 A. Over my five plus, six years there,
16 there wasn't much that I didn't do. I've done from
17 regular housing to gang floors, new processing,
18 segregation, intake and processing of new inmates,
19 transportation. Everything. Western taught us to
20 do everything. And worked as an acting sergeant
21 when they was short on supervisors.

22 Q. Is it safe to say that at Western Youth
23 Institution there were not quite as defined roles
24 for correctional officers as at other facilities?

25 A. You had defined roles as being assigned

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Page 22

1 to floors. It's been so long I couldn't tell you
2 how long I spent on each floor, but I can tell you
3 there was not too many posts at that facility that
4 I did not work.

5 Q. How long did you work at Western Youth
6 Institution?

7 A. I left Western Youth in January of 2006.

8 Q. Why did you leave?

9 A. I was promoted to correctional sergeant
10 and transferred to Alexander Correctional.

11 Q. Where were you assigned at Alexander
12 Correctional?

13 A. I started on first shift blue unit.

14 Q. What is blue unit?

15 A. It was housing for close maximum custody
16 inmates and we had physically handicapped inmates
17 on part of the units that had wheelchairs or
18 physical disabilities or ailments.

19 Q. Can you describe generally how your
20 duties changed from being a correctional officer to
21 being a sergeant?

22 A. I went from correctional officer of
23 following state policy and procedures,
24 institutional standard operating procedures and
25 post assignment post orders to supervising inmates

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Page 27

1 A. I transferred to green unit.

2 Q. What is green unit?

3 A. It housed our woodworking inmates,
4 Alexander has a woodworking factory that builds
5 furniture for state industry and facilities and
6 kitchen workers.

7 Q. How long did you do that?

8 A. Until I transferred out in May or June,
9 April, May, June of 2010.

10 Q. Where did you go when you transferred
11 out?

12 A. I transferred back to Western Youth
13 Institution as a sergeant, just lateral.

14 Q. How long were you at Western Youth
15 Institution?

16 A. Until it's closure in 2013.

17 Q. Then what did you do?

18 A. When it closed, I was rifted back to
19 Alexander.

20 Q. When you say rifted, your position was
21 terminated as a part of a reduction in force; is
22 that correct?

23 A. No, sir. The facility was closed and I
24 was rifted, I kept the same position and was
25 transferred into a position of same rank at

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Page 28

1 Alexander and given my rift rights.

2 Q. What were your rift rights --

3 A. Rift rights was there wasn't a job
4 closer to my home and I had one year to use the
5 rift rights so that if a position would become
6 available, I could use the rift rights and I would
7 be given first priority to have a chance at the
8 position -- facility of my choosing.

9 Q. Was there ever a period that you were
10 not employed by DPS?

11 A. No.

12 Q. So in 2013 you went back to Alexander;
13 correct?

14 A. In 2013, yes.

15 Q. Where were you assigned when you were
16 assigned to Alexander?

17 A. I went back to red unit.

18 Q. How long were you in red unit?

19 A. I was on red unit until I used my rift
20 rights in July of 2014 and transferred to
21 Foothills.

22 Q. Why did you transfer to Foothills?

23 A. Foothills was a mile and a half from my
24 home.

25 Q. What position were you assigned to at

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Page 89

1 you let me know?

2 A. I'm sorry, one more time?

3 Q. If you see a document with someone with
4 the last name Caraway that you believe does not
5 refer to you, to a relative or someone else, will
6 you let me know?

7 A. I will.

8 Q. The question I have, if you look down
9 here where my cursor is, it says September 23, 1994.

10 A. Yes.

11 Q. Other records indicate you began your
12 service as a correctional officer in November 1994,
13 and I guess I'm curious why you would sign paperwork
14 in September of that year.

15 A. Can you roll back to the top?

16 Q. Um-hmm.

17 A. If you go back to the bottom.

18 Q. Sure.

19 A. I'm not sure. We was opening a new
20 prison, and I was getting hired on at Marion
21 Correctional Institution and -- I don't know if
22 there's a conditional alter that I signed, but I do
23 know that my initial employment date, even within
24 the state system, shows November 8 which was
25 retroactivate back to November 1, that is to my

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Page 90

1 understanding. I would say that this has something
2 to do when we're going through all the processing
3 paperwork for the months that it took or year that
4 it took to get on with the department at that time.

5 Q. Could you describe that hiring process?
6 That was going to be my next question. Because it
7 sounds like you -- there were meetings and the like
8 prior to your November 1994 start date. Is that
9 correct?

10 A. Yes.

11 Q. So how did you find out that there were
12 positions available with the Department of Public
13 Safety?

14 A. The department's always had vacancies.
15 That would be the easiest thing. But I was working
16 a job and I had been trying to get on with the
17 department, and a lady by the name of Jean Walker
18 had came into the business I was working at and we
19 began talking and I found out her husband was
20 Warden Walker at Marion Correctional -- was going
21 to be Warden Walker. And so I applied at Marion.
22 And some months later I got called up and they
23 scheduled an interview and then I got an interview,
24 and then an executive interview, and then later on
25 I was called and advised I got hired and got a job

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Page 91

1 within the department.

2 Q. You said you had an interview. Was the
3 interview with employees of Department of
4 Corrections?

5 A. With the Department of Corrections, yes.

6 Q. Then it was the Department of
7 Corrections. Was the executive interview with the
8 Department of Corrections?

9 A. The first interview was probably with an
10 administrative assistant who I don't know. And
11 then we got an executive interview with who was
12 going to be the assistant warden, Mr. Ricky
13 Anderson, and the warden Mr. Dean Walker.

14 Q. Were those two individuals in charge of
15 supervising the Marion Correctional Institute?

16 A. They were in charge of the facility and
17 opening it, seeing that it was employed and
18 staffed.

19 Q. There are some other documents here.
20 This is -- is that your signature on this page 2 of
21 this exhibit Sergeant Caraway?

22 A. Yes.

23 Q. Is your signature dated September 23,
24 1994?

25 A. That would be.

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Page 93

1 Q. Where is Torrid located?

2 A. My store is located in Hickory, North
3 Carolina, Valley Hills Mall.

4 Q. Have you long have you worked at Torrid?

5 A. Roughly a year and a half. Maybe a
6 little longer.

7 Q. Do you have any other employers that you
8 have reported to the Department of Public Safety?

9 A. I have no other employers that you work
10 for, no.

11 Q. Prior to your employment at Torrid, did
12 you have another employer that you reported to the
13 Department of Public Safety?

14 A. The only employer I worked for in the
15 last 27 years other than Torrid was the Department
16 of Corrections, Department of Public Safety.

17 Q. I will ask you again to look at the
18 exhibit or another document that appears to have
19 been signed by you on September 23, 1994. Is that
20 correct?

21 A. I see that, yes.

22 Q. It acknowledges receipt of an
23 administrative memorandum entitled, "Conditions of
24 continued employment." Do you know what memorandum
25 that refers to?

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Page 95

1 haven't looked at an updated policy for years. I
2 just know that I don't take favors, honorariums,
3 donations or gifts of any type because I work with
4 the prison system.

5 Q. I'm going to try to show you another
6 document. I'm going to ask if you can explain this
7 document to me and its purpose.

8 (SHP Exhibit 5, Salary Adjustment
9 Request, marked for identification, as of this
10 date.)

11 Q. Sergeant Caraway, is this a document
12 that reflects an increase in pay for you?

13 A. Can you scroll down please.

14 Q. Absolutely.

15 A. I don't know. I don't see any increase
16 in pay on there at all so I'm not sure.

17 Q. Do you see the language of salary
18 adjustment request?

19 A. I see a request. I'm not sure whether I
20 got any money out of it or not. That may be a
21 request but that doesn't mean I got anything.

22 Q. As a corrections officer, Sergeant
23 Caraway, are you required to maintain certification
24 with the State of North Carolina?

25 A. Yes.

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Page 96

1 Q. What's the agency that certifies you?

2 A. Criminal Justice Standard Commissions.

3 Q. Do you understand that that
4 certification from the Criminal Justice Standards
5 Commission is a requirement with the Department of
6 Public Safety?

7 A. Absolutely.

8 Q. Does that have an annual training
9 requirement?

10 A. It's supposed to, yes.

11 Q. You said it's supposed to. What does
12 that mean?

13 A. So we actually have a leeway of two
14 years, and with COVID, the Criminal Justice
15 Standard Commission gave everybody a waiver. So
16 there will be people that go up to three years
17 possibly without having been to their annual
18 training. But in normal years, yes, you're
19 supposed to go yearly.

20 Q. Who provides that training?

21 A. The department supplies the training and
22 it's overseen in our facility by Mr. Avery, and he
23 schedules your training yearly, and then the
24 training is conducted by OSDT and our local college
25 system and they supply instructors.

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Page 97

1 Q. And you participate in this training,
2 Sergeant Caraway, is that correct?

3 A. I'm required to, yes.

4 Q. Let's see if I can find the document I
5 want to show you next.

6 (SHP Exhibit 6, STS History Report,
7 marked for identification, as of this date.)

8 Q. Sergeant Caraway, can you see the
9 document on your screen marked Exhibit 6?

10 A. Yes. It's all real tiny.

11 Q. I will zoom in.

12 A. I do know what the form is, yes.

13 Q. What is this form?

14 A. That's a history of my training and
15 education record.

16 Q. These are the training that we were just
17 speaking of; is that correct?

18 A. Correct.

19 Q. So you are required as a member -- as a
20 corrections officer in the State of North Carolina
21 to attend training; is that correct?

22 A. I was required as a correctional officer
23 and I'm still required as a correctional sergeant
24 and front line supervisor to attend annual
25 training, yes.

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Page 98

1 Q. So these are training from 2013. But
2 these -- you testified these would have been
3 trainings arranged and provided through the
4 leadership at the institution you were at at the
5 time?

6 A. They would have been scheduled by the
7 institution, yes, but supplied by the officer of
8 staff development training.

9 Q. Did you have to pay for these training?

10 A. No. The department pays for this stuff.

11 Q. This record, the department keeps track
12 of these trainings?

13 A. Yes. There should be a record all the
14 way back to 1994 to currently.

15 Q. This record I can get as far back as --
16 1994. So it appears your first training was blood
17 borne pathogens.

18 A. That would have been my very first day
19 on November 8, 1994, at the incubation training
20 unit at Marion correctional.

21 Q. That identifies -- this document which
22 only goes through 2013 identifies over a thousand
23 hours of training provided by the Department of
24 Public Safety; is that correct?

25 A. Well, the one above it would have

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Page 99

1 covered -- up through 2013, I would have
2 received -- whatever date that was on the very
3 first would have been 1,075, but that particular
4 blood borne, I received three hours of certified
5 training for. But that 1,075 would have ended on
6 March 21, 2013, yes.

7 Q. Sergeant Caraway, do you recognize this
8 record?

9 A. Could you enlarge it please? Okay, hold
10 up there. Yeah, that would have been on training
11 that would have been completed towards the end of
12 May.

13 Q. Would this include additional training
14 that you received that was not reflected on the
15 prior exhibit?

16 A. Yes.

17 Q. Again, these are trainings provided by
18 the Department of Public Safety at no expense to
19 you?

20 A. Yes.

21 Q. And these are requirements of
22 maintaining your employment at the Department of
23 Public Safety?

24 A. Correct.

25 Q. Sergeant Caraway, who is your

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Page 100

1 supervisor?

2 A. Phillip Badgett.

3 Q. What is Mr. Badgett's title?

4 A. Correctional housing unit manager number

5 2.

6 Q. Does Mr. Badgett provide you with an
7 annual performance evaluation?

8 A. He's supposed to be placing in monthly
9 entries and every six months making an evaluation
10 and yearly evaluations, yes.

11 Q. You said he's supposed to. Has he been
12 doing that?

13 A. I'm sure you've got my records from my
14 evaluations. So probably not.

15 Q. Is anybody else responsible for doing
16 performance evaluations?

17 A. His supervisor above him is required to
18 see that he does his job.

19 Q. If you were to be recommended for an
20 increase in pay, Sergeant Caraway, would Mr. Badgett
21 have to sign off on that?

22 A. We haven't been given the merit-based
23 pay raises in year so the pay raises that we
24 receive would be given to us from the general
25 assembly or across the board. Unless I have a

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Page 101

1 negative rating overall, I don't know if it would
2 affect my pay or not, but to the best of my
3 recollection, Mr. Badgett has made one or two total
4 monthly entries in my evaluations in the last three
5 years.

6 Q. Does the Department of Public Safety
7 have a process to discipline employees?

8 A. They do.

9 Q. What is that process called?

10 A. There is an investigation process.

11 Q. What is Mr. Badgett's role in the
12 investigation process?

13 A. If there's wrongdoing, he's supposed to
14 report it up. He could actually give you a
15 coaching session or something within those
16 guidelines, but with actual disciplinary action, it
17 would go to our facility head, to region, then to
18 DPS headquarters in Raleigh, and then come back
19 down the chain and everybody would have to be in
20 agreement that that was a just punishment handed
21 out.

22 Q. You mentioned a number of individuals or
23 institutions involved in that decision. Are all the
24 individuals involved in that decision employees of
25 the Department of Public Safety?

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Page 102

1 A. Absolutely.

2 Q. Does anyone at the State Health Plan
3 have any role in that disciplinary process?

4 A. I don't know.

5 Q. Do you have any reason to believe that
6 someone at the State Health Plan does have a role in
7 that process?

8 A. I'm going to be honest with you, I don't
9 have no idea. I don't work in Raleigh. I just
10 work in my facility. So I just don't know if
11 anybody does.

12 Q. Who is LaDonna Browning?

13 A. She is our current Western Regional
14 manager.

15 Q. What does LaDonna Browning do in that
16 role?

17 A. She's over all the facilities in the
18 western half of the state.

19 Q. So is she the supervisor of the wardens
20 for the facilities in the western half of the state?

21 A. She is over it all.

22 Q. Has she been in that position since
23 2014?

24 A. No.

25 Q. What were her prior positions?

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Page 103

1 A. She was warden at Foothills Correctional
2 where I'm located at currently.

3 Q. Was she the warden when you were
4 transferred to Foothills Correctional Institution?

5 A. She was.

6 Q. Does she make the final decision about
7 whether to recommend that you be transferred to
8 Foothills?

9 A. She would have had input into whether or
10 not I was allowed to the come to the facility, but
11 I did have rift rights so I think I would have got
12 to come regardless.

13 Q. Sergeant Caraway, what are post orders?

14 A. Post orders are if -- I have an officer
15 assigned to work a control room, there's certain
16 responsibilities that that staff member would carry
17 out in that one post and those orders in that
18 specific post, each post would have different
19 orders so that specific post for that control room,
20 he would have orders for that spot, that's a post
21 order.

22 Q. Do you have post orders for your
23 position?

24 A. Yes.

25 Q. Those are -- I want to see if I can make

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Page 104

1 sure I understand. Those are the duties that you
2 are expected to carry out on a daily basis in your
3 position?

4 A. Right.

5 Q. Who issues post orders?

6 A. They're set forth by the facility. So
7 unit management would be involved, facility
8 management would be involved, and it would all have
9 to fall in guidelines with institutional standard
10 operating procedures, departmental policy and
11 procedures and state and federal laws.

12 Q. Is failure to follow post orders a basis
13 for discipline?

14 A. It could be a basis for discipline, it
15 could be.

16 Q. Sergeant Caraway, can you see my screen?

17 A. I do.

18 Q. Is this the post order that applies to
19 your position at the Department of Public Safety?

20 A. It appears so, yes.

21 Q. Your testimony is that this document
22 describes your responsibilities as a sergeant at
23 Foothills Correctional Institution; is that correct?

24 A. Correct.

25 Q. This document is -- as you can see up

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Page 105

1 there, it has an issue date of July 21, 2020?

2 A. I do see that, yes.

3 Q. Do you believe that's the most current
4 post order?

5 A. I'm not sure, I'm going to be honest, I
6 don't know if there's been an update since then or
7 not.

8 Q. But that's updated by the Department of
9 Public Safety; is that correct?

10 A. No. If you will scroll up all the way
11 to the bottom, that would have been signed off by
12 our current warden Theresa Jordan. So she signed
13 that one off at 7/21. So that post order would
14 have been written in-house and had to have followed
15 all the other procedures and then signed off by our
16 institutional warden.

17 Q. So the final signature on a post order
18 is the warden of the institution?

19 A. At that level for that post order, yes.

20 Q. For a post order that applies to your
21 position, it has to be signed off on by the warden?

22 A. And it could be it was the assistant
23 warden. I have occasionally seen assistant
24 wardens, it just depends who they're designated to
25 at the time. But this one appears Ms. Jordan, that

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Page 107

1 Q. How about the letters HBR?

2 A. No. Not that I can recall.

3 Q. Sergeant Caraway, have you ever had a
4 circumstance in which there was an error in your
5 pay?

6 A. I'm sure that's happened several times
7 in my career.

8 Q. If there were an error in your pay
9 today, who would be the person you would go to about
10 that?

11 A. Our personnel in human resources in our
12 facility.

13 Q. Is there a specific person in that job?

14 A. Well, there's four people involved. The
15 supervisor would be Mary Carter, but she has been
16 out with -- on medical leave. So in her place it's
17 been Ginger Murphy and maybe Bertie Bland which
18 would be her assistant.

19 Q. What was it --

20 A. B-E-R-T-I-E B-L-A-N-D. And Virginia
21 Murphy would be the proper name.

22 Q. If you had questions about whether you
23 had been paid for the hours you worked, you would
24 speak with one of those three individuals?

25 A. Yes.

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DEPOSITION OF SERGEANT DANA CARAWAY

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Page 109

1 break because I think we've been going for quite a
2 while.

3 (SHP Exhibit 7, Caraway Payment
4 Advice, marked for identification, as of this
5 date.)

6 Q. Sergeant Caraway, have you seen a
7 document like this before?

8 A. Yes.

9 Q. Would you refer to this as your pay
10 advice?

11 A. That would be a monthly pay stub, yes.

12 Q. Does that include various deductions for
13 benefits; is that correct?

14 A. Correct.

15 Q. You mentioned SEANC dues. Is that one
16 of the deductions there?

17 A. That is one of the deductions.

18 Q. It looks like at the top there is says
19 BYUP 8020 PT. Is that the deduction for the State
20 Health Plan?

21 A. No. That is my monthly out-of-pocket
22 expense for the State Health Plan.

23 Q. The deduction from your pay for the cost
24 of the State Health Plan?

25 A. Yes.

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Page 110

1 Q. SEANC insurance, what is that?

2 A. I think I have dental insurance or
3 something through SEANC, I can't rightly remember,
4 but I have some insurance through SEANC or dental
5 or vision or something, I don't remember.

6 Q. There is American Heritage Insurance
7 Company. Do you know what that is, Sergeant
8 Caraway?

9 A. I will be honest with you, I don't know
10 what that is. I did sign up for it but I don't
11 remember what it is.

12 MR. MCINNES: David, I think
13 Sergeant Caraway needs a break, I need a
14 break. Should we --

15 MR. KNEPPER: How long would you
16 like the break to be, Sergeant Caraway? Come
17 back at 2:45?

18 THE VIDEOGRAPHER: We're off the
19 record at 2:33 p.m.

20 (Recess taken.)

21 THE VIDEOGRAPHER: Back on the
22 record at 2:45 p.m.

23 Q. Sergeant Caraway, are you required to
24 wear a uniform during the performance of your duties
25 for the Department of Public Safety?

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DEPOSITION OF SERGEANT DANA CARAWAY

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Page 111

1 A. Yes.

2 Q. Do you provide that uniform yourself?

3 A. No, the department provides it.

4 Q. Is there equipment that you are required
5 to possess as an officer with the Department of
6 Public Safety?

7 A. Yes.

8 Q. What is that equipment?

9 A. Handcuffs, they give me a belt --
10 handcuffs, handcuff holster, pepper spray, pepper
11 spray holster, baton, baton holster. If I have to
12 go out on an escape or something, transport,
13 firearm, firearm holster, ammunition. Clothing and
14 boots. The only thing they don't supply is socks
15 and undergarments.

16 Q. You anticipated my second question. The
17 Department of Public Safety supplies you with that
18 equipment; correct?

19 A. Yes.

20 Q. You were not free to use your own
21 equipment in lieu of that supplied by the Department
22 of Public Safety?

23 A. No.

24 Q. Sergeant Caraway, how long have you been
25 enrolled in the State Health Plan?

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DEPOSITION OF SERGEANT DANA CARAWAY

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Page 126

1 A. Correct.

2 Q. What is your basis for that belief?

3 A. I read the news articles and seen
4 comments that he had made on the television and
5 read his comments directly out of the News &
6 Observer, out of Raleigh, they'd been posted or
7 pasted on the internet.

