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

CHRISTOPHER FAIN and SHAUNTAE ANDERSON; individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), Plaintiffs Christopher Fain and Shauntae Anderson (collectively, "Plaintiffs"), on behalf of themselves and the proposed class, respectfully move the Court for summary judgment on all claims, seeking declaratory and permanent injunctive relief on their claims under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV; Section 1557 ("Section 1557") of the Patient Protection and Affordable Care Act ("ACA" or "Affordable Care Act"), 42 U.S.C. § 18116[1]; and the Comparability and Availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A)-(B).

Plaintiffs seek a judgment as to liability on their claims that Defendants' enforcement of the exclusion of gender-confirming care for transgender West Virginia Medicaid participants

[1] In light of *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, 2022 WL 1243658 (U.S. Apr. 28, 2022), Plaintiffs no longer seek damages in their individual capacities under the Affordable Care Act. Accordingly, the only relief Plaintiffs request in this case is declaratory and injunctive relief and no damages issues remain for trial.

constitutes unlawful discrimination based on sex and transgender status in violation of the Equal Protection Clause and Section 1557 of the ACA. Defendants' exclusion of gender-confirming care also violates Medicaid's Comparability and Availability requirements. Plaintiffs respectfully request that this Court issue a declaratory judgment finding that Defendants' enforcement of the exclusion violates the rights of Plaintiffs and all others similarly situated under the Equal Protection Clause, Section 1557 of the ACA, and Medicaid's Comparability and Availability requirements, and permanently enjoin Defendants, their agents, employees, successors, and all others acting in concert with them, from enforcing the exclusion for gender-confirming care.

Dated: May 31, 2022

Respectfully submitted,

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

CHRISTOPHER FAIN, *et al.*, individually and on behalf of all others similarly situated, *Plaintiffs*, v. WILLIAM CROUCH, *et al.*, *Defendants.*	CIVIL ACTION NO. 3:20-cv-00740 HON. ROBERT C. CHAMBERS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, and any attachments, were served electronically on May 31, 2022 on the following counsel for Defendants in this case:

Lou Ann S. Cyrus (WVSB # 6558)
Roberta F. Green (WVSB #6598)
Caleb B. David (WVSB #12732)
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Attorneys for Defendants William Crouch; Cynthia Beane; and West Virginia Department of Health and Human Resources, Bureau for Medical Services

Dated: May 31, 2022

Respectfully submitted,

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

CHRISTOPHER FAIN, *et al.*, individually and on behalf of all others similarly situated, *Plaintiffs*, v. WILLIAM CROUCH, *et al.*, *Defendants.*	CIVIL ACTION NO. 3:20-cv-00740 HON. ROBERT C. CHAMBERS, JUDGE

DECLARATION OF CHRISTOPHER FAIN

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

1. My name is Christopher Fain. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I have agreed to be a class representative in this case because I want to see my state provide coverage for gender-confirming care to transgender people, regardless of our sex and transgender status. We all deserve equal treatment within West Virginia's Medicaid program. I have kept in close contact with my counsel throughout my involvement in this case. In joining this case, continuing to participate in the case, and communicating with my counsel, I have had the proposed class's best interests in mind.

3. I am 46 years old. I was born in West Virginia and have lived in West Virginia for the majority of my life. I currently live in Huntington, West Virginia.

4. I have been enrolled as a Medicaid participant for most of my adult life.

5. I am a transgender man. I was incorrectly designated female at birth; my gender identity is male.

6. I experience gender dysphoria related to the disconnect between my primary and secondary sex characteristics and my gender identity.

7. I have been aware of my gender identity since a young age. During the early years of my life, I remember several instances during which I tried to communicate my understanding of my gender identity to my parents, family, and friends. These attempts to share my gender identity with my father, however, were not well received.

8. At age three, my brother was born. The birth of my brother helped me understand that I would never develop the physical characteristics that aligned with my gender identity on my own.

9. At or around age nine, when I was provided with information about puberty and sex because I was in the early stages of puberty, I demanded to know why my body would go through these changes. I was angry about growing breasts and bewildered by my period. By age twelve, I confronted my mother, yet again, with the fact that I felt like a boy.

10. As I got older, I behaved like a boy and wore male clothing. Unfortunately, these attempts to live in a manner that was aligned with my gender identity led to ongoing physical and verbal abuse from my father. In response to these actions, I was instructed to wear make-up and jewelry, women's clothing, and women's shoes.