8 Q. Did you attend any meetings of the board
9 of trustees of the State Health Plan?

10 A. No. But I do recall that was a closed
11 door session when they decided to place -- he
12 decided to place an exclusionary rule on
13 transgender services, so had I went to Raleigh
14 regardless I wouldn't have been allowed into that
15 room to have my voice heard.

16 Q. You believe that was the end of 2017?

17 A. I believe that was sometime in the year
18 2017 that he would have placed the exclusionary
19 rule to go into affect in January 1, 2018.

20 Q. Have you ever reviewed the minutes of
21 the State Board of Trustees for the North Carolina
22 State Health Plan?

23 A. No.

24 Q. So your belief that it was a closed
25 session where this matter was discussed is based on

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Department of State Treasurer, Retirement Systems Division
325 North Salisbury Street, Raleigh, North Carolina 27603-1388

Exhibit
0004 SHP
Caraway

XX TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM
LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM

PLEASE PRINT OR TYPE FORM AND ATTACH A PHOTOCOPY OF YOUR SOCIAL SECURITY CARD.

Name [REDACTED] Active Register Number (To be provided by Retirement System) [REDACTED]
Address [REDACTED] (First) [REDACTED] (M.I.) [REDACTED] (Last) [REDACTED] S.S. # [REDACTED]
City [REDACTED] State [REDACTED] Zip Code [REDACTED] Birthdate [REDACTED]
Sex: Male ☒ Female ☐

CERTIFICATION BY EMPLOYER: We certify that the above-named person is currently serving in a position which is eligible for membership in the Retirement System previously indicated.

Employer DEPARTMENT OF CORRECTIONS Employer Code [REDACTED]
Membership Date [REDACTED] Position CORRECTIONAL OFFICER
Authorized Signature [REDACTED] Date [REDACTED]

BENEFICIARY DESIGNATION: (Please read carefully the information on the reverse.) I request the Board of Trustees to pay, in the event of my death prior to retirement:

A. The total amount of accumulated contributions standing to my credit in the Retirement System:

COMPLETE NAME	ADDRESS	RELATIONSHIP	DATE OF BIRTH
Principal:			
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>
Contingent:			
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>

B. The total amount of the death benefit provided under G.S. 135-5 or 128-27 to which I may be entitled.

COMPLETE NAME	ADDRESS	RELATIONSHIP	DATE OF BIRTH
Principal:			
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>
Contingent:			
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>
<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>	<u>[REDACTED]</u>

I hereby authorize the Board of Trustees to make payment to the beneficiary(ies) whom I have nominated above and agree on behalf of myself and my heirs and assigns, that payment so made shall be a complete discharge of the claim and shall constitute a release of the Retirement System from any further obligation on account of the benefit. In completing and signing this form, I acknowledge having read the information printed on the reverse. I reserve the right to change the beneficiary(ies) designated above as prescribed in the Rules and Regulations.

Signature [REDACTED] Date Sept 23, 1994

NOTARY PUBLIC CERTIFICATION: State of North Carolina County of Mecklenburg

I, as a Notary Public of the said State and County, do hereby certify that [REDACTED] Caraway personally appeared before me and executed the foregoing instrument.

Witness my hand and seal this 3rd day of September, 1994 (Notary Public Seal)

Signature of Notary John Renee Hawkins My commission expires Nov 14, 1998

ACKNOWLEDGEMENT
SECONDARY EMPLOYMENT

This is to acknowledge that I have read and understand the Department of
Correction policy of Secondary Employment. I have also been provided with a
form in which to request approval for secondary employment

9-23-94
(Date)

 C. C. C.
(Employee Signature)

R. D. D.
Witness

DC-4

STATE OF NORTH CAROLINA
OFFICE OF THE STATE CONTROLLERPayroll Section
TAX EXEMPTION CERTIFICATESUnit: 3730
Retirement Number:

FOR PAYROLL OFFICER USE ONLY	Agency Name:		Retirement Number:	
	If the answer to the question below is 'YES', please furnish the following information			
	Last Date Employed by State	Wages Paid by State Subject to Soc. Sec. Withholding	Social Security Tax Withheld:	
If a new employee, have you been employed by the state of North Carolina during the current calendar year? ☐ YES ☒ NO			Name of Previous Agency	

Form W-4 Department of the Treasury Internal Revenue Service	Employee's Withholding Allowance Certificate	OMB No. 1545-0010
1 Type or print your first and middle initial [REDACTED]		2 Your social security number [REDACTED]
Last name Caraway		
Home address (number and street or rural route) [REDACTED]		
City or town, state, and ZIP code [REDACTED]		
4 Total number of allowances you are claiming.....		4 [REDACTED]
5 Additional amount, if any, you want deducted from each pay.....		5 \$ [REDACTED]
6 I claim exemption from withholding and I certify that I meet ALL of the following conditions for exemption: • Last year I had a right to a refund of ALL Federal income tax withheld because I had NO tax liability; AND • This year I expect a refund of ALL Federal income tax withheld because I expect to have NO tax liability; AND • This year if my income exceeds \$500 and includes nonwage income, another person cannot claim me as a dependent. If you meet all of the above conditions, enter the year effective and "EXEMPT" here.....		6 19
7 Are you a full-time student? (Note: Full-time students are not automatically exempt.).....		7 ☐ Yes ☒ No
Under penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate or entitled to claim the exempt status.		
Employee's signature ▶ [REDACTED] Caraway		Date ▶ Sept. 23, 1994
8 Employer's name and address (Employer: Complete 8 and 10 only if sending to IRS) OFFICE OF THE STATE CONTROLLER, RALEIGH, N.C. 27603-8003		9 Office code (optional) 56-6023166
		10 Employer identification number

Form NC-4	NORTH CAROLINA DEPARTMENT OF REVENUE Employee's Withholding Allowance Certificate
1 Type or print your first and middle initial [REDACTED]	
Last name Caraway	
2 Your social security number [REDACTED]	
Home address (number and street or rural route) [REDACTED]	
City or town, state, and ZIP code [REDACTED]	
4 Total number of allowances you are claiming.....	
5 Additional amount, if any, you want deducted from each pay.....	
6 I claim exemption from withholding and I certify that I meet ALL of the following conditions for exemption: • Last year I had a right to a refund of ALL State income tax withheld because I had NO tax liability; AND • This year I expect a refund of ALL State income tax withheld because I expect to have NO tax liability. If claiming exempt, the statement is effective for one calendar year only and a new statement must be completed by next February 15 and given to your employer. If you meet all of the above conditions, the year effective and "EXEMPT" here.....	
6 19	
7 Are you a full-time student? (Note: Full-time students are not automatically exempt.).....	
7 [REDACTED]	
I certify, under penalties provided by law, that the withholding allowance on this certificate do not exceed the amount to which I am entitled.	
Employee's signature ▶ [REDACTED] Caraway	
Date ▶ SAME AS ABOVE, 19	
8 Employer's name and address (Employer: Complete 8 and 9 only if sending to NCDR) SAME AS ABOVE	
9 Employer identification number 092-100081	

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NCDPS 000044

MARION CORRECTIONAL INSTITUTION
3730

I hereby acknowledge receipt of a copy of Administrative
Memorandum: 1.07.27-88 entitled "Conditions of Continued
Employment."

I understand that it is my responsibility to become familiar with
and abide by these policies.

Also, I understand that a complete copy of the Department of
Correction Disciplinary and Grievance Policy and Procedures are
posted in the Assembly room and are available for my review.

 Caseyway Name (Print)

 Caseyway Employee's Signature

9-23-94 Date

UPON COMPLETION, THIS FORM MUST BE RETURNED TO MCI PERSONNEL

REQUIREMENTS OF THE DIVISION OF PRISONS REGARDING THE ACCEPTANCE
OF COURT SUBPOENAS

I have read, understand, and have received a copy of the directive dated October 13, 1992 issued by the Division of Prison's Deputy Director for Operations regarding the requirements of the Division of Prisons regarding the acceptance of court subpoenas by staff. I understand that if I have further questions about these requirements, that I may contact my supervisor.

EMPLOYEE SIGNATURE: [REDACTED]

PRINT NAME AS IT APPEARS ABOVE: [REDACTED]

POSITION: [REDACTED]

DATE: 9-23-1994

UPON COMPLETING THIS FORM, IT MUST BE RETURNED TO SMCI & JEL

DIVISION OF PRISONS POLICY ON GIFTS, FAVORS, HONORARIUMS AND SOLICITATION
OF DONATIONS

It is the policy of the Division of Prisons to generally prohibit the acceptance or solicitation of gifts, favors or donations for personal use from individuals or other entities who are, or plan to be, conducting business with the Department of Correction. The details of this policy may be found in Department of Correction Administrative Memorandum 1.01.03-92. This rule applies to employees of the Division of Prisons and their immediate family.

The Department prohibits any employee from accepting honorariums for participating in activities while the employee is on duty. The Department prohibits employees who arrange or manage contracts from soliciting or accepting donations from any source, under any circumstances.

It is the responsibility of the employee to decline offers of gifts, favors, or honorariums. But in the event that refusal is unsuccessful and a gift, favor, or honorarium is received, the employee must report immediately in writing the facts of the matter to his/her supervisor.

Failure to comply with this policy will be considered unacceptable personal conduct as defined in the State Personnel Manual and subject to the sanctions contained therein.

I have read and understand this statement of the Department of Correction, Division of Prisons Policy on Gifts, Favors, Honorariums and Solicitation of Donations. I understand that specific details of the above rules are described in Department of Correction Administrative Memorandum 1.01.03-92.* If I have further questions about the policy, I understand that I may contact my supervisor or the Secretary's office directly.

*By signing below, I acknowledge receipt of a copy of this referenced memorandum.

EMPLOYEE SIGNATURE: _____

PRINT NAME AS IT APPEARS ABOVE: _____

POSITION #: _____

DATE: _____

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, et al.,)
)
Plaintiffs,)
) No. 1:19-cv-272-LCB-LPA
V.)
)
DALE FOLWELL, et al.,)
)
Defendants.)
_____)

VIDEOCONFERENCE DEPOSITION

OF

BECKI JOHNSON

30(b)(6) DESIGNEE FOR NC DEPARTMENT OF PUBLIC SAFETY

SEPTEMBER 15, 2021

THIS TRANSCRIPT IS NOT COMPLETE
PORTIONS OF THIS TRANSCRIPT AND/OR EXHIBITS
MAY BE DESIGNATED CONFIDENTIAL/ATTORNEYS EYES ONLY
AFTER REVIEW OF TRANSCRIPT BY ATTORNEYS WITHIN 30
DAYS OF DATE OF DEPOSITION PER PROTECTIVE ORDER

WAKE COUNTY, NORTH CAROLINA

Reported by: Michelle Maar, RDR, RMR, FCRR

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DEPOSITION OF BECKI JOHNSON

Page 9

1 Q. Okay. And any other positions before that?

2 A. No.

3 Q. Or in between the two?

4 A. Not for DPS.

5 Q. Okay. Yeah.

6 What are your, what are your responsibilities?

7 A. I oversee the benefits programs for the
8 department, which include insurance benefits, leave
9 benefits, retirement and disability benefits, as well as
10 leave of absence and separations.

11 Q. And what were your, what were your
12 responsibilities as disability -- was it Disability
13 Benefits Manager? Was that the previous position?

14 A. It was Disability and Retirement Program Manager.

15 And my responsibilities were to oversee the
16 retirement program for the agency, as well as the
17 disability benefits for the agency, and process disability
18 payments monthly for employees out on short-term
19 disability.

20 Q. Ms. Johnson, does the Department of Public Safety
21 offer health insurance to its employees?

22 A. Yes. Through the State Health Plan.

23 Q. Sorry -- you said through the State Health Plan?

24 A. Yes. Yes.

25 Q. And does DPS pay money into the State Health Plan

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DEPOSITION OF BECKI JOHNSON

Page 10

1 to contribute for its employees' health insurance premiums?

2 A. Yes. We pay a monthly employee, employer portion
3 for each employee.

4 Q. And how is the amount that DPS pays into the
5 State Health Plan each month determined?

6 A. The State Health Plan determines it each year and
7 provides it to us.

8 Q. And so DPS doesn't play a role in making that
9 determination. It's purely the State Health Plan, and DPS
10 just goes along with that.

11 Is that right?

12 A. Yes. That's correct.

13 Q. And so if the amount changes at any point, that
14 would all be determined by the State Health Plan?

15 A. Correct.

16 Q. Approximately how many DPS employees qualify for
17 health insurance through the State Health Plan?

18 A. We have about 21,000 employees.

19 Q. And all of them are on the State Health Plan?

20 There aren't any who don't qualify for insurance
21 or --

22 A. Well, depending on their hours worked, some
23 probably don't qualify, or some that have declined coverage
24 because they have other coverage.

25 Q. Right. Can you estimate of how many of those

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DEPOSITION OF BECKI JOHNSON

Page 11

1 21,000 employees would be on the State Health Plan?

2 A. I would say maybe about 18 or 19,000.

3 Q. And again approximately, how much does DPS pay
4 the State Health Plan each year in total for all these
5 employees?

6 A. We don't pay it directly, the Office of the State
7 Controller pays it. I can give you the monthly amount per
8 employee.

9 Q. Sure. That's fine.

10 A. It's 521.96 currently.

11 Q. And so just to make sure I'm understanding -- so
12 that's, it's 521 or so for each of those employees.

13 And that's for all of those employees who are on
14 the Health Plan, correct?

15 A. Correct. Yes.

16 Q. So if I were doing the math, I could just
17 multiply that by 18 or 19,000 and that would be the total?

18 A. Yes.

19 Q. Does the Department of Public Safety have any
20 control over the health insurance that its employees
21 receive?

22 A. No.

23 Q. Okay. And I'm actually going to pull up -- well,
24 I'm going to send another, put another exhibit into the
25 folder, if you'll bear with me for a minute.

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DEPOSITION OF BECKI JOHNSON

Page 17

1 would they have to ask a question about how to access the
2 website?

3 A. So, yeah, generally they would go to the HBR at
4 their facility to ask questions, for help.

5 There is no form. It has to be done through the
6 system.

7 But if they can't get up with the HBR, they would
8 reach out to the Insurance Section in our office.

9 Q. Okay. And HBR, is that Health Benefits
10 Representative?

11 A. Yes. It is.

12 Q. Does DPS offer any type of health insurance apart
13 from what is offered through the State Health Plan?

14 A. No.

15 Q. Are DPS employees required to sign up for health
16 insurance?

17 A. No.

18 Q. Does DPS provide insurance, health insurance for
19 employees' qualifying dependents?

20 A. Yes.

21 Q. And does DPS offer health insurance for anyone
22 other than the employees and their qualifying dependents?

23 A. No.

24 Q. I'm going to pull up another exhibit here.

25 MR. MAROLF: Give me one second, Alan.

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DEPOSITION OF BECKI JOHNSON

Page 29

1 to process those exception requests?

2 A. So if our Insurance Section determines that we
3 can submit an exception request, we type up that exception
4 request and submit it through an online form to the State
5 Health Plan.

6 And then the State Health Plan reviews that and
7 makes the final determination as to whether they'll
8 reinstate the coverage or not.

9 Q. And so that, that final determination is made by
10 the State Health Plan.

11 Is that right?

12 A. Yes. That's correct.

13 Q. I want to ask about the State Health Plan's
14 exclusion of coverage for gender confirming healthcare.

15 Does that exclusion apply to DPS employees?

16 A. Yes. It would apply, if it's a State Health Plan
17 exclusion, it would apply to anybody enrolled in the State
18 Health Plan.

19 Q. And does DPS have any control over whether that
20 exclusion remains in the Plan?

21 A. We do not.

22 Q. Does DPS have any control over any terms of the
23 Plan?

24 A. No. We do not.

25 Q. Has DPS ever received any complaints from

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DEPOSITION OF BECKI JOHNSON

Page 30

1 employees about the exclusion for gender confirming care?

2 A. Not to my knowledge. If we received complaints
3 about what is covered, we usually just direct them to the
4 State Health Plan at the number on their insurance card
5 because we don't have any control over the coverage terms.

6 Q. Have there ever been any communications between
7 DPS and Sergeant Dana Caraway regarding her insurance
8 coverage?

9 A. Not to my knowledge. It's possible, you know,
10 she reached out to someone else.

11 Q. But you're not aware of any?

12 A. I'm not. That doesn't ring a bell, but I deal
13 with several employees so it's possible.

14 Q. Has DPS had any communications with the State
15 Health Plan regarding the exclusion for gender confirming
16 healthcare?

17 A. No. Not to my knowledge.

18 MR. MAROLF: Alan, I think I'm getting close to
19 done.

20 Do you mind if we take a quick break so I can go
21 back over my notes?

22 MR. MCINNIS: Works for us.

23 MR. MAROLF: 10 minutes? Let's just say come
24 back at 10:25.

25 (Off the record)

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DEPOSITION OF BECKI JOHNSON

Page 34

1 A. No, no, not in the termination.

2 We just process the separation action in the
3 Integrated HR Payroll System.

4 Q. I understand. Who makes the decision to
5 terminate an employee at a correctional institution?

6 A. So to my knowledge, it would probably start with
7 the supervisor and then go up through the chain of command
8 through the warden and superintendent.

9 And then if it's a termination, they work with
10 the Employee Relations Section in Central HR.

11 Q. So where does the buck stop?

12 A. I believe the Employee Relations Section would
13 give that final approval to terminate somebody.

14 Q. And that's an office in DPS. Is that correct?

15 A. Yes. In the Central HR Office.

16 Q. And that, and that individual then reports up to
17 the deputy secretary of the department?

18 A. Correct.

19 Q. And what is the name of the current person in
20 charge of the Employee Relations Section?

21 A. Cassandra Harris-Skinner.

22 Q. Let me just repeat it so I make sure -- Cassandra
23 Harris-Skinner.

24 A. Yes. Harris, H-A-R-R-I-S-hyphen-Skinner.

25 Q. I thought that's what it was. But between Zoom

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DEPOSITION OF BECKI JOHNSON

Page 37

1 start date so that she could fill it out.

2 Q. And I -- just -- I include this question only to
3 make sure the record is clear -- the paperwork I have,
4 which I received from your office, identifies the
5 employee's name as Dowd Caraway.

6 Would you agree for purposes of this litigation,
7 this is paperwork for Sergeant Dana Caraway within Sergeant
8 Caraway's personnel file?

9 A. Yes. I agree with that.

10 Q. That way, that way I don't have to keep on
11 saying, you know, I didn't show you the right paperwork.

12 Now, is there a training or certification
13 requirement for corrections officers?

14 A. Yes. They go to a basic certification training.

15 Q. And who provides that training?

16 A. Department of Public Safety.

17 Q. And is that training required as a condition of
18 being a corrections officer or being employed as a
19 corrections officer in the state of North Carolina?

20 A. To my knowledge, they have to complete the
21 training. But while they're going through the training or
22 until they pass the training, they're still a corrections
23 officer.

24 Q. I understand. So -- I'm going to show you
25 another exhibit.

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DEPOSITION OF BECKI JOHNSON

Page 39

1 as a corrections officer by the department?

2 A. Not to my knowledge. I think if they lose that
3 certification, then they usually separate at that point.

4 Q. And you mentioned that Sergeant Caraway currently
5 works at the Foothills Correctional Institution or that's
6 -- we, we -- that's possible.

7 Do you know of any, Sergeant Caraway's other
8 employment stations since 1994?

9 A. Looking through the personnel file, I believe she
10 was at Alexander Correctional. That's the only one that
11 stands out to me.

12 Q. So how does the hiring process work for a
13 corrections officer?

14 A. I'm not, I'm not familiar with the hiring process
15 because that's done at the, at the facilities.

16 Q. So, so the hiring process is handled by each
17 individual DPS facility?

18 A. Yes. That's correct.

19 Q. And the facilities advertise that the job, that
20 they have a job available?

21 A. Correct.

22 Q. And then the facility staff review applications?

23 A. Yes. That's correct.

24 Q. And then do they send some sort of notice to you
25 at the HR Department that they have hired someone?

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DEPOSITION OF BECKI JOHNSON

Page 40

1 A. So the prison facilities each have a Regional
2 Employment Office. So they would send the hiring paperwork
3 to the Regional Employment Office. It's not sent to
4 Central HR.

5 Q. So -- and the Regional Employment Office is --
6 are they under -- it sounds like they're not under Central
7 HR?

8 A. They are. They report up through -- we have --
9 there's a manager in Central HR that oversees the different
10 Regional Employment Offices across the state.

11 Q. But the Regional Employment Office handles the
12 hiring paperwork.

13 Is that correct?

14 A. Yes. That's correct.

15 Q. All right. And when you mentioned the NCID and
16 the log-on to what used to be referred to as the Beacon
17 system, is that information that would be provided by the
18 Regional Employment Office at each facility?

19 A. So each facility has an NCID administrator. And
20 that person is who would assign the NCID.

21 Q. Now, you say the NCID administrator -- is that a
22 DPS job title?

23 A. It's not a job title. It's just an assignment
24 that was given to someone at the facility to take on that
25 role.

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215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

DEPOSITION OF BECKI JOHNSON

Page 44

1 individuals other than the lieutenant that would supervise
2 a correctional sergeant?

3 A. No, not to my knowledge. I think it would be the
4 lieutenant. And there's captains above that as well.

5 Q. But do you supervise any correctional sergeants?

6 A. No. I do not.

7 Q. Would there -- are you aware of anyone other than
8 the correctional lieutenant who would supervise Sergeant
9 Caraway?

10 A. Not to my knowledge, no.

11 Q. If there were a decision to terminate Sergeant
12 Caraway -- and this is, this is about the process vis-à-vis
13 the department, not that I have knowledge that there's any
14 basis for termination for Sergeant Caraway -- but if there
15 were a decision to terminate Sergeant Caraway, how does
16 that process work?

17 Would that originate with the correctional
18 lieutenant?

19 A. Yes, with the supervisor.

20 Q. And then would be processed through layers of
21 supervision above that?

22 A. Yes. To my knowledge.

23 Q. Are corrections sergeants expected to have
24 assigned uniforms and equipment?

25 A. Yes.

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215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

DEPOSITION OF BECKI JOHNSON

Page 45

1 Q. Who supplies the assigned uniforms?

2 A. Department of Public Safety.

3 Q. Are they the property of the Department of Public
4 Safety?

5 A. Yes.

6 Q. And corrections officers are expected to return
7 those uniforms at the end of their service?

8 A. Yes. That's correct.

9 Q. Are corrections officers supplied equipment that
10 they use in the performance of their duties?

11 A. Yes.

12 Q. What equipment are they supplied?

13 A. I'm not aware of the specific equipment.

14 Q. But is that equipment supplied by the Department
15 of Public Safety?

16 A. Yes.

17 Q. Are the officers allowed to bring in their own
18 equipment for use in a facility?

19 A. Not to my knowledge.

20 Q. And when an officer leaves the service of the
21 Department of Public Safety, are they expected to return
22 that equipment?

23 A. Yes.

24 Q. Where are employment records stored for DPS
25 employees?

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215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

DEPOSITION OF BECKI JOHNSON

Page 47

1 I've seen corrections officers listed in certain
2 generally available state directories.

3 And I've seen other directories that take law
4 enforcement officials out of the general population.

5 You can find out how much the accountant at the
6 Department of Audits makes but not how much a corrections
7 officer makes.

8 Who monitors -- actually, I'm going to show you a
9 document because I just don't know what it is. And I'm
10 going to ask if you, if you know -- it's a document
11 produced by the department.

12 (Exhibit 6 is marked for identification.)

13 MR. KNEPPER: Good news -- this was uploaded
14 prior to the deposition. Otherwise, we would be waiting
15 for a very long time.

16 THE WITNESS: Okay.

17 BY MR. KNEPPER:

18 Q. Have you seen a record like this before, Ms.
19 Johnson?

20 A. I have not.

21 Q. So do you know -- do you have any knowledge of
22 what information is contained in this record?

23 I see, for example, Begin Date, Completion Date,
24 and Course Number, Unlawful Workplace Harassment (2 hours),
25 and then the Contact Hours, 2.

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DEPOSITION OF BECKI JOHNSON

Page 48

1 Do you, do you have any understanding of what that
2 might be in reference to or what that might describe?

3 A. Yeah. I would assume it's the training courses
4 that are required.

5 Q. And you said required. Required by whom?

6 A. The Department of Public Safety -- in most cases.
7 Some might be Criminal Justice stuff as well.

8 Q. Does the Department of Public Safety have its own
9 training requirements for employees?

10 A. Yes.

11 Q. And employees are expected to participate in
12 those trainings or be disciplined?

13 A. Yes.

14 Q. You haven't seen this particular printout for
15 Sergeant Caraway.

16 Is that correct?

17 A. Correct.

18 Q. I want to show you another document in a slightly
19 different format.

20 Again, I'm going to ask you if you've seen it and
21 what it is.

22 (Exhibit 7 is marked for identification.)

23 THE WITNESS: Okay.

24 BY MR. KNEPPER:

25 Q. Have you seen this document before, Ms. Johnson?

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DEPOSITION OF BECKI JOHNSON

Page 51

1 Secretary of DPS?

2 A. I think, I think he reports to -- well, currently
3 yes, because we have an interim secretary.

4 But I think there's somebody else that he reports
5 to, and then the secretary is above that person.

6 Q. You said that -- does Mr. Dail have a title other
7 than HR Director?

8 A. No.

9 Q. Does DPS have a secondary employment policy?

10 A. Yes. We do.

11 Q. What is the secondary employment policy?

12 A. Employees have to notify us prior to taking on
13 secondary employment.

14 They would complete a form and give it to their
15 supervisor. And then we would make sure there's no
16 conflict of interest prior to approving it.

17 Q. And if an employee -- well, let me just ask you
18 -- what happens if an employee takes a secondary employment
19 position without receiving approval from the department?

20 A. The department can take disciplinary action.

21 Q. You said they can take disciplinary action.

22 A. Okay.

23 Q. Are you aware of circumstances in which the
24 department has taken disciplinary action?

25 A. I'm sure they have. It just doesn't come up

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215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

DEPOSITION OF BECKI JOHNSON

Page 63

1 A. No.

2 Q. But your role is to ensure that the employee
3 record system reflects that leave of absence?

4 A. Yes.

5 Q. And that while someone is on an unpaid leave of
6 absence, they're not paid?

7 A. Can you repeat that?

8 Q. And to make sure that when someone is on an
9 unpaid leave of absence, they're not paid?

10 A. That would be the facility's responsibility
11 because they're entering the time.

12 Q. Okay. Is the -- does the Department of Public
13 Safety employ Sergeant Caraway?

14 A. Yes -- to my knowledge.

15 Q. Does the State Health Plan employ Sergeant
16 Caraway?

17 A. Not that I'm aware of.

18 Q. Does the State Health Plan have the authority to
19 hire or fire Sergeant Caraway?

20 A. Not that I'm aware of.

21 Q. Does the State Health Plan have the authority to
22 supervise Sergeant Caraway?

23 A. Not that I'm aware of.

24 Q. Does the State Health Plan have the authority to
25 discipline Sergeant Caraway?

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215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

DEPOSITION OF BECKI JOHNSON

Page 64

1 A. Not that I'm aware of.

2 Q. Does the State Health Plan furnish the equipment
3 or the place of work for Sergeant Caraway?

4 A. Not that I'm aware of.

5 Q. Does the State Health Plan have custody over
6 Sergeant Caraway's personnel file?

7 A. No. Not that I'm aware of.

8 Q. Your testimony is that Sergeant Caraway has
9 worked for the Department of Public Safety since 1994.
10 Is that correct?

11 A. Yes. I believe that's correct.

12 Q. So doing the math, is that 17 years of employment
13 with -- or I guess -- no, it's -- now I'm going to be
14 embarrassed by my math -- is that 27 years of employment
15 with the Department of Public Safety?

16 A. Yes. That's what I calculate.

17 Q. I first thought 17 and then I realized that I've
18 been out of high school a lot longer than 17 years. And
19 1994 isn't that far away from when I was in high school.

20 MR. MCINNIS: Time flies.

21 BY MR. KNEPPER:

22 Q. Does DPS provide corrections officers with formal
23 and informal training?

24 A. Yes.

25 Q. Does DPS track the training provided to its

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215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

DEPOSITION OF BECKI JOHNSON

Page 65

1 employees?

2 A. Yes.

3 Q. Okay. You stated that Sergeant Caraway -- we've
4 established that Sergeant Caraway is a Corrections Sergeant
5 for the Department of Public Safety.

6 Is that correct?

7 A. Yes. That's correct.

8 Q. Is there a job description for a corrections
9 sergeant with the Department of Public Safety?

10 A. Yes. There should be.

11 Q. And who, who, who is responsible for establishing
12 that job description?

13 A. I'm not sure who creates them initially, but the
14 supervisor maintains them.

15 Q. So an employee of the Department of Public Safety
16 at Foothills Correctional Institution is responsible --

17 A. Yes. That's correct.

18 Q. -- is responsible for Sergeant Caraway's job
19 description?

20 A. Yes. That's correct.

21 Q. And to the best of your knowledge, Sergeant
22 Caraway only provides services to the Department of Public
23 Safety?

24 A. Yes -- to the best of my knowledge.

25 Q. And if Sergeant Caraway provided, had a second

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DEPOSITION OF BECKI JOHNSON

Page 66

1 employer, the department's policy is that he needed to or
2 she needed to get that approved prior to assuming that
3 second task or second job?

4 A. Yes. That's correct.

5 Q. And a failure to do so is a basis for discipline
6 by the Department of Public Safety?

7 A. Yes. That's correct.

8 MR. KNEPPER: Ms. Johnson, I think that's it.

9 I'm going to ask for a couple of minutes to take
10 a brief break, to make sure there's nothing else that I've
11 missed or forgotten.

12 MR. MCINNIS: John, before you do that, I have
13 just a couple of questions. Let me ask those in case you
14 have some follow-up to those.

15

16 EXAMINATION

17 BY MR. MCINNIS:

18 Q. Ms. Johnson, my name is Alan McInnis. I
19 represent the North Carolina Department of Public Safety in
20 this matter.

21 Let me -- Mr. Knepper asked you some questions
22 about -- if you could pull up Exhibit 6 again.

23 Okay. I'm sorry, I'm sorry. Go back to Exhibit
24 8, the last exhibit.

25 And he asked you some questions about some of the

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL, et al.,

Plaintiffs,

v.

DALE FOLWELL, et al.,

Defendants.

No. 1:19-cv-00272-LCB-LPA

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56.1, Plaintiffs Maxwell Kadel; Jason Fleck; Connor Thonen-Fleck; Julia McKeown; Michael D. Bunting, Jr.; C.B., by his next friends and parents, Michael D. Bunting, Jr. and Shelley K. Bunting; Sam Silvaine; and Dana Caraway (collectively, "Plaintiffs"), respectfully move the Court for summary judgment on their Equal Protection claims, seeking declaratory and permanent injunctive relief.¹ Plaintiffs also move for partial summary judgment on their statutory claims, seeking declaratory and permanent injunctive relief on all Plaintiffs' claims under Section 1557 of the Affordable Care Act ("ACA") and Plaintiff

¹ Plaintiff Sam Silvaine's Equal Protection claim is moot because he no longer works for the state.

Dana Caraway’s claims under Title VII of the Civil Rights Act of 1964 (“Title VII”), and reserving issues of damages on all statutory claims for trial.

Plaintiffs’ motion seeks a judgment as to liability on their claims that Defendants’ enforcement of categorical exclusions of gender-confirming care for transgender people in the North Carolina State Health Plan for Teachers and State Employees constitutes unlawful discrimination based on sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment, the ACA, and Title VII. Plaintiffs respectfully request that this Court issue a declaratory judgement finding that Defendants’ enforcement of the categorical exclusions violates Plaintiffs’ rights under the Equal Protection Clause, ACA, and Title VII, and permanently enjoin Defendants, their agents, employees, successors, and all others acting in concert with them, from enforcing the categorical exclusions of coverage for gender-confirming health care.

Dated: December 20, 2021

Respectfully submitted,

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* Appearing by special appearance pursuant to L.R. 83.1(d).

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: December 20, 2021

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL, et al.,

Plaintiffs,

v.

DALE FOLWELL, et al.,

Defendants.

No. 1:19-cv-00272-LCB-LPA

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF CONTENTS i

NATURE OF THE CASE..... 1

STATEMENT OF FACTS..... 2

I. THE PARTIES 2

II. NCSHP’S HEALTH PLANS 8

 A. The State Health Plan Structure. 8

 B. NCSHP Staff’s Efforts to Comply with the ACA..... 9

 C. Coverage Lapses Under Treasurer Folwell..... 13

III. THE STANDARD OF CARE FOR GENDER-AFFIRMING CARE..... 14

ARGUMENT..... 17

I. THE EXCLUSION VIOLATES THE EQUAL PROTECTION
 CLAUSE..... 17

 A. The Exclusion Discriminates Based on Sex..... 18

 B. The Exclusion Discriminates Based on Transgender Status..... 20

 C. The Exclusion Fails Heightened Scrutiny..... 20

 1. Purported cost savings cannot excuse invidious discrimination 22

 2. Medical consensus and FDA approval 23

II. THE EXCLUSION VIOLATES THE AFFORDABLE CARE ACT..... 27

III. THE EXCLUSION VIOLATES MS. CARAWAY’S RIGHTS
 UNDER TITLE VII..... 29

 A. The Exclusion Is Impermissible Sex Discrimination
 Under Title VII..... 29

B. Defendants’ Finger-Pointing Does Not Allow Them to
Evade Liability 30

1. DPS is liable as Ms. Caraway’s employer..... 31

2. NCSHP is liable as an agent of, and joint employer
with, DPS 31

IV. PLAINTIFFS SATISFY THE REQUIREMENTS FOR
DECLARATORY AND INJUNCTIVE RELIEF..... 34

CONCLUSION 35

Plaintiffs respectfully submit this memorandum of law in support of their motion for summary judgment on their Equal Protection claims, seeking declaratory and permanent injunctive relief;¹ and partial summary judgment on their statutory claims, seeking declaratory and permanent injunctive relief on their claims under Section 1557 of the Affordable Care Act (“ACA”), and Plaintiff Dana Caraway’s claims under Title VII of the Civil Rights Act of 1964, reserving issues of damages on all statutory claims for trial.²

NATURE OF THE CASE

Plaintiffs are current or former participants in the North Carolina State Health Plan for Teachers and State Employees (“NCSHP”). As part of compensation for employment, the State of North Carolina (“State”) provides health coverage to employees and their dependents through NCSHP. Some employees and their dependents, however, receive less compensation than others: those denied coverage for the gender-affirming care that transgender people require. NCSHP contains sweeping exclusions of such care, while covering the same kinds of treatments for cisgender employees who require them for other reasons. Defendants thus deny equal treatment to employees who are transgender or have transgender dependents, and harm transgender family members who depend on employees for health care coverage.

¹ Plaintiff Sam Silvaine’s Equal Protection claim is moot because he no longer works for the state.

² Unless otherwise indicated, all exhibits are attached to the Declaration of Amy Richardson.

STATEMENT OF FACTS

I. THE PARTIES.

Plaintiffs are, or have been, enrolled in NCSHP for health coverage. ECF No. 85 ¶ 1. Two Plaintiffs are parents whose children are denied gender-affirming care, and the others are transgender employees, former employees, or dependents who have or continue to be denied coverage solely because they are transgender. All transgender Plaintiffs have been diagnosed with gender dysphoria. Mot. to Seal, Brown Rep. ¶¶ 50–68; Supp. Brown Rep. ¶¶ 9-14. Plaintiffs have been denied care for their gender dysphoria under NCSHP’s exclusions of coverage for “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation”³ and “[t]reatment or studies leading to or in connection with sex changes or modifications and related care” (collectively, the “Exclusion”). Exs. 8-9.

Plaintiff Maxwell Kadel is enrolled in NCSHP as a University of North Carolina, Chapel Hill (“UNC”) employee. Kadel Decl. ¶¶ 2, 4, 16. He is a 39-year-old transgender man.⁴ See *id.* ¶ 2. Before his transition, Mr. Kadel experienced significant distress as a result of his gender dysphoria. Ex. 15, 117:2-11; Kadel Decl. ¶ 6, 8. He began hormone therapy in 2016, but because of the Exclusion, Mr. Kadel has been forced to pay out-of-pocket. *Id.* ¶¶ 7, 9. The Exclusion also prevented Mr. Kadel from obtaining chest

³ While the health plans exclude coverage for psychological treatment, NCSHP’s Rule 30(b)(6) designee testified that NCSHP does not enforce that exclusion. Ex. 12, 49:8-23.

⁴ Mr. Kadel turned 39 on December 3, 2021.

surgery when he needed it, leading to a years-long delay while he saved up to pay at his own expense. *Id.* ¶¶ 12-15. Mr. Kadel has an ongoing need for hormone therapy and may seek additional surgical care in the future. *Id.* ¶ 16.

Plaintiff Connor Thonen-Fleck is enrolled in NCSHP as a dependent of **Plaintiff Jason Fleck**, a UNC-Greensboro employee. ECF No. 85 ¶¶ 83-84; ECF No. 96 ¶ 8. Mr. Thonen-Fleck is a 19-year-old transgender man. Thonen-Fleck Decl. ¶¶ 2-3. Until he began to transition, he experienced increasing anguish. *Id.* ¶ 5. Beginning hormone therapy and obtaining chest reconstruction surgery to masculinize his chest was life changing. Ex. 16, 102:8-19, 116:16-25; Ex. 17, 64:2-21; Thonen-Fleck Decl. ¶¶ 7, 16. Based on the Exclusion, Mr. Thonen-Fleck has been denied coverage for endocrinologist appointments, testosterone, and chest reconstruction surgery. Ex. 16, 6:23-7:11; Fleck Decl. ¶¶ 10-14. The denials invoked only the Exclusion for treatment of gender dysphoria and no other exclusions. Fleck Decl. ¶¶ 11-12. Mr. Thonen-Fleck has an ongoing need for hormone therapy and anticipates seeking additional surgical care in the future. *Id.* ¶ 17.

Plaintiff Julia McKeown is enrolled in NCSHP as an employee of North Carolina State University (“NC SU”). ECF No. 85 ¶ 94; ECF No. 96 ¶ 9. Dr. McKeown is a 45-year-old transgender woman. McKeown Decl. ¶ 2. Until she began her transition, she experienced significant distress. *Id.* ¶¶ 4-5, 9; Ex. 18, 150:11-151:4. By 2018, Dr. McKeown’s medical provider referred her for vaginoplasty, and she requested preauthorization for the surgery. McKeown Decl. ¶ 9. The request was denied based on

the Exclusion for treatment of gender dysphoria and no other exclusions. *Id.* ¶¶ 10-11. Dr. McKeown appealed that decision to Blue Cross and Blue Shield of North Carolina (“BCBSNC”) but was informed that they only administer the plan and could not resolve the issue. *Id.* ¶ 11; ECF No. 85 ¶ 96. Dr. McKeown has an ongoing need for hormone therapy and anticipates possibly seeking additional surgical care in the future. McKeown Decl. ¶ 14.

Plaintiff C.B. is enrolled in NCSHP as a dependent of **Plaintiff Michael D. Bunting, Jr.**, a retiree of UNC. ECF No. 85 ¶¶ 109, 117; C.B. Decl. ¶ 19; M. Bunting Decl. ¶ 26; S. Bunting Decl. ¶ 16. C.B. is a 16-year-old transgender young man. C.B. Decl. ¶¶ 2-4. Before his transition, C.B. experienced distress associated with his birth-designated sex. Ex. 19, 35:8-22; C.B. Decl. ¶¶ 11, 13, 24; Ex. 20, 82:2-9; M. Bunting Decl. ¶ 9; S. Bunting Decl. ¶¶ 7, 12. In 2017, C.B. was diagnosed with gender dysphoria and was later prescribed puberty-delaying medication. C.B. Decl. ¶ 14; M. Bunting Decl. ¶ 14; S. Bunting Decl. ¶ 13. Because of the Exclusion, C.B.’s parents were forced to obtain additional coverage for C.B. for 2019 in order to be able to afford C.B.’s puberty-delaying medication. Ex. 20, 105:20-106:12; M. Bunting Decl. ¶¶ 22–23; S. Bunting Decl. ¶ 27. C.B. has also been prescribed testosterone, but coverage has been denied on multiple occasions. C.B. Decl. ¶¶ 21-22; M. Bunting Decl. ¶ 26; S. Bunting Decl. ¶¶ 30-32. C.B. has an ongoing need for hormone therapy. Ex. 20, 132:21–133:1; M. Bunting Decl. ¶ 26; S. Bunting Decl. ¶ 35. C.B.’s gender-conforming treatment has helped reduce

his anxiety and brought him much-needed relief. Ex. 19, 36:1-3; C.B. Decl. ¶¶ 15, 21, 24; M. Bunting Decl. ¶ 15; S. Bunting Decl. ¶ 14.