11. For many years, I delayed my transition out of fear that discrimination and stigma against transgender people would prevent me from being able to support my own family. After separating from my husband, I was a single parent and the primary caregiver for my children, and I could not risk losing employment due to discrimination. Delaying access to gender-confirming care, however, took an enormous toll on me and became unsustainable so eventually I came out to my family.

12. My children are incredibly supportive of me. Although my mother passed away only a few months into my medical transition, she was very reassuring and understood that I needed to live my life as the man I know myself to be.

13. On April 6, 2018, I obtained a legal name change to reflect my gender identity through a West Virginia court order. Shortly thereafter, I updated my name to reflect my male gender identity on my Social Security account. In August 2021, I updated my name on my West Virginia driver's license.

14. In or around June 2018, I began counseling at Marshall University to help address the distress I was feeling. It was around this time that I was diagnosed with gender dysphoria.

15. In or around February 2019, my health care provider recommended that I begin hormone replacement therapy to alleviate my gender dysphoria by aligning my physical characteristics with my gender identity.

16. I began hormone replacement therapy on or around March 2019.

17. Since development during puberty, I have been uncomfortable with the size of my chest. To avoid being incorrectly identified as female and to reduce the severe distress and embarrassment I feel over the presence of my large and typically-female appearing breasts I often wear a binder, and slouch and hunch my shoulders and back.

18. Wearing a binder for prolonged periods of time, however, often chafes my skin, sometimes creates deep sores, and leads to difficulty breathing. But to help manage my gender dysphoria, I sometimes wear a binder five to six days a week for up to 16 hours at a time. There are days when wearing a binder is so painful that I cannot wear it at all. On those days, I bundle myself up in multiple layers of clothes to hide the fact that I'm not wearing a binder and attempt to ease my own distress. When I am physically unable to wear a binder, my dysphoria is intense

and I often feel confused and anxious because of how much I am aware of my breasts while trying to focus on other things, such as my work-related tasks.

19. I require a bilateral mastectomy as medically necessary care to treat my gender dysphoria. Having access to this vital and medically necessary care would alleviate the overwhelming distress I feel, eliminate the need for my ongoing use of a binder, and ease the physical discomfort I am in due to years of slouching and hunching to conceal my large chest.

20. As a Medicaid participant, I receive coverage through the Managed Care Organization Unicare. I am aware that there is an exclusion in the state Medicaid Plan that bans the gender-confirming surgical care I need. As a result, I am forced to delay this urgently-needed care to treat my gender dysphoria. Medicaid's refusal to cover this medically necessary care, increases my symptoms of gender dysphoria and causes me emotional hardship and deeply impacts my self-esteem. I am incapable of forming close emotional and physical connections because of the presence of my breasts. I feel physically sick when I hug my family and friends because I become aware of my breast tissue.

21. The idea of dying with breasts is horrifying to me. It is incredibly uncomfortable and unbearable living in this world with breasts because it means I am forced to exist in a body that is not aligned with my gender identity. I have to force myself to get up and function every day even though the surgical care that I need, care that is medically necessary, is inaccessible to me. It is exhausting, and at times overwhelming.

22. Having access to gender-confirming surgical care means that I will finally be able to walk with my shoulders straight, head held high, and not have to live with the fear and distress that my chest gives away my birth-assigned sex.

23. I am only in the middle years of my life; however, it is important to me that I be able to live a happy, healthy, and complete life for my family. I want to be able to see my grandchildren graduate from high school and feel confident when I put on that tie for their ceremonies.

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

Dated: April 27, 2022

Christopher Fain

Subscribed and sworn before me, a Notary Public in and for the County of Cabell, State of West Virginia, this 27th day of April, 2022.

Signature of Notary

OFFICIAL SEAL
NOTARY PUBLIC, STATE OF WEST VIRGINIA
John F. Leaberry
729 Ninth Avenue
Huntington WV 25701
My Commission Expires 03/29/2027

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

CHRISTOPHER FAIN, *et al.*, individually and on behalf of all others similarly situated, *Plaintiffs*, v. WILLIAM CROUCH, *et al.*, *Defendants.*	CIVIL ACTION NO. 3:20-cv-00740 HON. ROBERT C. CHAMBERS, JUDGE

DECLARATION OF SHAUNTAE ANDERSON

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

1. My name is Shauntae Tamara Anderson.[1] I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I have agreed to be a class representative in this case because I want to help make the system better for all transgender Medicaid participants in West Virginia who are being or would be denied gender-confirming care. I have kept in close contact with my counsel throughout my involvement in this case. In joining this case, continuing to participate in the case, and communicating with my counsel, I have had the proposed class's best interests in mind.