Plaintiff Sam Silvaine was enrolled in NCSHP as an employee of NCSU from 2016 through 2018. Ex. 21, 8:23-9:1; Silvaine Decl. ¶ 5. He is a 33-year-old transgender man. Silvaine Decl. ¶ 2. While he was working at NCSU, Mr. Silvaine lived with significant distress caused by gender dysphoria. Ex. 21, 105:14-23; Silvaine Decl. ¶ 7. In 2017, Mr. Silvaine was prescribed hormone therapy, but that was not sufficient to alleviate his daily distress because of his non-masculine chest. Ex. 21, 48:9-16; Silvaine Decl. ¶¶ 8-12. In consultation with his provider, he decided to seek chest surgery to treat his gender dysphoria. Ex. 21, 48:9-20; Silvaine Decl. ¶ 13. Although he initially received prior authorization, after the Exclusion was reinstated, the authorization was rendered invalid. Ex. 21, 73:9-74:19; Silvaine Decl. ¶¶ 14-16. He was forced to pay for his surgery out-of-pocket, which was a stressful burden. Ex. 21, 72:16-22; Silvaine Decl. ¶¶ 17-18.

Plaintiff Dana Caraway is a transgender woman and a State of North Carolina, Department of Public Safety (“DPS”) employee. Caraway Decl. ¶¶ 2-3, 8; ECF No. 96 ¶ 12. She pays the same premium as other State employees to enroll in the 80/20 plan. Caraway Decl. ¶¶ 16-17; ECF No. 96 ¶ 133. Until she began to transition in 2018, she had grown increasingly isolated and distressed. Ex. 22, 78:15-79:4, 79:18-80:1, 152:12-20; Caraway Decl. ¶¶ 9-14. Treating her gender dysphoria was so important that she obtained surgery in 2020 by paying for it largely out of her retirement savings. Caraway

Decl. ¶¶ 23-25. BCBSNC denied coverage, citing the Exclusion as the only reason. Ex. 22, 64:6-10; Caraway Decl. ¶ 24. She paid for a second surgery and needs one more procedure to feminize her facial features, which she cannot afford. Caraway Decl. ¶¶ 25-26. She also takes hormone therapy, which NCSHP has covered inconsistently—both as to the medication and related visits to her practitioner. *Id.* ¶¶ 20, 28.

Defendant Dale Folwell is sued in his official capacity as the North Carolina State Treasurer. ECF No. 85 ¶ 13; Ex. 11, 30:23-31:5. Defendant Folwell is Chair of NCSHP Board of Trustees (the “Board”). Ex. 11, 44:18-20; Ex. 10 at 2. His statutory duties include administering and operating NCSHP, setting benefits with Board approval, and designing and implementing coordination of benefits policies. N.C. Gen. Stat. § 135-48.30(a); Ex. 4 Admis. 4. He approves the final agenda for each Board meeting as part of the process by which NCSHP determines which benefits the plan will cover each year. Ex. 11, 44:21-45:2, 46:1-47:1; Ex. 3 Interrog. 7.

Defendant Dee Jones is sued in her official capacity as Executive Administrator of NCSHP. ECF No. 85 ¶ 14; Ex. 12, 13:6-8. She is responsible for management of the plan, Ex. 12, 14:21-23, and is statutorily authorized to negotiate, renegotiate, and execute contracts for NCSHP pursuant to N.C. Gen. Stat. § 135-48.23. Ms. Jones testified as NCSHP’s 30(b)(6) designee. *Id.* 5:6-10.

Defendant NCSHP provides group health insurance to eligible state employees and their dependents pursuant to N.C. Gen. Stat. § 135-48.2. “The opportunity to enroll in [NCSHP] is a part of the compensation package provided to state employees.” Ex. 4

Admis. 6. NCSHP is self-funded, ECF No. 85 ¶ 1, and “determines what health benefits are available to state employees through their employment” and the number of plan options. ECF No. 96 ¶ 179; Ex. 14, 13:3-14:6. NCSHP receives federal funding through “quarterly payments under the Retiree Drug Subsidy from the U.S. Department of Health and Human Services.” Ex. 5 Admis. 1 Interrog. 1.

Defendant DPS is an employer within the meaning of Title VII. ECF No. 96 ¶ 18; ECF No. 85 ¶ 18; ECF Nos. 104-1, 105; Ex. 7 Admis. 1. As an employer, DPS provides health care coverage to its employees through NCSHP. ECF No. 85 ¶ 18; ECF No. 96 ¶¶ 18, 22; Ex. 14, 9:20-24, 17:18-23. DPS facilitates employee access to NCSHP coverage in several ways. DPS contributes \$521.96 to NCSHP per month per employee. Ex. 7 Admis. 2. Upon hiring, and during annual open enrollment, DPS “Health Benefit Representatives provide the benefits information to the employees to give them the information they need to determine if they would like to join the SHP.” Ex. 6 Interrog. 3(a); Ex. 12, 88:22-89:3.

Each Health Benefits Representative (“HBR”) is an employee not of NCSHP, but instead of the relevant state agency, such as DPS. Ex. 12, 118:6-17. HBRs are “the first line of contact” for employees with questions about insurance, Ex. 14, 24:7-13, and are “responsible for their employer’s employees and getting them enrolled [in NCSHP] and making sure they understand the processes.” Ex. 12, 118:6-14; Ex. 14, 21:20-22:13. Additionally, the human resources staff of the participating employer, such as DPS, are responsible for entering information into the system so that the State Controller can

deduct the employees' premiums. Ex. 12, 90:19-24. When an employee changes their health coverage because of a qualifying life event, DPS's human resources section reviews relevant documents and determines whether to approve the requested change. Ex. 14, 14:18-16:22.

DPS also becomes "involved if an employee loses coverage of the State Health Plan due to non-payment of the employee's premium." Ex. 6 Interrog. 3(b)-4. "If the employee wants ... coverage ... reinstated before the annual enrollment period," DPS works with both "the employee to submit an exception request to the State Health Plan," and "with the State Health Plan which is a part of the State Treasurer's Office to submit the exception request" *Id.* 3(b).

II. NCSHP'S HEALTH PLANS.

A. The State Health Plan Structure.

NCSHP covers more than 740,000 teachers, state employees, retirees, and their dependents. Ex. 10 at 2; Ex. 12, 18:14; ECF No. 85 ¶ 4. NCSHP offers an 80/20 PPO Plan and a 70/30 PPO Plan (collectively, the "Plan") that are generally available to enrollees. ECF No. 85 ¶ 48; ECF No. 96 ¶ 48. Covered services include medically necessary pharmacy benefits, mental health benefits, and medical care such as surgical benefits at inpatient and outpatient facilities. Exs. 8-9; ECF No. 85 ¶ 49; ECF No. 96 ¶ 49. BCBSNC serves as the third-party administrator and CVS Caremark ("CVS") administers pharmacy benefits for the Plan. ECF No. 85 ¶ 48.

NCSHP's health plans share one feature: a categorical Exclusion of coverage for gender-affirming care. Exs. 8-9. The Exclusion applies even to the very same treatments that are covered when they are medically necessary for cisgender participants, including hormone therapy, Ex. 2 Admis. 1, Ex. 5 Admis. 2; puberty-delaying hormone treatment, Ex. 5 Admis. 2; mammoplasty and breast reconstruction, Ex. 2 Admis. 2, Ex. 5 Admis. 3; vaginoplasty, Ex. 2 Admis. 3; and hysterectomy, Ex. 2 Admis. 4. Because of the Exclusion, transgender people are denied the opportunity to make the same individualized showing of medical necessity for treatments covered by the Plan as cisgender people are permitted. Exs. 8-9.

B. NCSHP Staff's Efforts to Comply with the ACA.

In 2010, Congress enacted Section 1557 of the ACA, 42 U.S.C. § 18116, a broad civil rights remedy to protect patients and other health care consumers from discrimination on the basis of race, ethnicity, sex, disability, and age. On May 18, 2016, the U.S. Department of Health and Human Services ("HHS") promulgated a final rule prohibiting "categorical coverage exclusion[s] or limitation[s] for all health services related to gender transition." Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,471-72 (May 18, 2016).⁵

NCSHP was aware at least as early as summer 2016 that it needed to eliminate the Exclusion to comply with the ACA. NCSHP's Deputy Executive Administrator and

⁵ The prior administration's attempt to roll back this aspect of the rule was enjoined and the rule's gender identity protections remain in effect. *See Walker v. Azar*, 480 F.Supp.3d 417, 420 (E.D.N.Y. 2020).

Legal Counsel Lotta Crabtree asked Mark Collins, a Plan financial analyst, to investigate the “cost of coverage for gender dysphoria” because “[t]he Plan believes that we will need to cover treatment and services for gender dysphoria beginning with Plan year 2017.” Ex. 31; *see also* Ex. 32 (email from Ms. Crabtree stating: “we need to ensure coverage under our benefits do not discriminate on the basis of ... sex. Sex includes gender identity and so we are trying to determine what we need to cover for individuals diagnosed with gender dysphoria.”); *see also* Ex. 30. By July 2016, NCSHP adopted a Section 1557 grievance procedure which explained NCSHP “is subject to Section 1557.” Ex. 33, PLANDEF0012787.

Subsequently, Ms. Crabtree worked with then-Executive Administrator Mona Moon to create bullet points for the Board about the ACA requirements. Ex. 34. The bullet points explained that the ACA “applies to” NCSHP by virtue of the \$19.5 million retiree drug subsidy NCSHP receives from HHS, and that participants “have a private right of action to sue for violations of the rule.” *Id.* KADEL00136650.

NCSHP retained Segal Consulting (“Segal”) for guidance regarding ACA requirements. Ex. 35; Ex. 12, 23:8-12. On November 29, 2016, Segal delivered a memo advising that NCSHP is “likely” a covered entity “subject to” the ACA, and that covered entities “must provide coverage for transgender health care ... beginning on or after 1-1-17.” Ex. 36. Segal also estimated that the new coverage would cost NCSHP between \$350,000 and \$850,000, or 0.011% to 0.027% of the plan’s total premium. Ex. 36, PLANDEF0006965. Segal’s estimate would prove to be highly accurate; NCSHP’s

costs for gender-affirming care for the 2017 plan year were \$404,609.26, at the lower end of Segal's estimate. Ex. 3 Interrog. 10; Ex. 5 Admis. 6.

On November 28-29, 2016, NCSHP approved a press release related to the upcoming Board meeting stating:

The Plan's outside legal counsel determined this rule requires action by the Plan on or before January 1, 2017. If the Plan does not take action to comply, the Plan risks losing millions of dollars in federal funding and could face discrimination lawsuits for non-compliance.

Ex. 37. Ms. Moon also helped NCSHP staff craft a response for members of the public, adding a statement that the Exclusion was being eliminated "as required by Federal law and to preserve federal Retiree Drug Subsidy funds received by the Plan." Ex. 38.

NCSHP staff recommended that the Board remove the Exclusion during its December 2016 meeting to provide "medically necessary services for the treatment of gender dysphoria." Ex. 39, PLANDEF006988; Ex. 12, 33:25-34:3. State Health Plan Medical Director Patti Forest, M.D. educated the Board about "gender dysphoria diagnostic criteria and standards of care," noting that the American Medical Association ("AMA"), American College of Physicians, and American College of Obstetricians and Gynecologists endorse coverage for this care. Ex. 40, PLANDEF0012825; *see also* ECF No. 131-2 (Br. Amici Curiae Am. Med. Ass'n, et al.). Dr. Forest also explained that "elements of care for transgender people [are] a 'medical necessity'" and "[d]elaying treatment for [gender dysphoria] can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health and strain the health

care system.” Ex. 39, PLANDEF0006971. Dr. Forest explained that the World Professional Association for Transgender Health (“WPATH”) has “established internationally accepted Standards of Care” for this treatment, noting that the AMA recognizes it as a “medical necessity.” *Id.* PLANDEF0006969-71.

During the Board meeting, the Plan’s outside legal counsel advised them that continuing to receive federal funding without coverage for treatment of gender dysphoria would render NCSHP “non-compliant as of January 1, 2017,” resulting in “the possibility of civil action by someone challenging the violation.” Ex. 40, PLANDEF0012825. NCSHP’s then-Legal Counsel, Lotta Crabtree, further advised that if NCSHP covered this care, it would “adopt the [BCBSNC] medical policy, included in the Board material, which includes the requirements in support of medical necessity.” *Id.* PLANDEF0012816; Ex. 12, 41:25-42:15; *see also* Ex. 43 (BCBSNC “Corporate Medical Policy, Gender Confirmation Surgery and Hormone Therapy”). NCSHP staff accordingly recommended to the Board that it “remov[e] the blanket exclusions” to provide “medically necessary services for the treatment of gender dysphoria.” Ex. 39, PLANDEF006988.

A Board member moved to eliminate the Exclusion, and another Board member amended the motion to apply only for plan year 2017. Ex. 40, PLANDEF0012816-17; Ex. 12, 43:2-44:11. The amended motion, which stated that the Exclusion would be “revisited in advance of the 2018 plan year,” was approved. Ex. 40, PLANDEF0012817. But the Board never revisited it. Ex. 12, 63:5-8.

In response to media requests, NCSHP reiterated its understanding that eliminating the Exclusion was necessary to avoid the risk of private discrimination suits. *See, e.g.*, Ex. 42; Ex. 41, PLANDEF0007138. NCSHP staff also worked to survey their contractors to ensure compliance with the ACA. Ex. 44.

C. Coverage Lapses Under Treasurer Folwell.

By August 2017, however, NCSHP staff had begun preparing for the Exclusion to be reinstated. A representative of BCBSNC emailed plan staff member Caroline Smart to explain that NCSHP would need to “sign a hold harmless if the plan decided not to cover gender dysphoria.” Ex. 45.

The Exclusion was “reinstated on January 1, 2018” by “operation of law.” Ex. 3 Interrog. 6. As NCSHP staff worked with vendors to reinstate the Exclusion, BCBSNC informed NCSHP again in December 2017 that it would need to sign an indemnification agreement before BCBSNC would make the necessary coding changes. Ex. 47. Several Plaintiffs and members of the public addressed the Board again at its October 22, 2018 Board meeting and asked that the Exclusion be eliminated. Ex. 11, 144:2-145:21. The Board declined. Exs. 8-9.

Three days later, on October 25, 2018, Mr. Folwell released a statement providing that “[u]ntil the court system, a legislative body or voters tell us that we ‘have to,’ ‘when to,’ and ‘how to’ spend taxpayers money on sex change operations,” he would not allow NCSHP to provide coverage. Ex. 48. Defendants Folwell and Jones negotiated and

approved contracts for 2018 through 2021 health plans excluding coverage for gender-confirming health care. ECF No. 85 ¶ 63; Exs. 8-9.

As NCSHP participants began appealing denials of coverage for hormone therapy under the Exclusion after 2017, BCBSNC—which handled the appeals—emailed NCSHP staff to complain that CVS was inaccurately denying the coverage in the first instance based on a lack of medical necessity, when it should instead be denied “based on the Plan’s benefits, not based on lack of medical necessity.” Ex. 49. The email noted that “the services associated with the treatment of gender dysphoria generally meet the statutory definition of medical necessity” in N.C. Gen. Stat. § 58-3-200(b), and the “pharmacy denials should be handled as lack of benefits, rather than lack of medical necessity.” *Id.*

III. THE STANDARD OF CARE FOR GENDER-AFFIRMING CARE.

Gender identity is a person’s internal sense of one’s sex, such as male or female. Ex. 23(a) ¶ 20; Ex. 24(a) ¶ 17; Ex. 25(a) ¶ 24; Ex. 27(a) ¶ 22; Ex. 26(a) ¶ 18. Although most people are cisgender, meaning their gender identity matches their birth-assigned sex, transgender people have a gender identity that differs from their birth-assigned sex. Ex. 23(a) ¶ 19; Ex. 25(a) ¶ 25; *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020). Left untreated, the dissonance between one’s gender identity and birth-assigned sex can be associated with clinically significant distress or significant impairment of functioning. Ex. 23, 84:16-85:7; Ex. 24, 18:12-16; Ex. 25, 17:18-22; Ex. 26, 18:25-19:6; Ex. 27, 18:5-19:4; Ex. 23(a) ¶ 24; Ex. 24(a) ¶ 18; Ex. 25(a) ¶¶ 29, 35; Ex.

27(a) ¶¶ 23, 38; Ex. 26(a) ¶ 62. The medical diagnosis for that incongruence and the attendant distress or impairment is gender dysphoria. Ex. 23, 84:16-85:7; Ex. 25, 18:4-6; Ex. 26, 19:12-17; Ex. 27, 18:5-19:4; Ex. 25(a) ¶¶ 29, 32; Ex. 27(a) ¶¶ 23-25; *Grimm*, 972 F.3d at 594-95. Being transgender is a normal variation of human development and “gender identity and gender incongruity ... are not a matter of choice.” Ex. 25(a) ¶ 69; Ex. 26(a) ¶ 21; *Grimm*, 972 F.3d at 594; *Kadel v. N.C. State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422, 427 (4th Cir. 2021) (same).

The diagnosis of gender dysphoria is codified in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders-5th edition* (“DSM-5”). Ex. 23, 86:25-87:7; Ex. 27, 18:17-19:2; Ex. 23(a) ¶ 24; Ex. 25(a) ¶ 29; Ex. 27(a) ¶¶ 24-25; Ex. 26(a) ¶ 24. “Gender incongruence” also is codified as a diagnosis in the *International Classification of Diseases* (World Health Org. 11th revision). Ex. 26, 23:4; Ex. 25(a) ¶ 29; Ex. 26(a) ¶ 25.

The WPATH has continuously maintained *Standards of Care for the Health of Transgender, Transsexual, and Gender-Nonconforming People* (“WPATH Standards”) since 1979, publishing its most recent update, Version 7, in 2012. Ex. 23(a) ¶ 33; Ex. 24(a) ¶ 21; Ex. 25(a) ¶ 36; Ex. 27(a) ¶ 26. The WPATH Standards “represent the consensus approach of the medical and mental health community ... and *have been recognized by various courts, including this one, as the authoritative standards of care.*” *Grimm*, 972 F.3d at 595 (emphasis added; collecting authorities); Ex. 25, 99:9-15; Ex. 23(d) ¶¶ 80, 101; Ex. 24(a) ¶ 21; Ex. 25(a) ¶¶ 36-37; Ex. 27(a) ¶ 27; Ex. 26(a) ¶ 27. In

addition, the Endocrine Society has published Guidelines for Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons (“Endocrine Society Guidelines”), which are consistent with the WPATH Standards. Ex. 23(a) ¶ 33; Ex. 27(a) ¶ 28; Ex. 26(a) ¶ 28.

The AMA and other major health organizations recognize the WPATH Standards and Endocrine Society Guidelines as authoritative. Ex. 23(d) ¶¶ 80, 101; Ex. 25(a) ¶ 37; Ex. 27(a) ¶ 27; Ex. 26(a) ¶ 27. BCBSNC relies on the WPATH Standards and the Endocrine Society Guidelines in its Corporate Medical Policy. Ex. 50, KADEL00316792. “There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.” *Grimm*, 972 F.3d at 595-96 (citation omitted).

Under the WPATH Standards, treatment for gender dysphoria may involve counseling, hormone therapy, and surgery. Ex. 23(a) ¶ 34; Ex. 25(a) ¶ 38; Ex. 27(a) ¶ 29. Medically necessary surgical procedures treat gender dysphoria by bringing a person’s body into better alignment with their gender identity, Ex. 24(a) ¶ 19; Ex. 24(b) ¶ 28; Ex. 26(a) ¶ 45, and are similar to surgical procedures performed for other diagnoses. Ex. 24(a) ¶¶ 27, 30-31; Ex. 24(b) ¶¶ 11, 21. Hormone therapy specifically for transgender adolescents may include puberty-delaying treatment. The beginning of puberty in transgender adolescents “is often a painful and sometimes traumatic experience” as their body develops sex characteristics that are incongruent with their gender identity. Ex. 26(a) ¶ 40; *see also* Ex. 27, 82:4-22; *Grimm*, 972 F.3d at 595. Puberty-delaying

treatment “essentially pauses puberty,” so that an adolescent can undergo “a single, correct pubertal process” consistent with their gender identity. Ex. 26(a) ¶¶ 40, 43; Ex. 26, 63:1-4; Ex. 27, 82:4-22. “No medical care is initiated until *after* the onset of puberty,” and care is provided based on “the youth’s unique cognitive and emotional maturation and ability to provide a knowing and informed consent.” Ex. 25(a) ¶ 74; Ex. 26(a) ¶¶ 36, 44; *see also* Ex. 26, 42:23-43:3; Ex. 27(a) ¶ 31; *Grimm*, 972 F.3d at 596.

“The American Medical Association [], the Endocrine Society, the American Psychiatric Association, and the American Psychological Association all agree that medical treatment for gender dysphoria is medically necessary and effective.” Ex. 23(a) ¶ 32; Ex. 25(a) ¶¶ 42, 49, 106; Ex. 24(a) ¶ 41; Ex. 24(b) ¶ 52; ECF No. 131-2. Accordingly, the “denial of gender affirming care is harmful to transgender people, as it exacerbates gender dysphoria and leads to negative health outcomes.” Ex. 25(a) ¶¶ 57, 106; Ex. 27(a) ¶ 38.

ARGUMENT

I. THE EXCLUSION VIOLATES THE EQUAL PROTECTION CLAUSE.

An Equal Protection claim requires that a plaintiff demonstrate “he has been treated differently from others with whom he is similarly situated,” facially or as “the result of intentional ... discrimination.” *Morrison v. Garrahy*, 239 F.3d 648, 654 (4th Cir. 2001). The undisputed facts show that the Exclusion—which prohibits coverage for “*gender transformation*” and “*sex changes*”—facially discriminates, obviating the need to show intent. Exs. 8-9; *see Fletcher v. Alaska*, 443 F.Supp.3d 1024, 1027, 1030 (D.

Alaska 2020) (finding “facially discriminatory policy” where health plan excluded coverage for treatment “related to changing sex or sexual characteristics”).

A. The Exclusion Discriminates Based on Sex.

As described above, the Exclusion’s explicitly sex-based terms make plain that the discrimination here is based on sex. In addition, *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020), confirms that if an employer takes an adverse action against “a transgender person who was identified as a male at birth but who now identifies as a female,” but treats more favorably “an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” *Id.* at 1741-42. This is what the Exclusion does.

Considering a similar exclusion in the Alaska state employee health plan, another district court granted the plaintiff summary judgment, finding that where the plan “covers vaginoplasty and mammoplasty surgery if it reaffirms an individual’s natal sex, but denies coverage for the same surgery if it diverges from an individual’s natal sex,” that constitutes “discrimination because of sex.” *Fletcher*, 443 F.Supp.3d at 1030; *see also Boyden v. Conlin*, 341 F.Supp.3d 979, 995 (W.D. Wisc. 2018) (discrimination in coverage for vaginoplasty based on one’s birth-assigned sex is a “straightforward” case of sex discrimination).

“[D]iscrimination against transgender people” also “punish[es] transgender persons for gender non-conformity, thereby relying on sex stereotypes.” *Grimm*, 972

F.3d at 608; *see also id.* at 608-09 (collecting authorities). Courts throughout the country, including this one, have found that healthcare discrimination against transgender people is rooted in impermissible stereotyping. *See, e.g., Kadel v. Folwell*, 446 F.Supp.3d 1, 14 (M.D.N.C. 2020) (the Exclusion “tethers Plaintiffs to sex stereotypes which, as a matter of medical necessity, they seek to reject”); *Toomey v. Arizona*, No. 19-cv-00035, 2019 WL 7172144, at *5-6 (D. Ariz. Dec. 23, 2019) (“Discrimination based on the incongruence between natal sex and gender identity—which transgender individuals, by definition, experience and display—implicates ... gender stereotyping”); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015). A health plan exclusion for gender-confirming care thus “entrenches” the sex-stereotyped “belief that transgender individuals must preserve the genitalia and other physical attributes of their [birth-assigned] sex over not just personal preference, but specific medical and psychological recommendations to the contrary.” *Boyden*, 341 F.Supp.3d at 997; *see also Flack v. Wis. Dep’t of Health Servs.*, 328 F.Supp.3d 931, 951 (W.D. Wisc. 2018).

Additionally, discrimination based on gender transition is necessarily discrimination *because of sex*. *Schroer v. Billington*, 577 F.Supp.2d 293, 306-08 (D.D.C. 2008) (employer’s “refusal to hire [plaintiff] after being advised that she planned to ... undergo[] sex reassignment surgery was literally discrimination because of ... sex”); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 527 (D. Conn. 2016). The same is true here, because the Exclusion expressly prohibits coverage for “treatment

in conjunction with proposed gender *transformation*” and “sex *changes*.” Exs. 8-9 (emphasis added); *see also Flack*, 328 F.Supp.3d at 949.

B. The Exclusion Discriminates Based on Transgender Status.

The Fourth Circuit has ruled that government classifications based on transgender status bear all the hallmarks of heightened scrutiny and are “at least quasi-suspect.” *Grimm*, 972 F.3d at 610; *see also id.* at 611-13. Here, there is no dispute that the Exclusion discriminates based on transgender status. *See Toomey*, 2019 WL 7172144, at *6 (exclusion “singles out transgender individuals for different treatment” because “transgender individuals are the only people who would ever seek gender reassignment surgery”).

C. The Exclusion Fails Heightened Scrutiny.

Because the Exclusion is subject to heightened scrutiny, the burden shifts to Defendants to show that it is substantially related to an important governmental interest. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Defendants argue that the Exclusion is justified for two reasons: as a cost-saving measure and because there is a supposed uncertainty about whether gender-affirming care is effective. Ex. 1 Interrog. 1; Ex. 5 Interrog. 3. But neither point comes close to carrying Defendants’ burden under heightened scrutiny. To start, these are post-hoc justifications on which Defendants did not actually rely upon when permitting the Exclusion to remain, so they are irrelevant. *Virginia*, 518 U.S. at 533 (justifications must be “genuine, not hypothesized or invented

post hoc in response to litigation”). And Defendants are wrong on both points on the substance.

NCSHP’s cost for gender-affirming care in 2017 was \$404,609, which—compared to NCSHP’s cash balance of over \$1 billion in August 2018—is not even a drop in the bucket. Ex. 3 Interrog. 10; Ex. 5 Admis. 6; Ex. 11, 148:21-149:20; Ex. 11(a), PLANDEF0154481-82. Not surprisingly, NCSHP’s Rule 30(b)(6) representative admitted that “the cost of this benefit is not going to break the Plan, never was, never will.” Ex. 12, 104:17-19. And in any event, it is settled law that saving money does not justify discrimination, since a state may not “protect the public fisc by drawing an invidious distinction.” *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974).

Defendants’ “medical uncertainty” argument is also a post-hoc rationale—because NCSHP *did* provide coverage for gender-affirming care in 2017 based on medical necessity—and it is wrong on the merits too. Every legitimate professional medical organization agrees that treatment for gender dysphoria is medically necessary and effective, as evidenced by (among other things) the amicus brief filed by many of those organizations in this case. ECF No. 131-2. Courts have recognized this as well, as recently as this year. *See, e.g., Brandt v. Rutledge*, 2021 WL 3292057, at *4 (E.D. Ark. Aug. 2, 2021) (enjoining ban on gender-affirming medical care for adolescents, concluding that “gender-affirming treatment is supported by medical evidence that has been subject to rigorous study,” and noting that this is the view of “every major expert medical association”).

1. Purported cost savings cannot excuse invidious discrimination.

When NCSHP eliminated the Exclusion in 2016, it knew what the care would cost, decided to eliminate the Exclusion on that basis, and ultimately incurred costs precisely as predicted—in fact, at the lower end of Segal’s prediction, which represented less than 0.027% of the premium. Ex. 3 Interrog. 10; Ex. 5, Admis. 6; Ex. 36, PLANDEF006965. The cost-saving rationale also is implausible given that any savings from denying this care would be negligible, if not “illusory.” See *Mem’l Hosp.*, 415 U.S. at 265 (delayed medical care can cause a patient needless deterioration, requiring more expensive future care and possibly causing disability, which can strain state social services).

Defendants’ witnesses did not contradict these facts. Testifying as NCSHP’s 30(b)(6) designee, Ms. Jones offered: “I’ll totally admit that the cost of this benefit is not going to break the Plan, never was, never will.” Ex. 12, 104:17-19. Mr. Folwell was disclosed as a Rule 26(a)(2)(C) expert to testify about the Plan’s “unfunded liability” and the general concerns of the plan’s financial sustainability. Ex. 10 at 2-3. Nonetheless, even he admitted that he was “not sure there’s a direct correlation between the unfunded liability and the exclusion.” Ex. 11, 192:9-10. Additionally, minutes from the Board’s December 1, 2016 meeting reflect that Financial Analyst Mark Collins advised the Board “that the State Health Plan Board is *not responsible* for the retiree health benefits liability He reiterated that while some of the Plan’s programs can affect the unfunded liability, the Board *doesn’t have a responsibility* for the results.” Ex. 40,

PLANDEF0012812 (emphasis added). NCSHP has also undertaken initiatives to address its unfunded liability that—in contrast to the minimal cost of gender-affirming care—save in some cases hundreds of millions of dollars. Ex. 5 Interrog. 2; Ex. 12, 80:13-82:10.

Moreover, even if cost was a factor—and it is not—a state may not “protect the public fisc by drawing an invidious distinction.” *Mem’l Hosp.*, 415 U.S. at 263; *see also Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (same); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) (same). Defendants must “do more than show” that denying equal coverage to transgender people “saves money,” *Shapiro*, 394 U.S. at 633—otherwise, this does nothing “more than justify [the] classification with a concise expression of an intention to discriminate.” *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

2. Medical consensus and FDA approval.

Gender-confirming medical care is both medically necessary and beneficial for transgender people with gender dysphoria. Ex. 29 at 12-10;⁶ Ex. 23(a) ¶ 32; Ex. 25(a) ¶¶ 42, 49, 106; Ex. 24(a) ¶ 41; Ex. 24(b) ¶ 52. Nonetheless, NCSHP has identified “medical uncertainty” as a governmental interest, raising several purported justifications for the “uncertainty.” Ex. 5 Interrog. 3.

⁶ Exhibit 29 is self-authenticating as a publication issued by a public authority, Fed. R. Evid. 902(5), and is appropriate for judicial notice, *United States v. Doe*, 962 F.3d 139, 147 n.6 (4th Cir. 2020).

First, NCSHP claims that it “has not identified any valid, reliable, peer-reviewed longitudinal studies that support the efficacy” of this care. Ex. 5 Interrog. 3. The Fourth Circuit has already accepted the WPATH Standards as “the authoritative standards of care.” *Grimm*, 972 F.3d at 595. So have medical and mental health organizations across the United States. Ex. 23(d) ¶¶ 80, 101; Ex. 25(a) ¶ 37; Ex. 27(a) ¶ 27; Ex. 26(a) ¶ 27. And in 2016, NCSHP itself determined that enough medical certainty existed to remove the Exclusion and cover treatment for gender dysphoria. Even now, under a new administration, NCSHP’s Rule 30(b)(6) designee, Ms. Jones, admitted that such studies are “[n]ot necessarily” required because NCSHP takes a “holistic view” and there is “no single pathway to coverage.” Ex. 12, 72:21-73:10. Nor does Ms. Jones believe NCSHP has searched for such studies. *Id.* 75:9-11. When Treasurer Folwell was asked about the basis for his October 25, 2018 statement claiming “medical uncertainty” about this care, he admitted that he is not a doctor or a subject matter expert. Ex. 11, 47:15, 64:1, 66:13-14, 167:8-13. Mr. Folwell “most relied on” Board member (and his personal physician) Dr. Peter Robie to form this view, *id.* 167:20-168:2, 170:8-17, but could not recall what Dr. Robie told him on this topic. *Id.* 170:24-171:2.

Dr. Robie admits he is not an expert in the diagnosis of gender dysphoria or its treatment, and has never diagnosed a patient with or treated a patient for gender dysphoria. Ex. 13, 11:12-23; *see also* Ex. 10 at 6 (disclosing that Dr. Robie “is not a specialist in the treatment of gender dysphoria, and the Defendants do not seek to qualify him as such”). Dr. Robie testified that the medical necessity of this care is a decision

made by the patient and provider, and did not know whether this care can be medically necessary. Ex. 13, 36:11-37:2.

In her capacity as NCSHP's Rule 30(b)(6) designee, Ms. Jones alluded to "uncertainty on whether or not the treatments are effective," but admitted that "in some cases, maybe they are." Ex. 12, 70:4-6. Ms. Jones testified that in evaluating benefit changes, NCSHP "use[s] a lot of research from Blue Cross or CVS or our actuary," in addition to other sources. *Id.* 18:19-19:5. Ms. Jones also testified that she conducted her own research on medical necessity for "[s]everal hours" in 2017, and "[p]robably less" in 2018, but the "main go-tos" for information on this subject are BCBSNC, CVS, and Segal. *Id.* 95:5-12, 97:14-19. BCBSNC, however, has advised Ms. Jones and NCSHP repeatedly that this care is medically necessary. *See, e.g.*, Ex. 50 (BCBSNC Corporate Medical Policy covers the excluded care); Ex. 49 (email correspondence from BCBSNC to NCSHP explaining that excluded care meets the statutory definition of medical necessity); Ex. 46 (BCBSNC provided Ms. Jones with numerous "Scientific Background and Reference Sources" relied upon by BCBSNC when it decided to cover the excluded care).

Second, Defendants identified the lack of an "objective test" to determine who would benefit from treatment as a justification. Ex. 5 Interrog. 3. But when asked about the necessity of an objective test, Ms. Jones clarified that this would simply be "taken into consideration" as part of NCSHP's "holistic review," and conceded that NCSHP has not searched for any such test. Ex. 12, 76:18-77:9. Additionally, the Fourth Circuit has

recognized that “transgender people constitute a discrete group with immutable characteristics,” defined by a gender identity different from their birth-assigned sex, and has recounted in detail the diagnostic criteria used to diagnose gender dysphoria. *Grimm*, 972 F.3d at 594-95, 612.

NCSHP’s similar concern about accurately identifying minors who are transgender is unsupported. Under heightened scrutiny, only NCSHP’s actual motivations matter to the analysis, and NCSHP’s admitted lack of expertise in the area and scant “research” on the Internet cannot support this claim. Ms. Jones’ own sources of preferred guidance cover this care for transgender adolescents. Ex. 12, 18:19-19:5, 95:5-12, 97:14-19; Ex. 43, PLANDEF0008648 (BCBSNC’s policy on coverage for puberty-delaying medication). And binding authority in this Circuit recognized the Standards of Care as authoritative in the context of an adolescent who had received gender-affirming care for gender dysphoria. *Grimm*, 972 F.3d at 595-96, 598.

Third, Defendants cited a lack of FDA approval for hormonal treatment of gender dysphoria. Ex. 5 Interrog. 3. But not only is it “common for medications to be used ‘off label’ across all domains of medicine,” Ex. 26(a) ¶ 96, the lack of FDA approval did not prevent NCSHP from covering this care during plan year 2017, and NCSHP’s Rule 30(b)(6) designee admitted the Plan has covered other non-approved applications of medications. See Ex. 12, 107:17-19 (testifying that the Plan covered COVID care).⁷

⁷ See *Coronavirus Updates*, NCSHP (Mar. 23, 2021), <https://perma.cc/F33T-K6UQ> (indicating NCSHP coverage for COVID vaccines in March 2021); *FDA Approves*

Moreover, as Defendants’ proffered experts admitted, it has been the FDA’s position for at least three decades that physicians may prescribe drugs on an off-label basis. *See, e.g.*, Ex. 28, 223:14-232:6; *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 351 (2001) (“off-label use is generally accepted”).

Finally, NCSHP invoked the inability “to identify a reasonable metric to distinguish the benefits sought by Plaintiffs from other uncovered medical treatments that affect small groups within the overall Plan’s population.” Ex. 5 Interrog. 3. But the metric that distinguishes the benefits at issue here is that they are chosen for exclusion on the basis of sex. *Grimm*, 972 F.3d at 607; *Bostock*, 140 S. Ct. at 1737 (when an employer takes an adverse action against an employee for being transgender, “[s]ex plays a necessary and undisguisable role in the decision”). The Exclusion does not treat all plan participants equally, but instead denies coverage based on sex and transgender status for medically necessary care while cisgender participants receive coverage for the same care.

II. THE EXCLUSION VIOLATES THE AFFORDABLE CARE ACT.

Congress passed the ACA with the “aim[] to increase the number of Americans covered by health insurance” through the creation of “a comprehensive national plan to provide universal health insurance coverage” across the nation. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538, 583 (2012). Section 1557 imposes an obligation to

First COVID-19 Vaccine, FDA (Aug. 23, 2021), <https://perma.cc/Z9UP-RK8M> (announcing first FDA approval of a COVID vaccine in August 2021). A “publication purporting to be issued by a public authority” is self-authenticating. Fed. R. Evid. 902(5).

not discriminate by incorporating “Title IX ... to prohibit discrimination based on sex in healthcare.” *C.P. by & through Pritchard v. Blue Cross Blue Shield of Ill.*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at *4 (W.D. Wash. May 4, 2021).

A plaintiff states a claim under Section 1557 by alleging that (1) defendant is a healthcare program that receives federal financial assistance; and (2) plaintiff was subjected to discrimination in healthcare services; (3) on the basis of sex. *See C.P.*, 2021 WL 1758896, at *4. Here, the undisputed facts show that Plaintiffs are entitled to judgment on this claim.

First, NCSHP is a “health program or activity, any part of which is receiving Federal financial assistance.” 42 U.S.C. § 18116(a). “By extending nondiscrimination protections to individuals under ‘any health program or activity,’ Congress clearly intended to prohibit discrimination by any entity acting within the ‘health’ system.” *Fain v. Crouch*, No. CV 3:20-0740, 2021 WL 2657274, at *3 (S.D. W.Va. June 28, 2021). Health insurance providers “implicate[] the health of persons falling within the scope of ACA protections,” including an insurer who denies access to transgender participants, “by virtue of its authority to design health benefits.” *Id.* Accordingly, as “the gatekeeper” to transgender participants’ health coverage, an insurer like NCSHP “qualifies as a ‘health program’ that Congress intended to rid of discrimination.” *Id.*⁸ In

⁸ Such understanding is consistent with other definitions of “health program” and “health care” in the ACA, which refers to “health programs” and “health care entities” as including insurers and insurance plans in other provisions. *See, e.g.*, 42 U.S.C. § 18051; 42 U.S.C. § 18113.

addition, NCSHP receives federal funding for its Retiree Drug Subsidy from HHS. Ex. 5 Admis. 1 Interrog. 1.

Second and third, Plaintiffs have been subjected to discrimination in the provision of healthcare services on the basis of sex for all the reasons described above.⁹

III. THE EXCLUSION VIOLATES MS. CARAWAY’S RIGHTS UNDER TITLE VII.

A. The Exclusion Is Impermissible Sex Discrimination Under Title VII.

Title VII prohibits an employer from discriminating against an individual in the terms of employment “because of such individual’s ... sex.” 42 U.S.C. § 2000e-2(a)(1). Health insurance constitutes an important part of one’s compensation for employment. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983). Substantively, the Exclusion is sex discrimination under Title VII for exactly the same reasons it is under Title IX. Under Title VII, a facially discriminatory policy may be justified only where “gender is a ‘bona fide occupational qualification [(“BFOQ”)] reasonably necessary to the normal operation of the particular business or enterprise.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (alterations omitted) (quoting 42 U.S.C. § 2000e-2(e)); *see also Fletcher*, 443 F.Supp.3d at 1030-31 (finding facially discriminatory exclusion in state employee plan only justifiable by BFOQ).

However, where a case involves “the terms of a retirement [or fringe benefit] plan,” the BFOQ defense “is inapplicable since the terms of a retirement [or fringe

⁹ The Fourth Circuit has now settled NCSHP’s previous claims of immunity from suit. *Kadel*, 12 F.4th at 439.

benefit] plan have nothing to do with occupational qualifications.” *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 n.13 (1983); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367 (9th Cir. 1986). Title VII only permits an employer to “hire and employ” based on sex in the narrow circumstances where sex is a BFOQ. 42 U.S.C. § 2000e-2(e)(1); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (BFOQ defense “reaches only special situations.”); *see also Fletcher*, 443 F.Supp.3d at 1031. Accordingly, judgment should be entered for Ms. Caraway because the Exclusion cannot be justified by a BFOQ.

B. Defendants’ Finger-Pointing Does Not Allow Them to Evade Liability.

Ms. Caraway raises this claim against two defendants: DPS, as her employer; and NCSHP, as an agent of and joint employer with DPS. If one credits both Defendants’ arguments, no one bears any liability at all for the Exclusion’s facial discrimination. *See* ECF No. 64 at 9 (NCSHP’s argument that “[l]iability for delegated decisions remains with the employer [DPS]”); ECF No. 96 ¶¶ 187-88 (denying that DPS “violated Title VII”). Defendants’ positions are thus “untenable.” *Boyden*, 341 F.Supp.3d at 997. The law does not permit this kind of evasion because Title VII does not allow “an employer who exercises actual control [to] avoid Title VII liability by hiding behind another entity.” *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 415 (4th Cir. 2015). DPS and NCSHP share liability under Title VII.