3. I am 45 years old and I live in Charleston, West Virginia. I was born in West Virginia and have lived in West Virginia for the vast majority of my life.

4. I have been enrolled as a Medicaid participant since 2019.

[1] Since the filing of the First Amended Class Action Complaint in this matter, ECF No. 140, I have changed my legal name to Shauntae Tamara Anderson.

5. I am a woman who is also transgender. Although I was incorrectly designated male at birth, my gender identity is female.

6. I experience gender dysphoria related to the disconnect between my primary and secondary sex characteristics and my gender identity.

7. As a child, I never felt "right" in my body. I was incredibly shy and was uncomfortable being raised and socialized as a boy. But for much of my childhood and into early adulthood, I was forced to suppress my gender identity due to family disapproval and societal stigma.

8. Around the age of six, I started using my mother's makeup and playing with my sister's toys. In or around ninth grade, I started to socially transition at school by dressing in a more typically feminine manner and wearing makeup.

9. In 2010, I began to medically transition. Although I lacked access to health insurance for gender-confirming care, my need to transition was so urgent that I was forced to self-treat. I began taking estrogen in the form of birth control pills to help feminize my appearance. While birth control pills are not remotely adequate as a substitute for hormone replacement therapy, my gender dysphoria was so severe that even a modest feminizing effect helped relieve some of my distress.

10. I subsequently served time in federal prison. While incarcerated, I continued the process of socially transitioning, and began a formal medical transition in consultation with and under the care of medical professionals.

11. During my time in the custody of the Bureau of Prisons, I updated my status within the Bureau of Prison's system to not only reflect my transgender identity but also ensure that I would be recognized and treated as a woman for the purpose of security checks. Additionally, I was evaluated by medical professionals and received approval to wear typically feminine undergarments as part of my transition.

12. I began counseling to help address my gender dysphoria, and was diagnosed with gender dysphoria.

13. While I was incarcerated, I advocated for access to gender-confirming care for several years.

14. In or around 2019, my health care providers recommended that I begin hormone replacement therapy to alleviate my gender dysphoria by further aligning my physical characteristics with my gender identity. I began hormone replacement therapy, in the form of estradiol pills and spironolactone, in or around May 2019. I was not, however, able to access gender-confirming surgery.

15. As a Medicaid participant, I receive coverage through the MCO Aetna Better Health of West Virginia. I understand, however, that there is an exclusion in the state Medicaid Plan that bans the gender-confirming surgical care I need. As a result I have no access to this surgery, which increases my symptoms of gender dysphoria and causes me a great deal of anguish. The type of hurt that I experience due to the distress I feel is a pain I do not want others to have to deal with. I have spent too much of my time in tears and there have been a lot of sleepless nights worrying about whether I will ever get the care that I need.

16. To try to reduce the severe distress and embarrassment over the presence of my typically male-appearing features, I often employ the use of shapewear, like push-up bras, to help with further feminizing my body. These coping techniques, however, are not adequate to treat my gender dysphoria and do not alleviate my need for surgery.

17. I need surgery to help treat my ongoing gender dysphoria related to my genitals and breasts. The agonizing distress I experience negatively impacts my life day in and day out. I particularly experience such distress when I get dressed and when I use the restroom. When I use the

restroom, I am often reminded of the fact that there are aspects of my physical body that do not feel right. While bathing and grooming myself, I make sure to not spend too much time looking at my body because it hurts to see a reflection of myself that does not match my gender identity. Additionally, I am forced to painfully arrange and hide my genitals as much as possible to ensure that they are not visible in the clothing I wear.