1. DPS is liable as Ms. Caraway's employer.

DPS admits it is Ms. Caraway's employer. ECF No. 96 ¶ 12. Title VII "prohibits an employer from offering its employees" a discriminatory fringe benefits plan. *Norris*, 463 U.S. at 1074 (per curiam). DPS plays an extensive role in facilitating access to the discriminatory coverage. To begin, "had [DPS] not hired" Ms. Caraway, she "would not have been permitted to enroll in the Plan at all." *Kadel*, 446 F.Supp.3d at 10. DPS also contributes \$521.96 monthly to NCSHP for each employee, Ex. 7 Admis. 2, and employs the HBRs responsible for assisting with enrollment. Ex. 6 Interrogs. 2-3(a); Ex. 12, 88:22-89:3. DPS human resources staff enter information in the system so that premiums can be deducted from employees' salary; they also approve coverage changes due to qualifying life events. Ex. 12, 90:19-24; Ex. 14, 14:18–16:22. DPS also assists employees who lose coverage due to non-payment of the premium. Ex. 6 Interrog. 3(b).

2. NCSHP is liable as an agent of, and joint employer with, DPS.

NCSHP has violated Title VII for two reasons, and each independently establishes NCSHP's liability under the statute.

First, NCSHP is an agent of DPS. Title VII defines "employer" to include the "agent" of one as well. 42 U.S.C. § 2000e(b). The Supreme Court held nearly half a century ago that a government administrative board that implements a discriminatory fringe benefit may be sued as the "agent" of the government agency that provides the benefit to its employees. *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978). This Court examined these principles when Plaintiffs moved

to add Ms. Caraway's Title VII claims to the complaint, finding that "Title VII's inclusion of 'agent' within its definition of 'employer' reinforces the principle that 'an employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells.'" *Kadel v. Folwell*, No. 1:19-cv-272, 2021 WL 848203, at *6 (M.D.N.C. Mar. 5, 2021) (quoting *Manhart*, 435 U.S. at 718 n.33).

This is consistent with this Court's analysis in analogous cases. In *Crowder v. Fieldcrest Mills, Inc.*, 569 F.Supp. 825 (M.D.N.C. 1983), the Court considered claims by a plaintiff against her employer and its health plan administrator as an agent of the employer under Title VII. The plaintiff sued because the health plan offered more favorable health coverage to male employees for their spouses than to female employees. *Id.* at 826. *Crowder* explained that where the administrator served in merely an "advisory capacity" with no "significant control" over the plan terms, no agent relationship existed; but where an employer had delegated responsibility for fringe benefits, this "delegation of authority functionally resulted in the associations having control of an aspect of the terms and conditions of employment," thus rendering the administrator an "employer" by virtue of serving as the employer's agent. *Id.* at 827-28. Here, there is no dispute that NCSHP has significant control over the terms of the plan, which has been delegated to it by operation of law. N.C. Gen. Stat. § 135-48.2(a); Ex. 5 Admis. 12-14; ECF No. 96 ¶ 179. State employers such as DPS do not have control over the health insurance their employees receive, the plan terms, which third-party administrators are selected, or

whether the Exclusion remains in the plan—all of which NCSHP decides. Ex. 14, 11:19–22, 14:7-17, 29:13-24.

Where a “delegation of authority functionally result[s]” in an entity like NCSHP “having control of an aspect” of employment such as insurance, the failure to impose liability on that agent means that “the purposes of Title VII ... could be frustrated by employers delegating to such parties authority over terms and conditions of employment.” *Crowder*, 569 F.Supp. at 828. The Court should not permit NCSHP to succeed with that kind of frustration here. *See also Boyden*, 341 F.Supp.3d at 998 (being empowered to administer health policies “forms a sufficient basis to hold [defendant liable] as an agent of the State and the ultimate employer”).

Second, NCSHP is a joint employer with DPS. The “joint employment doctrine is the law of [the Fourth] Circuit.” *Butler*, 793 F.3d at 409. This doctrine “serves Title VII’s purpose of eliminating discrimination in employment based on ... sex,” *id.* at 410 (quote marks omitted), “prevent[ing] those who effectively employ a worker from evading liability by hiding behind another entity.” *Id.* Accordingly, “multiple entities may simultaneously be considered employers for the purposes of Title VII.” *Id.* The Court should hold that NCSHP is such an entity.

The Fourth Circuit uses a “hybrid test” to allow for “the broadest possible set of considerations in making a determination of which entity is an employer.” *Id.* at 414. Courts consider nine factors to determine whether an entity is a joint employer, but none is dispositive—and the Fourth Circuit instructs that “courts can modify the factors to the

specific industry context.” *Id.*; *see also id.* at 415 (“the consideration of factors must relate to the particular relationship under consideration”) (citation omitted). The principal guidepost, however, remains the common law element of control. *Id.* at 415. “Otherwise, an employer who exercises actual control could avoid Title VII liability by hiding behind another entity.” *Id.*

There is no dispute that state law delegates control over health coverage to NCSHP, which exists solely to permit that delegation, as its enacting statute makes clear. N.C. Gen. Stat. § 135-48.2(a). NCSHP thus is a joint employer with DPS for the same reasons it is an agent of DPS. Where an entity “exhibit[s] a high degree of control over the terms of [] employment,” it is liable as a joint employer. *Butler*, 793 F.3d at 415.

IV. PLAINTIFFS SATISFY THE REQUIREMENTS FOR DECLARATORY AND INJUNCTIVE RELIEF.

Plaintiffs satisfy the requirements for declaratory relief. This case presents an “actual controversy,” allowing the Court to “declare the rights of the parties.” 28 U.S.C. § 2201(a).

Plaintiffs also satisfy the four criteria for permanent injunctive relief. First, the denial of Plaintiffs’ constitutional rights constitutes irreparable harm. *See Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). So does the denial and delay of healthcare. Ex. 25(a) ¶¶ 57, 106; Ex. 27(a) ¶ 38. Second, no monetary damages can restore Plaintiffs to their rightful position of being able to access medical care at the time they need it, or undo the deprivation of equal treatment under law. *See Walker*, 480 F.Supp.3d 417. Third, the balance of the hardships tips sharply in Plaintiffs’ favor. NCSHP negotiates

reduced rates and covering Plaintiffs at those lower rates would save NCSHP and taxpayers money, instead of compensating Plaintiffs for the full price charged by providers without those negotiated discounts. Ex. 12, 47:11-48:4. Finally, “upholding constitutional rights surely serves the public interest.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002); *see also Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F.Supp.3d 1, 61 (D.D.C. 2020) (“There is clearly a robust public interest in safeguarding prompt access to health care.”).

CONCLUSION

Plaintiffs respectfully request that the Court grant them summary judgment on their constitutional claims, and partial summary judgment on their statutory claims; declare that the Exclusion violates Equal Protection, the ACA, and Title VII; and permanently enjoin Defendants from enforcing it.

Dated: December 20, 2021

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* Appearing by special appearance pursuant to L.R. 83.1(d).

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is in compliance with the Court's Order entered December 10, 2021 at ECF No. 176 because the body of this brief, including headings and footnotes, does not exceed 9,000 words as indicated by Microsoft Word, the program used to prepare this document.

Dated: December 20, 2021

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

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DECLARATION OF MAXWELL KADEL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL, *et al.*,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as
State Treasurer of North Carolina, *et al.*,

Defendants.

No. 1:19-cv-00272-LCB-LPA

**DECLARATION OF MAXWELL
KADEL**

I, Maxwell Kadel, hereby state as follows:

1. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 38-year-old transgender man. I was employed by the University of North Carolina at Chapel Hill ("UNC") from October 2016 to November 2019. After working for a different employer since November 2019, I returned to work at UNC in October 2021. I live in Chapel Hill, North Carolina.

3. I was designated female at birth but have a male gender identity. I live all aspects of my life in accordance with my male gender identity.

4. I began working with the UNC School of Government in October 2016, where I worked as an Administrative Support Associate until I accepted another job opportunity outside the University system in November 2019. In October 2021, I returned to UNC as a Software Applications Developer in the UNC University Libraries system.

5. While working at the UNC School of Government, as a North Carolina state employee, I was enrolled in the North Carolina State Health Plan for Teachers and State Employees ("NCSHP"), and I received health care benefits from this plan as part of my compensation. I contributed each month to the plan via a paycheck deduction.

6. I have struggled with gender dysphoria since childhood, and was diagnosed with gender dysphoria at the age of 33.

7. As part of my prescribed treatment for gender dysphoria, I began hormone therapy in June 2016.

8. While I was working at the UNC School of Government, I lived with significant distress caused by gender dysphoria. This included distress and anxiety about how people treated me with regard to my gender, and discomfort with my physical appearance and with being seen as a woman.

9. Because of the NCSHP's categorical Exclusion of coverage for gender-confirming health care, my insurance did not cover my hormone therapy and I was forced to pay for it out of pocket.

10. On October 29, 2018, CVS issued a Notice of Determination ("ND") denying prior authorization for coverage of my testosterone prescription. A true and correct copy of the ND is attached as Exhibit A. The ND explained that the prescription would only be covered for males with "primary or hypogonadotropic hypogonadism," and that because my "use of this drug d[id] not meet th[is] requirement," it would not be covered. Exhibit A at 2 (KADEL00313153).

11. In 2017, after the NCSHP eliminated the Exclusion, I considered pursuing chest surgery to create a more typically masculine chest, but decided to wait and see whether hormone therapy would be sufficient to relieve my gender dysphoria.

12. In 2018, in consultation with my health care providers, I determined that chest surgery was necessary to alleviate my gender dysphoria, and was ready to move forward with further consultations leading to surgery. I then discovered that the NCSHP had reinstated the Exclusion, effective January 1, 2018, in all of its health plans.

13. After the Exclusion was reinstated in 2018, I was deprived of insurance coverage for medically necessary hormone therapy and gender-confirming surgical care. I paid out-of-pocket for hormone therapy. During that time, to lessen the financial burden of paying out-of-pocket for testosterone every month, I often rationed and used vials of testosterone past the expiration date.

14. I also had to forgo chest surgery, which caused me to experience significant gender dysphoria-related distress on a daily basis. I wore a binder to compress my chest, but it caused me physical discomfort and breathing difficulties. I also have asthma, which was exacerbated by having to bind my chest because I could not obtain a permanent medically necessary solution through surgery.

15. Eventually, I was able to save enough to undergo chest surgery in February 2021. Although the expense for surgery was substantial for me as an individual paying out-of-pocket—\$10,525—surgery brought significant relief from my gender dysphoria and

the physical discomfort I had felt with my body. I now feel much more comfortable with my body.

16. Because I have returned to work at UNC, the Exclusion also prohibits me from seeking future medically necessary gender-confirming health care, such as ongoing hormone therapy and additional surgery I may need.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: 11/24/2021

Maxwell Kadel

Maxwell Kadel

Subscribed and sworn before me, a Notary Public in and for the ORANGE COUNTY,

State of NORTH CAROLINA, this 24 day of NOVEMBER, 2021.



Kyle F. Hoopes

Signature of Notary

Kyle F Hoopes

Exp: JANUARY 27, 2023

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: November 30, 2021

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Exhibit A

Oct 29 2018 17:23:30 AT&T/CVS Pharmacy ->

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Page 001



Fax Transmittal

To: MEMBER

From: CVS Caremark® Prior Authorization

Electronically (ePA) (4 to 5 minutes process time)	Phone (10 to 15 minutes process time)	Fax (24 to 72 hours process time)
ePA is CVS Caremark's preferred method for receiving prior authorizations and now accepts PA requests online 24/7. Easier: Reduce the need for paper forms, faxes, and phone calls More Convenient: Centrally manage ePAs and more easily view their status Faster: Generally receive faster determinations so patients can fill their medication sooner Visit http://info.caremark.com/ePA to learn more and get started today.	Calling us with your PA request during our business hours is another option. <u>See next page for the specific phone number.</u> The process over the phone can take between 10 and 15 minutes. OR see ePA option	You may also continue to fax us your PA request. <u>See next page for specific fax number.</u> Faxes received are processed within 24 to 72 hours. OR see ePA option

If this fax is in response to an inquiry about clinical criteria for coverage of a prescription drug for your patient, the criteria for the specific drug is attached.

Please note that your inquiry does not constitute a request for coverage. CVS Caremark cannot process a request for coverage until we receive a completed criteria form or appropriate clinical information.

The recipient of this fax may make a request to opt-out of receiving telemarketing fax transmissions from CVS Caremark. There are numerous ways you may opt-out: The recipient may call the toll-free number at 877-265-2711 and/or fax the opt-out request to 401-652-0893, at any time, 24 hours a day/7 days a week. The recipient may also send an opt-out request via email to do_not_call@cvscaremark.com. An opt out request is only valid if it (1) identifies the number to which the request relates, and (2) if the person/entity making the request does not, subsequent to the request, provide express invitation or permission to CVS Caremark to send facsimile advertisements to such person/entity at that particular number. CVS Caremark is required by law to honor an opt-out request within thirty days of receipt. The information contained in this message may be privileged and confidential and protected from disclosure. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the message and deleting it from your computer. Thank you, CVS Caremark.
91-41319A 062917

Oct 29 2018 17:24:03 AT&T/CVS Pharmacy ->

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Page 002



Notice of Determination

Date: 10/29/2018

MAXWELL KADEL



Plan Member Name: MAXWELL KADEL

Plan Member ID: *****

Plan Name: North Carolina State Health Plan 0274 Non-Grandfathered

Prescriber Name: QUANG PHAM

Prescriber Phone: 1-9199428741

Prescriber Fax: 1-9199421473

Dear MAXWELL KADEL:

CVS Caremark® received a request from your provider for coverage of Testosterone Cypionate IM Injection. The request was denied because:

Your plan approved Testosterone Products criteria covers this drug when you have primary or hypogonadotropic hypogonadism. Your use of this drug does not meet the requirement. This is based on the information we have.

You can ask for a free copy of the actual benefit provision, guideline, protocol or other similar criterion used to make the decision and any other information related to this decision by calling Customer Care at **1-888-321-3124**.

For more information regarding your prescription benefit, please refer to your Benefit Booklet available on the Plan's website at www.shpnc.org.

If your provider would like to discuss this decision with a clinical reviewer at CVS Caremark, your provider can call CVS Caremark, and we will make arrangements for the conversation.

You may request an appeal by sending a written request to the address below. To be eligible for an appeal, your request must be in writing and received within 180 days of the date of this letter. Please mail or fax your appeal to:

Blue Cross/Blue Shield of North Carolina
Appeals Department / Level I
PO Box 30055
Durham, NC 27702
Fax: 1-919-765-2322

This document contains references to brand-name prescription drugs that are trademarks or registered trademarks of pharmaceutical manufacturers not affiliated with CVS Caremark.

Your privacy is important to us. Our employees are trained regarding the appropriate way to handle your private health information.
91-40230B 032318 TDD/TTY: 1-800-863-5488

Oct 29 2018 17:24:34 AT&T/CVS Pharmacy ->

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Page 003

If your situation is urgent as defined by law, you may ask for an expedited appeal. Important information about your appeal rights and directions about how to ask for an appeal are provided with this letter.

If you have questions, please call Customer Care at **1-888-321-3124**.

Sincerely,

CVS Caremark

Enclosures

cc: Dr. QUANG PHAM

PA# North Carolina State Health Plan 0274 Non-Grandfathered 18-035548880 AG
Plan-approved Criteria: Testosterone Products
Claim Amount (if available):
Service Date: 10/25/2018 10:23:25 AM

If your provider included diagnosis or treatment codes with your claim for Testosterone Cypionate IM Injection to CVS Caremark, that information is listed here:

ICD diagnosis code: E34.9

Associated diagnosis: Endocrine disorder, unspecified

CPT treatment code:

Associated treatment:

You may wish to contact your provider for more information about these codes.

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Oct 29 2018 17:24:55 AT&T/ CVS Pharmacy ->

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Page 004

Important Information About Your Appeal Rights

What if I need help understanding this denial? You may contact CVS Caremark by calling **1-800-294-5979** if you need assistance understanding this notice or our decision to deny you a service or coverage.

What options does my provider have? If there is relevant information that has not been previously submitted, the treating physician may request a Provider Courtesy Review (PCR) by calling **1-800-446-8053 extension 52961** or by sending a written request within 180 days to:

Blue Cross/Blue Shield of North Carolina
Appeals Department / Provider Courtesy Review
PO Box 30055
Durham, NC 27702

What if I don't agree with this decision? You may request an appeal by sending a written request to the address below. To be eligible for an appeal, your request must be in writing and received within 180 days of the date of this letter.

Blue Cross/Blue Shield of North Carolina
Appeals Department / Level I
PO Box 30055
Durham, NC 27702

A member appeal form is available on the Web at www.BCBSNC.com.

What if my situation is urgent? If your situation meets the legal definition of urgency, the review of your claim will be conducted within 72 hours, or earlier if required by law. Generally, an urgent situation is one in which your health may be in serious jeopardy or, in the opinion of your physician, you may experience pain that cannot be adequately controlled while you wait for a decision on the external review of your claim. If you believe that your situation is urgent, you or your physician may request an expedited appeal by contacting BCBSNC via mail or fax at the address below. In addition, you may have the ability to seek an expedited external review of your adverse benefit determination. To determine whether an external review process is available to you, please consult your benefit booklet or call BCBSNC customer service on the back of your ID Card.

Blue Cross/Blue Shield of North Carolina
Appeals Department / Level 1
PO Box 30055
Durham, NC 27702
Fax: 1-919-765-2322

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Oct 29 2018 17:25:27 AT&T/CVS Pharmacy ->

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Page 005

Who may file an appeal? You or someone whom you name to act for you (your authorized representative) may file an appeal. A member consent form is attached for your convenience and is also available on our Web site at www.BCBSNC.com.

Can I provide additional information about my appeal? Yes. As part of the appeal process, you have the right to submit supporting materials in advance of a decision being made on your appeal.

What happens next? If you appeal, BCBSNC will review the decision and provide you a written determination within 30 calendar days. If the adverse benefit determination is overturned, BCBSNC will provide coverage or payment for your health care item or service. If the adverse benefit determination is upheld, you may have additional appeal rights.

How do I file a request for external review? You may be eligible for an external review process. To determine whether an external review process is available to you, please consult your benefit booklet or call BCBSNC customer service on the back of your ID card.

What other remedies do I have? Depending on your plan, you may also have the right to bring action under section 502(a) of ERISA. You and your plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact your local U.S. Department of Labor office and your state insurance regulatory agency.

Can I request copies of information relevant to my adverse benefit determination? Yes. You may request and receive, at no cost to you, reasonable access to and copies of all documents, records and other information relevant to your claim by writing to:

Blue Cross and Blue Shield of North Carolina
Healthcare Management & Operations
P. O. Box 2291
Durham, NC 27702

This information may also include the following:

- Any internal rules, guidelines, protocols, or other criteria used to make this decision, including any clinical review criteria indicated above (please include the referenced medical policy from page 1 of this notice with your request); and/or
- If the decision is based on medical necessity, experimental treatment or another similar exclusion, an explanation of the scientific or clinical judgment for the determination, applied to your medical circumstances.

Other resources to help you: For questions about your rights, this notice, or for assistance, you can contact the Employee Benefits Security Administration at **1-866-444-EBSA (3272)**. You may also receive assistance with appeals from Smart NC by contacting:

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Oct 29 2018 17:26:05 AT&T/CVS Pharmacy ->

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Page 006

North Carolina Department of Insurance
 Health Insurance Smart NC
 1201 Mail Service Center
 Raleigh, NC 27699-1201
1-855-408-1212 (toll-free)

External Review

North Carolina law provides for review of *adverse benefit determinations* by an external, independent review organization (IRO). The North Carolina Department of Insurance (NCDOI) administers this service at no charge to you, arranging for an IRO to review your case once the NCDOI establishes that your request is complete and eligible for review. *BCBSNC* will notify you of your right to request an external review each time you receive:

- An *adverse benefit determination*, or
- An appeal decision upholding an *adverse benefit determination* or
- A second-level *appeal* decision upholding an *adverse benefit determination*.

You or someone whom you have authorized to represent you may request an external review.

In order for your request to be eligible for an external review, the NCDOI must determine the following:

- Your request is about a *medical necessity* determination that resulted in an *adverse benefit determination* (i.e., a *noncertification*);
- You had coverage with *BCBSNC* when the *adverse benefit determination* was issued;
- The service for which the *adverse benefit determination* was issued appears to be a *covered service*; and
- You have exhausted *BCBSNC*'s internal *appeal* review process as described below.

For a standard external review, you will have exhausted the internal *appeal* review process if you have:

- Completed *BCBSNC*'s first- and second-level *appeal* review and received a written second-level determination from *BCBSNC*, or
- Filed a second-level *appeal* and have not requested or agreed to a delay in the second-level *appeal* process, but have not received *BCBSNC*'s written decision within 60 days from the date that you can demonstrate that an appeal was filed with *BCBSNC*, or
- received written notification that *BCBSNC* has agreed to waive the requirement to exhaust the internal *appeal* and/or second-level *appeal* process.

External reviews are performed on a standard or expedited basis, depending on which is requested and on whether medical circumstances meet the criteria for expedited review.

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Oct 29 2018 17:26:39 AT&T/CVS Pharmacy ->

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Page 007

Standard External Review

For all requests for a standard external review, you must file your request with the NCDOL within 120 days of receiving one of the notices listed above.

If the request for an external review is related to a retrospective *adverse benefit determination* (an *adverse benefit determination* that occurs after you have already received the services in question), the 60-day time limit for receiving *BCBSNC*'s second-level determination does not apply. You will not be eligible to request an external review until you have exhausted the internal appeal process and have received a written second-level determination from *BCBSNC*.

Expedited External Review

An expedited external review may be available if the time required to complete either an expedited internal first- or second-level appeal review or a standard external review would reasonably be expected to seriously jeopardize your life or health or to jeopardize your ability to regain maximum function. If you meet this requirement, you may file a request to the NCDOL for an expedited external review, after you receive:

- An *adverse benefit determination* from *BCBSNC* and have filed a request with *BCBSNC* for an expedited first-level appeal; or
- A first-level appeal decision upholding an *adverse benefit determination* and have filed a request with *BCBSNC* for an expedited second-level *appeal* review; or
- A second-level *appeal* review decision from *BCBSNC*.

In addition, prior to your discharge from an inpatient facility, you may also request an expedited external review after receiving a first-level appeal or second-level appeal decision concerning an adverse benefit determination of the admission, availability of care, continued stay or emergency health care services.

If your request is not accepted for expedited review, the NCDOL may (1) accept the case for standard external review if you have exhausted the internal appeal review process; or (2) require the completion of the internal appeal review process and another request for an external review. An expedited external review is not available for retrospective adverse benefit determinations.

When processing your request for external review, the NCDOL will require you to provide the NCDOL with a written, signed authorization for the release of any of your medical records that need to be reviewed for the purpose of reaching a decision on the external review. For further information about external review or to request an external review, contact the NCDOL at:

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Oct 29 2018 17:27:16 AT&T/CVS Pharmacy ->

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Page 008

(Mail)

By Mail:

NC Department of Insurance

Health Insurance Smart NC

1201 Mail Service Center

Raleigh, NC 27699-1201

Toll-Free Telephone: **1-855-408-1212**

www.ncdoi.com/smart

(In person)

For the physical address for Health Insurance Smart NC, please visit the web-page:

<http://www.ncdoi.com/Smart>

Toll-Free Telephone: **1-855-408-1212**

The Healthcare Review Program provides consumer counseling on utilization review and appeal issues. Within ten business days (or, for an expedited review, within three business days) of receipt of your request for an external review, the NCDOL will notify you and your provider of whether your request is complete and whether it has been accepted. If the NCDOL notifies you that your request is incomplete, you must provide all requested, additional information to the NCDOL within 150 days of the written notice from BCBSNC upholding an adverse benefit determination (generally the notice of a second-level appeal review decision), which initiated your request for an external review. If the NCDOL accepts your request, the acceptance notice will include: (i) name and contact information for the IRO assigned to your case; (ii) a copy of the information about your case that BCBSNC has provided to the NCDOL; and (iii) a notification that you may submit additional written information and supporting documentation relevant to the initial adverse benefit determination to the assigned IRO within seven days after the receipt of the notice. It is presumed that you have received written notice two days after the notice was mailed. Within seven days of BCBSNC's receipt of the acceptance notice (or, for an expedited review, within the same business day), BCBSNC shall provide the IRO and you, by the same or similar expeditious means of communication, the documents and any information considered in making the adverse benefit determination, appeal decision or the second-level appeal review decision. If you choose to provide any additional information to the IRO, you must also provide that same information to BCBSNC at the same time and by the same means of communication (e.g., you must fax the information to BCBSNC if you faxed it to the IRO). When sending additional information to BCBSNC, send it to:

(Mail)

Blue Cross/Blue Shield of North Carolina

Appeals Department

PO Box 30055

Durham, NC 27702

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Oct 29 2018 17:27:51 AT&T/CVS Pharmacy ->

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Page 009

Questions? Do you need help in a different language or format? If you do not speak English or have special needs, oral interpretation and alternate formats of this notice are available, as is other assistance, by contacting us at the number on your State Health Plan ID card.

Spanish:

Si usted necesita asistencia o necesita hablar con alguien en Español, por favor llame al número gratuito de Servicio al Cliente ubicado en su tarjeta de identificación de beneficios.

Chinese (simplified):

如果您需要帮助,或需要同中国人讲话,请拨打您的福利卡上面的客户服务免费电话号码。

Tagalog:

Kung kailangan ninyo ng tulong o kailangan ninyong makipag-usap sa isang tao sa Tagalog, mangyari lamang na tumawag nang walang-bayad sa Serbisyo sa Kostumer sa numero na nakasulat sa inyong ID kard ng benepisyo.

Navajo:

Shika at'ohwol ei doodaii' dinék'ehgo la bi'chí haadeedzihi nínízinígo, t'áá shqodí, t'áá jíik'e ya ndaalnishi, ni naaltsoos bikáa'gi bi'chí hodülnih.

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Page 010

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Activity Report

Date/Time	10-29-2018	05:29:33 p.m.	Transmit Header Text	
Local ID 1	0000000000		Local Name 1	000

Completed Jobs : 1

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	402	CVS Caremark	05:24:06 p.m. 10-29-2018	00:05:04	10/10	1	EC	HR	CP2400

Abbreviations:

HS: Host send	PL: Polled local	MP: Mailbox print	CP: Completed	TS: Terminated by system
HR: Host receive	PR: Polled remote	RP: Report	FA: Fall	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

DECLARATION OF CONNOR THONEN-FLECK

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL, *et al.*,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as
State Treasurer of North Carolina, *et al.*,

Defendants.

No. 1:19-cv-00272-LCB-LPA

**DECLARATION OF CONNOR
THONEN-FLECK**

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.
2. I am a 19-year-old man.
3. I am also transgender. This means that although I was designated “female” at birth, I have a male gender identity.
4. I am a college sophomore at the North Carolina State University. I have long been passionate about veterinary science, and am currently working on a double-major in Animal Science and Biochemistry to prepare for veterinary school.
5. I struggled with gender dysphoria since childhood. I demonstrated stereotypically masculine tendencies and characteristics from a young age. But until I began to transition, I was in serious and increasing distress, to the point that I experienced

suicidal ideation because of untreated gender dysphoria. Ultimately, I came out as transgender to my family and explained my need to transition.

6. My family and I did some research and learned that there were medical professionals we could consult with about the proper treatment for me. I initially began seeing a psychiatrist and therapist. By the time I was 15 years old, I had socially transitioned and was living in my authentic male gender identity in all aspects of my life.

7. In January of 2018, I began hormone therapy as part of treatment for my gender dysphoria. I did not undertake this decision lightly, and had been considering hormone therapy for many months prior to initiating that care. My doctors provided information so that my parents and I could make an informed decision that was right for me regarding whether to receive hormones. My parents both believed, based on my symptoms of gender dysphoria, and the advice and expertise of my treating doctors, that hormone therapy was the best treatment option for me. In fact, it was life-changing for me, and the anxiety and depression I had experienced without treatment began to lift.

8. I continued my transition so that all aspects of my life were aligned with my male gender identity. In March of 2018, I obtained a legal name and gender marker change and subsequently obtained a corrected birth certificate and driver's license.

9. Although counseling, hormone therapy, and social transition significantly improved my quality of life, I still experienced significant gender dysphoria on a daily basis because I did not have a typically male chest.

10. As part of treatment for my gender dysphoria, my health care providers recommended chest surgery that would give me a more typical male chest. This surgery was medically necessary, including to bring my body into better alignment with my gender identity and lived experience and further reduce my symptoms of gender dysphoria.

11. My father, Jason Fleck, is a North Carolina state employee, and is enrolled for health coverage through NCSHP. As my father's dependent, I also am enrolled in health coverage through NCSHP.

12. In 2018, my father and I were both enrolled in the 80/20 Health Plan offered through NCSHP. My father and I struggled after that point to obtain coverage of my required office visits to my endocrinologist, who prescribes and monitors my masculinizing hormone therapy. My understanding is that because I received that care in connection with my gender dysphoria, insurance coverage for those visits has been inconsistent, and in some instances denied. Where coverage has been denied, my father and I have been left with full financial responsibility for the cost of the care.

13. My family and I have done our best to access medically necessary health care, but paying out-of-pocket for health care that has been denied under the plan has been an emotional and financial burden on me and my parents. This became even more stressful after we had to pay out-of-pocket for chest surgery for me, since living indefinitely without it had become unbearable for me.

14. Before obtaining that surgery, I lived with daily distress caused by not having a typically male chest, and urgently required gender-confirming surgery to treat my

symptoms of gender dysphoria. My parents and I could not easily afford to pay for the surgery out of pocket, as it imposed a financial hardship on us. As a result, even with my full academic workload, I took on a part-time job during high school in an effort to earn and save money so that I could contribute to the out-of-pocket costs for my surgery. This mean that, as a 16-year-old, I needed to work a job in addition to my schoolwork so that I could help pay for my own medical care.

15. My family witnessed my daily distress due to my inability to access health insurance coverage for medically necessary care and were worried about the effects my untreated gender dysphoria had on my mental and physical health, my education, and my future plans.

16. We finally saved enough for me to undergo surgery on May 28, 2019. Although shouldering that expense was stressful for me and my parents, I felt like my life was opening up, and I was much more at ease with myself and with other people in social situations. The relief the surgery provided me from my gender dysphoria was critical for my ongoing development and functioning as a young adult.

17. I require ongoing access to hormone therapy as treatment for gender dysphoria. I also anticipate needed additional surgery in the future, including for example a hysterectomy. Without access to health coverage, however, it is difficult to imagine when I can afford that surgery on my own.

I declare under the penalty of perjury that the foregoing is true and correct.

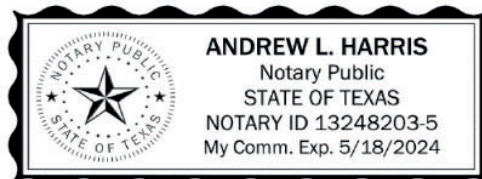
Dated: November 15th, 2021



Connor Thonen-Fleck

State of Texas

County of Tarrant



This notarial act was an online notarization

Sworn and subscribed before me on November 15, 2021 by Connor Thonen-fleck. This notarial act was an online notarization.

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: November 30, 2021

/s/ Amy E. Richardson
Amy E. Richardson
N.C. State Bar No. 28768
HARRIS, WILTSHIRE & GRANNIS LLP
1033 Wade Avenue, Suite 100
Raleigh, NC 27605-1155
Telephone: 919-429-7386
Facsimile: 202-730-1301
arichardson@hwglaw.com

Counsel for Plaintiffs

DECLARATION OF JASON FLECK

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A A

MAXWELL KADEL, *et al.*,

No. 1:19-cv-00272-LCB-LPA

Plaintiffs,

v.

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E

DALE FOLWELL, in his official capacity as
State Treasurer of North Carolina, *et al.*,

Defendants.

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.
2. I am the father of Plaintiff Connor Thonen-Fleck, a 19-year-old transgender man. I am an employee of the University of North Carolina, Greensboro (“UNCG”), and Connor receives health coverage as my dependent. I live in High Point, North Carolina.
3. I have been employed by UNCG since 1997 and currently work as Associate Director for Technology and Operations.
4. As a North Carolina state employee, I am enrolled for health coverage through the North Carolina State Health Plan. As my dependent, Connor is also enrolled in health coverage through NCSHP.
5. Connor has long excelled academically and is a college sophomore. In addition to his rigorous academic responsibilities, Connor also works at a veterinary clinic.

Connor is passionate about veterinary medicine and plans to pursue a career in the veterinary field.

6. Looking back now, I can see that Connor struggled with gender dysphoria since his childhood. But before we understood that he was transgender and began seeking treatment under the prevailing standards of care, Connor was in serious and consistently increasing distress. His symptoms of depression and distress became more pronounced around his freshman year of high school. I remember that he was sleeping excessively, was very unhappy, and was isolating himself from others.

7. When Connor first came out to me and explained that he is transgender, I told him that he was my child, and as long as he was happy and healthy, that was all that was important to me.

8. The lack of access to coverage through the state health plan has been a serious barrier at different points to helping Connor be happy and healthy, and has imposed significant stress on our family.

9. In January of 2018, Connor began hormone therapy as part of treatment for his gender dysphoria. He became a totally different person. His mood brightened. He started interacting with friends and being more social. He started thriving. The change was drastic. Before he began this treatment, we were deeply worried about Connor's suicidal ideation. But after he was on hormone therapy for a few months, he had improved so much that we no longer had that concern. In retrospect, it has become clear to me that treatment for gender dysphoria was what Connor needed all along.

10. But trying to access coverage for this care was stressful. In 2018, Connor and I were enrolled in the 80/20 Health Plan offered through NCSHP. The exclusion for gender-affirming care had been reinstated by that point and touched off an ongoing struggle to get Connor's urgently-needed medical care covered. We had difficulty getting coverage for Connor's required office visits to his endocrinologist, who prescribes and monitors Connor's masculinizing hormone therapy. Where coverage has been denied, Connor and I have been left with full financial responsibility for the cost of the care.

11. On April 9, 2018, CVS issued a Notice of Determination denying prior authorization for coverage of Connor's testosterone prescription. The Notice of Determination explained that the diagnosis code submitted, F64.0 "Transsexualism," was not a covered diagnosis code for prescription testosterone under the plan. The Notice of Determination further explained that the prescription would be covered for males with "primary or hypogonadotropic hypogonadism," but not for Connor. No other exclusion in the health plan was cited as a basis for the denial of coverage. A true and correct copy of the Notice of Determination is attached as Exhibit A.

12. We appealed the denial of coverage and were issued a Notice of Final Adverse Benefit Determination dated November 8, 2018. A true and correct copy is attached as Exhibit B. The sole basis provided for denial of the coverage is the exclusion of care for gender dysphoria. *See* Exhibit B at 2 (citing in relevant part exclusion for "Treatment or studies to or in connection with sex changes or modifications and related care"). No other exclusion was referenced to deny the coverage.

13. We also struggled to cover the cost of Connor's chest reconstruction surgery. Despite the benefit he experienced from hormone therapy, it was clear that being a teenage boy without a typically male chest was very painful for him. As part of treatment for the gender dysphoria he was experiencing relating to his chest, Connor's health care providers recommended surgery that would give Connor a more typical male chest. Based on medical advice, I understand this surgery to have been medically necessary, including to bring Connor's body into better alignment with his gender identity and lived experience and further reduce his gender dysphoria.

14. But without any coverage under our health plan, we could not afford the care when Connor was ready for it, and he had to suffer through delay while we saved money and he worked a job to help contribute to the cost of the surgery. Watching your child suffer without needed care and have to shoulder the burden of earning money as a 16-year-old to pay for basic, essential medical treatment, is an awful feeling.

15. After we saved enough money, Connor was finally able to undergo surgery on May 28, 2019. The further relief this provided him from his gender dysphoria allowed him the basic sense of well-being to be able to thrive again.

16. The process of obtaining this care for Connor has been thoughtful and deliberative. Both Connor's mother and I were involved in working with a team of medical professionals who helped us understand why Connor was suffering without treatment for gender dysphoria, the risks and benefits of treatment, and the standard of care for treating gender dysphoria in adolescents. The process was also a careful one on the provider side,

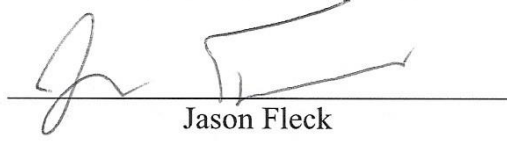
since the treatment requires multiple steps to help ensure that it is medically necessary and indicated for the adolescent. While the process was not easy, the life-changing effect it has had for Connor is unmistakable. After he started undergoing treatment, I finally felt like I had my kid back.

17. As a North Carolina state employee, I am enrolled in the NCSHP and receive health care benefits from this plan as part of my compensation. As a dependent of mine, Connor also is enrolled in the NCSHP. I contribute \$305.00 each month via a payroll deduction for family coverage under the 80/20 Health Plan. Even though I receive inferior coverage because of the exclusion for gender-affirming care, I pay the same amount for this family coverage as my colleagues do.

* * *

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: November 11, 2021


Jason Fleck

E A E E

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: November 30, 2021

/s/ Amy E. Richardson
Amy E. Richardson
N.C. State Bar No. 28768
HARRIS, WILTSHIRE & GRANNIS LLP
1033 Wade Avenue, Suite 100
Raleigh, NC 27605-1155
Telephone: 919-429-7386
Facsimile: 202-730-1301
arichardson@hwglaw.com

Counsel for Plaintiffs

**G.S. § 10B-41 NOTARIAL CERTIFICATE FOR
ACKNOWLEDGMENT**

Guilford County, North Carolina

I certify that the following person(s) personally appeared before me this day, each
acknowledging to me that he or she signed the foregoing document:

Jason Fleck
Name(s) of principal(s)

Date: 11/11/21



Donna S. Huff
Official Signature of Notary

Donna S. Huff, Notary Public
Notary's printed or typed name

My commission expires: June 6, 2026

Exhibit A

Apr 09 2018 12:48:26 AT&T/CVS Pharmacy ->

Fax Server

Page 001



Fax Transmittal

To: DOCTOR

From: CVS Caremark® Prior Authorization

Electronically (ePA) (4 to 5 minutes process time)	Phone (10 to 15 minutes process time)	Fax (24 to 72 hours process time)
ePA is CVS Caremark's preferred method for receiving prior authorizations and now accepts PA requests online 24/7. Easier: Reduce the need for paper forms, faxes, and phone calls More Convenient: Centrally manage ePAs and more easily view their status Faster: Generally receive faster determinations so patients can fill their medication sooner Visit http://info.caremark.com/ePA to learn more and get started today.	Calling us with your PA request during our business hours is another option. <u>See next page for the specific phone number.</u> The process over the phone can take between 10 and 15 minutes. OR see ePA option	You may also continue to fax us your PA request. <u>See next page for specific fax number.</u> Faxes received are processed within 24 to 72 hours. OR see ePA option

If this fax is in response to an inquiry about clinical criteria for coverage of a prescription drug for your patient, the criteria for the specific drug is attached.

Please note that your inquiry does not constitute a request for coverage. CVS Caremark cannot process a request for coverage until we receive a completed criteria form or appropriate clinical information.

The recipient of this fax may make a request to opt-out of receiving telemarketing fax transmissions from CVS Caremark. There are numerous ways you may opt-out: The recipient may call the toll-free number at 877-265-2711 and/or fax the opt-out request to 401-652-0893, at any time, 24 hours a day/7 days a week. The recipient may also send an opt-out request via email to do_not_call@cvscaremark.com. An opt-out request is only valid if it (1) identifies the number to which the request relates, and (2) if the person/entity making the request does not, subsequent to the request, provide express invitation or permission to CVS Caremark to send facsimile advertisements to such person/entity at that particular number. CVS Caremark is required by law to honor an opt-out request within thirty days of receipt. The information contained in this message may be privileged and confidential and protected from disclosure. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the message and deleting it from your computer. Thank you, CVS Caremark.

91-41319A 062917

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Page 002



Notice of Determination

Date: 04/09/2018

MARIONELIZABETH WALSH
1 MEDICAL CENTER BLVD FL 1ST
WINSTON SALEM, NC 27103

Plan Member Name: CONNOR THONEN FLECK
Plan Member ID: *****
Plan Name: North Carolina State Health Plan 0274 Non-Grandfathered

Prescriber Name: MARIONELIZABETH WALSH
Prescriber Phone: 1-3367164500
Prescriber Fax: 1-336-713-4501

Dear CONNOR THONEN FLECK:

CVS Caremark® received a request from your provider for coverage of Testosterone Cypionate IM Injection. The request was denied because:

Your plan approved Testosterone Products criteria covers this drug when you meet one of these conditions: - You are a male with primary or hypogonadotropic hypogonadism
Your use of this drug does not meet the requirements. This is based on the information we have.

You can ask for a free copy of the actual benefit provision, guideline, protocol or other similar criterion used to make the decision and any other information related to this decision by calling Customer Care at **1-888-321-3124**.

For more information regarding your prescription benefit, please refer to your Benefit Booklet available on the Plan's website at www.shpnc.org.

If your provider would like to discuss this decision with a clinical reviewer at CVS Caremark, your provider can call CVS Caremark, and we will make arrangements for the conversation.

You may request an appeal by sending a written request to the address below. To be eligible for an appeal, your request must be in writing and received within 180 days of the date of this letter. Please mail or fax your appeal to:

BlueCross BlueShield of North Carolina
Appeals Department / Level I
P.O. Box 30055
Durham, NC 27702

This document contains references to brand-name prescription drugs that are trademarks or registered trademarks of pharmaceutical manufacturers not affiliated with CVS Caremark.
Your privacy is important to us. Our employees are trained regarding the appropriate way to handle your private health information.
91-40230B 061317 TDD/TTY: 1-800-863-5488

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Page 003

Fax: 919-765-2322

If your situation is urgent as defined by law, you may ask for an expedited appeal. Important information about your appeal rights and directions about how to ask for an appeal are provided with this letter.

If you have questions, please call Customer Care at 1-888-321-3124.

Sincerely,

CVS Caremark

Enclosures

cc: Dr. MARIONELIZABETH WALSH

PA# North Carolina State Health Plan 0274 Non-Grandfathered 18-032492652 JM
Plan-approved Criteria: Testosterone Products
Claim Amount (if available): 0.0
Service Date: 4/9/2018 11:02:26 AM

If your provider included diagnosis or treatment codes with your claim for Testosterone Cypionate IM Injection to CVS Caremark, that information is listed here:

ICD diagnosis code: F64.0

Associated diagnosis: Transsexualism

CPT treatment code:

Associated treatment:

You may wish to contact your provider for more information about these codes.

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Page 004

Important Information About Your Appeal Rights

What if I need help understanding this denial? You may contact CVS Caremark by calling **1-800-294-5979** if you need assistance understanding this notice or our decision to deny you a service or coverage.

What options does my provider have? If there is relevant information that has not been previously submitted, the treating physician may request a Provider Courtesy Review (PCR) by calling 1-800-672-7897 extension 52961 or by sending a written request within 180 days to:

BlueCross BlueShield of North Carolina
Appeals Dept. / Provider Courtesy Review
P. O. Box 30055
Durham, NC 27702

What if I don't agree with this decision? You may request an appeal by sending a written request to the address below. To be eligible for an appeal, your request must be in writing and received within 180 days of the date of this letter.

BlueCross BlueShield of North Carolina
Appeals Department / Level I
P.O. Box 30055
Durham, NC 27702

A member appeal form is available on the Web at **www.BCBSNC.com**.

What if my situation is urgent? If your situation meets the legal definition of urgency, the review of your claim will be conducted within 72 hours, or earlier if required by law. Generally, an urgent situation is one in which your health may be in serious jeopardy or, in the opinion of your physician, you may experience pain that cannot be adequately controlled while you wait for a decision on the external review of your claim. If you believe that your situation is urgent, you or your physician may request an expedited appeal by contacting BCBSNC via mail or fax at the address below. In addition, you may have the ability to seek an expedited external review of your adverse benefit determination. To determine whether an external review process is available to you, please consult your benefit booklet or call BCBSNC customer service on the back of your ID Card.

BlueCross BlueShield of North Carolina
Appeals Department / Level 1
P. O. Box 30055
Durham, NC 27702
Fax: 919-765-2322

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Page 005

Who may file an appeal? You or someone whom you name to act for you (your authorized representative) may file an appeal. A member consent form is attached for your convenience and is also available on our Web site at www.BCBSNC.com.

Can I provide additional information about my appeal? Yes. As part of the appeal process, you have the right to submit supporting materials in advance of a decision being made on your appeal.

What happens next? If you appeal, BCBSNC will review the decision and provide you a written determination within 30 calendar days. If the adverse benefit determination is overturned, BCBSNC will provide coverage or payment for your health care item or service. If the adverse benefit determination is upheld, you may have additional appeal rights.

How do I file a request for external review? You may be eligible for an external review process. To determine whether an external review process is available to you, please consult your benefit booklet or call BCBSNC customer service on the back of your ID card.

What other remedies do I have? Depending on your plan, you may also have the right to bring action under section 502(a) of ERISA. You and your plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact your local U.S. Department of Labor office and your state insurance regulatory agency.

Can I request copies of information relevant to my adverse benefit determination? Yes. You may request and receive, at no cost to you, reasonable access to and copies of all documents, records and other information relevant to your claim by writing to:

Blue Cross and Blue Shield of North Carolina
Healthcare Management & Operations
P. O. Box 2291
Durham, NC 27702

This information may also include the following:

- Any internal rules, guidelines, protocols, or other criteria used to make this decision, including any clinical review criteria indicated above (please include the referenced medical policy from page 1 of this notice with your request); and/or
- If the decision is based on medical necessity, experimental treatment or another similar exclusion, an explanation of the scientific or clinical judgment for the determination, applied to your medical circumstances.

Other resources to help you: For questions about your rights, this notice, or for assistance, you can contact the Employee Benefits Security Administration at 866.444.EBSA (3272). You may also receive assistance with appeals from Smart NC by contacting:

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Page 006

North Carolina Department of Insurance
 Health Insurance Smart NC
 1201 Mail Service Center
 Raleigh, NC 27699-1201
 855-408-1212 (toll free)

External Review

North Carolina law provides for review of *adverse benefit determinations* by an external, independent review organization (IRO). The North Carolina Department of Insurance (NCDOI) administers this service at no charge to you, arranging for an IRO to review your case once the NCDOI establishes that your request is complete and eligible for review. *BCBSNC* will notify you of your right to request an external review each time you receive:

- An *adverse benefit determination*, or
- An appeal decision upholding an *adverse benefit determination* or
- A second-level *appeal* decision upholding an *adverse benefit determination*.

You or someone whom you have authorized to represent you may request an external review.

In order for your request to be eligible for an external review, the NCDOI must determine the following:

- Your request is about a *medical necessity* determination that resulted in an *adverse benefit determination* (i.e., a *noncertification*);
- You had coverage with *BCBSNC* when the *adverse benefit determination* was issued;
- The service for which the *adverse benefit determination* was issued appears to be a *covered service*; and
- You have exhausted *BCBSNC*'s internal *appeal* review process as described below.

For a standard external review, you will have exhausted the internal *appeal* review process if you have:

- Completed *BCBSNC*'s first- and second-level *appeal* review and received a written second-level determination from *BCBSNC*, or
- Filed a second-level *appeal* and have not requested or agreed to a delay in the second-level *appeal* process, but have not received *BCBSNC*'s written decision within 60 days from the date that you can demonstrate that an appeal was filed with *BCBSNC*, or
- received written notification that *BCBSNC* has agreed to waive the requirement to exhaust the internal *appeal* and/or second-level *appeal* process.

External reviews are performed on a standard or expedited basis, depending on which is requested and on whether medical circumstances meet the criteria for expedited review.

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Page 007

Standard External Review

For all requests for a standard external review, you must file your request with the NCDOL within 120 days of receiving one of the notices listed above.

If the request for an external review is related to a retrospective *adverse benefit determination* (an *adverse benefit determination* that occurs after you have already received the services in question), the 60-day time limit for receiving BCBSNC's second-level determination does not apply. You will not be eligible to request an external review until you have exhausted the internal appeal process and have received a written second-level determination from BCBSNC.

Expedited External Review

An expedited external review may be available if the time required to complete either an expedited internal first- or second-level appeal review or a standard external review would reasonably be expected to seriously jeopardize your life or health or to jeopardize your ability to regain maximum function. If you meet this requirement, you may file a request to the NCDOL for an expedited external review, after you receive:

- An *adverse benefit determination* from BCBSNC and have filed a request with BCBSNC for an expedited first-level appeal; or
- A first-level appeal decision upholding an *adverse benefit determination* and have filed a request with BCBSNC for an expedited second-level *appeal* review; or
- A second-level *appeal* review decision from BCBSNC.

In addition, prior to your discharge from an inpatient facility, you may also request an expedited external review after receiving a first-level appeal or second-level appeal decision concerning an *adverse benefit determination* of the admission, availability of care, continued stay or emergency health care services.

If your request is not accepted for expedited review, the NCDOL may (1) accept the case for standard external review if you have exhausted the internal appeal review process; or (2) require the completion of the internal appeal review process and another request for an external review. An expedited external review is not available for retrospective *adverse benefit determinations*.

When processing your request for external review, the NCDOL will require you to provide the NCDOL with a written, signed authorization for the release of any of your medical records that need to be reviewed for the purpose of reaching a decision on the external review. For further information about external review or to request an external review, contact the NCDOL at:

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Apr 09 2018 12:57:29 AT&T/CVS Pharmacy ->

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Page 000

(Mail)

By Mail:

NC Department of Insurance

Health Insurance Smart NC

1201 Mail Service Center

Raleigh, NC 27699-1201

Toll-Free Telephone: (855) 408-1212

www.ncdoi.com/smart

(In person)

For the physical address for Health Insurance Smart NC, please visit the web-page:

<http://www.ncdoi.com/Smart>

Toll Free Telephone: (855) 408-1212

The Healthcare Review Program provides consumer counseling on utilization review and appeal issues. Within ten business days (or, for an expedited review, within three business days) of receipt of your request for an external review, the NCDOI will notify you and your provider of whether your request is complete and whether it has been accepted. If the NCDOI notifies you that your request is incomplete, you must provide all requested, additional information to the NCDOI within 150 days of the written notice from BCBSNC upholding an adverse benefit determination (generally the notice of a second-level appeal review decision), which initiated your request for an external review. If the NCDOI accepts your request, the acceptance notice will include: (i) name and contact information for the IRO assigned to your case; (ii) a copy of the information about your case that BCBSNC has provided to the NCDOI; and (iii) a notification that you may submit additional written information and supporting documentation relevant to the initial adverse benefit determination to the assigned IRO within seven days after the receipt of the notice. It is presumed that you have received written notice two days after the notice was mailed. Within seven days of BCBSNC's receipt of the acceptance notice (or, for an expedited review, within the same business day), BCBSNC shall provide the IRO and you, by the same or similar expeditious means of communication, the documents and any information considered in making the adverse benefit determination, appeal decision or the second-level appeal review decision. If you choose to provide any additional information to the IRO, you must also provide that same information to BCBSNC at the same time and by the same means of communication (e.g., you must fax the information to BCBSNC if you faxed it to the IRO). When sending additional information to BCBSNC, send it to:

(Mail)

Blue Cross/Blue Shield of North Carolina

Appeals Department

PO Box 30055

Durham, NC 27702

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Page 009

Questions? Do you need help in a different language or format? If you do not speak English or have special needs, oral interpretation and alternate formats of this notice are available, as is other assistance, by contacting us at the number on your State Health Plan ID card.

Spanish:

Si usted necesita asistencia o necesita hablar con alguien en Español, por favor llame al número gratuito de Servicio al Cliente ubicado en su tarjeta de identificación de beneficios.

Chinese (simplified):

如果您需要帮助, 或需要同中国人讲话, 请拨打您的福利卡上面的客户服务免费电话号码。

Tagalog:

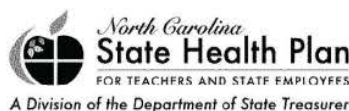
Kung kailangan ninyo ng tulong o kailangan ninyong makipag-usap sa isang tao sa Tagalog, mangyari lamang na tumawag nang walang-bayad sa Serbisyo sa Kostumer sa numero na nakasulat sa inyong ID kard ng benepisyo.

Navajo:

Shika at'ohwol ei doodaii' dinék'ehgo ła bi'chì haadeedziib nínízinigo, t'áá shqódi, t'áá jíik'e ya ndaalnishi, ni naaltsoos bikáa'gi bi'chì hodiilniih.

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Exhibit



Notice of Final Adverse Benefit Determination

Transcend Legal
Attn: Noah E. Lewis
3553 82nd Street #6D
Jackson Heights, NY 11372

Date of Notice: November 8, 2018

Blue Cross Blue Shield of North Carolina
Appeals Department
P.O. Box 30055
Durham, NC 27702

Telephone Number: 800-446-8053
Fax Number: 919-765-2322
Website: www.BlueCrossNC.com

This document contains important information that you should retain for your records.

This document serves as notice of a final adverse benefit determination. We have declined to provide benefits, in whole or in part, for the requested treatment or service described below.

Case Details:

Patient Name: Connor Thonen Fleck
Member ID: [REDACTED]
Appeal ID: 469742

Provider: Marion Walsh, MD
Date(s) of Service: Future
Type of Service: Testosterone Cypionate

Reason for Denial: Benefit Exclusion

Claim(s) Detail: *(Not available if this is a pre-service request.)*

Claim #:	Charged Amt.:	Allowed Amt.:	Other Non-Covered Amts.:	Amt. Paid:
Diagnosis Code:	Diagnosis Description:	Treatment (Procedure) Code:	Treatment (Procedure) Description:	Treatment Category (Subcategory):
Denial Code(s):				

Policy Information: *(This information is current based on claims that have fully completed the adjudication process as of the date of this letter.)*

Other Insurance:	Deductible:	Co-pay:
No	Not Applicable (N/A)	N/A
Coinsurance:	YTD Deductible Credit:	YTD Out-of-Pocket Credit:

PLAN DEF0132767
ATTORNEY EYES ONLY
HIPAA -- Plaintiff

N/A	N/A	N/A

Background Information:

This is in response to your request, on Connor Thonen Fleck's behalf, for an appeal received October 17, 2018.

Reviewers' Understanding:

You have requested that Blue Cross and Blue Shield of North Carolina (Blue Cross NC) reconsider the denial of testosterone cypionate intramuscular (IM) injection.

Final Adverse Benefit Determination:

The adverse benefit determination has been upheld.

The following evidence and documentation were reviewed:

- Member's North Carolina State Health Plan 80/20 PPO Plan Benefits Booklet;
- Level One Letter of Appeal dated October 6, 2018 written by Noah E. Lewis of Transcend Legal;
- Authorized Representative Request signed by Jason Fleek, member's guardian;
- Hellosign Fleck CVS Authorization to Appeal Document History dated October 5, 2018;
- Document labeled, "Exhibit 2" inclusive of CVS caremark Fax Transmittal dated April 9, 2018 and CVS caremark Notice of Determination dated April 9, 2018;
- Document labeled "Exhibit 3" inclusive of Prior Authorization Criteria for Testosterone Products (Brand and Generic) received on October 17, 2018;
- North Carolina State health Plan for Teachers and State Employees Third Party Authorization From dated October 21, 2018 signed by member's guardian, Jason P. Fleek;
- Blue Cross NC Tracking Systems.

The professional qualifications and licensure of the reviewers are:

- Medical Team Lead, Appeals, Registered Nurse;
- Clinical Appeals Analyst, Registered Nurse with over 15 years of healthcare experience.

Findings:**Contractual Basis:**

According to the member's North Carolina State Health Plan 80/20 PPO Plan Benefits Booklet section titled, "What Is Not Covered?" it states, in pertinent part, "...The *Plan* does not cover services, supplies, medications or charges for...Sexual dysfunction unrelated to organic disease... [and/or] Treatment or studies to or in connection with sex changes or modifications and related care..."

Clinical Rationale: Not Applicable (N/A)

A Blue Cross NC Medical Team Lead has reviewed your request, and based on the aforementioned North Carolina State Health Plan 80/20 PPO Plan Benefits Booklet language, it has been determined that the member does not have benefits for the requested treatment.

As a result of this review, Blue Cross NC has confirmed that the denial of benefits for the testosterone cypionate intramuscular (IM) injection was correct. Please consult your benefit booklet, under the section titled, "What Is Not Covered?" to review this exclusion.

If you have any questions regarding this appeal, please contact me directly. If you have other questions about your health plan benefits, please contact Customer Service at 1-888-234-2416.

Sincerely,

Joy Brazier, BSN, RN

Joy Brazier, BSN, RN
Clinical Appeals Analyst
Appeals Department

cc: Parent/Guardian of: Connor Thonen Fleck;
Dr. Marion Walsh

Important Information about Your Rights

What if I need help understanding this denial? Contact the appeals analyst at 1-800-446-8053, extension 52822 if you need assistance understanding this notice or our decision to deny you a service or coverage.

What if I don't agree with this decision? You do have the right to appeal this decision with the Office of Administrative Hearings (OAH) by filing a "Petition for a Contested Case Hearing" within 60 days of the date of this letter. A \$20 filing fee is required by OAH. If you cannot afford to pay the filing fee you may request a waiver by filing "A Petition to File a Petition for Contested Case as Indigent" with OAH prior to filing the "Petition for Contested Case Hearing." You may obtain all necessary petition forms by contacting OAH at (919) 431-3000 or visiting the OAH website at www.oah.state.nc.us. The completed form/s should be submitted to:

Office of Administrative Hearings
1711 New Hope Church Rd
Raleigh, North Carolina 27609

A copy of the completed form should also be mailed to:

North Carolina State Health Plan
Attention: General Counsel for the NC Department of State
Treasurer
3200 Atlantic Avenue,
Longleaf Building
Raleigh, North Carolina 27604

Can I request copies of information relevant to my claim? Yes. You may request and receive, at no cost to you, reasonable access to, and copies of, all documents, records and other information relevant to your claim by writing to:

Blue Cross Blue Shield of North Carolina
Appeals Department
P. O. Box 30055
Durham, NC 27702
Fax: 919-765-2322

- This information may also include the following: any internal rules, guidelines, protocols, or other criteria used to make this decision, including any clinical review criteria indicated above (please include the medical policy number with your request); and/or
- If our decision is based on medical necessity, experimental treatment or another similar exclusion, an explanation of the scientific or clinical judgment for the determination, applied to your medical circumstances.

Other resources to help you:

The North Carolina Department of Insurance is available to assist you with questions about health insurance. You may contact Health Insurance Smart NC at:

By Mail:

NC Department of Insurance
Health Insurance Smart NC
1201 Mail Service Center
Raleigh, NC 27699-1201
Toll Free Telephone: (855) 408-1212
www.ncdoi.com/smart

In Person:

For the physical address for Health Insurance Smart NC, please visit the web-page:
<http://www.ncdoi.com/Smart>
Toll Free Telephone: (855) 408-1212

Non-Discrimination and Accessibility Notice

Discrimination is Against the Law

- Blue Cross and Blue Shield of North Carolina ("Blue Cross NC") complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex.
- Blue Cross NC does not exclude people or treat them differently because of race, color, national origin, age, disability, or sex.

Blue Cross NC:

- Provides free aids and services to people with disabilities to communicate effectively with us, such as:
 - Qualified interpreters
 - Written information in other formats (large print, audio, accessible electronic formats, other formats)
 - Provides free language services to people whose primary language is not English, such as:
 - Qualified interpreters
 - Information written in other languages
- If you need these services, contact Customer Service **1-888-234-2416**, TTY and TDD, call **1-800-442-7028**.
 - If you believe that Blue Cross NC has failed to provide these services or discriminated in another way on the basis of race, color, national origin, age, disability, or sex, you can file a grievance with:
 - Blue Cross NC, PO Box 2291, Durham, NC 27702, Attention: Civil Rights Coordinator-Privacy, Ethics & Corporate Policy Office, Telephone **919-765-1663**, Fax **919-287-5613**, TTY **1-888-291-1783** civilrightscordinator@bcbsnc.com
 - You can file a grievance in person or by mail, fax, or email. If you need help filing a grievance, Civil Rights Coordinator - Privacy, Ethics & Corporate Policy Office is available to help you.
 - You can also file a civil rights complaint with the U.S. Department of Health and Human Services, Office for Civil Rights, electronically through the Office for Civil Rights Complaint Portal, available at <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>, or by mail or phone at: U.S. Department of Health and Human Services 200 Independence Avenue, SW Room 509F, HHH Building Washington, D.C. 20201 **1-800-368-1019**, **800-537-7697** (TDD). Complaint forms are available at <http://www.hhs.gov/ocr/office/file/index.html>.
 - This Notice and/or attachments may have important information about your application or coverage through Blue Cross NC. Look for key dates. You may need to take action by certain deadlines to keep your health coverage or help with costs. You have the right to get this information and help in your language at no cost. Call Customer Service **1-888-234-2416**.

ATTENTION: If you speak another language, language assistance services, free of charge, are available to you. Call 1-888-234-2416 (TTY: 1-800-442-7028).