18. I need gender-confirming surgery, including but not limited to vaginoplasty and breast reconstruction surgery. My physical and mental wellbeing has suffered without access to this surgical care. I lie awake at night, sometimes in tears, thinking about how grueling it is to deal with the constant ache of having significant parts of my body misaligned with my gender identity. Additionally, because I have not had surgery to remove my hormone-producing gonads, I need to take higher doses of estrogen to try to counterbalance the testosterone my body produces. I understand that higher doses of estrogen can have side effects and I experience hot flashes and fatigue. My body constantly feels out of step with itself and at my age, it takes a lot out of me physically. Gender-confirming surgery would ensure that I could lower my dose of estrogen and alleviate my gender dysphoria.

19. The ability to access gender-confirming surgery that can help further align my physical self with my gender identity is also a matter of personal safety. Not being able to fully align my body with my identity makes it more likely that others recognize that I am transgender, which can be unsafe. I have experienced hostility in the past when certain people in public discovered my transgender identity. For example, once while traveling by bus, someone announced to others sitting near me, "that's a damn man." I endured dirty looks for the rest of the ride and constant anxiety that they might escalate to further harassment or even violence. Because transgender people are still widely stigmatized, the risk of being involuntarily outed in my ordinary life is frightening. The effort

it takes to try to counteract this risk is exhausting. Every day, I check myself several times before I go out. I feel like everything about my appearance has to be perfect because if I am not seen as the woman that I am, I may be harassed or worse.

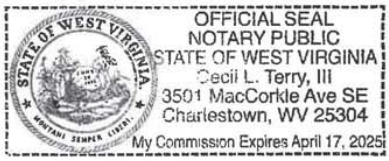
20. At times my spirit feels broken. The emotional toll of being denied surgery, and the gender dysphoria it causes, tears me apart. I would not wish this feeling on anyone else in the world. That is why I am a plaintiff in this lawsuit, because I hope that other Medicaid participants will not have to suffer like this in the future.

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

Dated: April 19, 2022

Shauntae Anderson

Subscribed and sworn before me, a Notary Public in and for the Charleston, State of WV, this 19 day of APRIL, 2022.



Signature of Notary

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

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

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

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

DECLARATION OF WALT AUVIL

I, Walt Auvil, do hereby declare as follows:

1. I am more than 18 years of age, have personal knowledge of the facts set forth herein, and am otherwise competent to testify to the matters set forth herein.

2. I am an attorney with and owner of The Employment Law Center, PLLC, and counsel for Plaintiffs in this matter. I submit this declaration in support of Plaintiffs' motions for summary judgment.

3. Attached to this declaration are true and correct copies of the documents listed in the table below. Entries in the table indicate where documents have been excerpted, or have had highlighting applied to indicate the relevant portions of the document.

4. Sensitive, protected, and/or irrelevant information has been redacted on certain pages of the attached exhibits in accordance with Federal Rule of Civil Procedure

5.1(a) and Local Rule of Civil Procedure 5.2.1.(a), with black boxes placed over the redacted text.

Exhibit	Description
1	Defs.' Rsps. to Pls.' First Set Reqs. for Admis., Aug. 27, 2021
2	Defs.' Respon. to Pls.' First Set of Interrogs., Aug. 27, 2021
3	Defs.' Respon. to Pls.' Second Set of Interrogs., Oct. 25, 2021
4	Defs.' 1st Suppl. Respon. to Pls.' First Set of Interrogs., Nov. 30, 2021
5	Defs.' Second Suppl. Respon. to Pls.' Second Set of Interrogs., Nov. 30, 2021
5(a)	Defs.' Ninth Suppl. Respon. to Pls.' First Reqs. for Produc., March 25, 2022
6	Excerpt of Dep. Tr. of Pltf. Christopher Fain
7	Excerpt of Dep. Tr. of Pltf. Shauntae Anderson
8	Excerpt of Dep. Tr. of Secretary Bill J. Crouch
9	Excerpt of Dep. Tr. of Commissioner Cynthia Beane
10	Excerpt of Dep. Tr. of Dr. James Becker
11	Excerpt of Dep. Tr. of Frederick Lewis
12	Excerpt of Dep. Tr. of Becky Manning
13	Excerpt of Dep. Tr. of Brian Thompson
14	Excerpt of Dep. Tr. of Sarah Young
15	Excerpt of Dep. Tr. of Dr. Dan H. Karasic, M.D.
16	Expert Rep. of Dan H. Karasic, M.D. (redacted)
17	Expert Rebuttal Rep. of Dan H. Karasic, M.D.
18	Excerpt of Dep. Tr. of Dr. Loren S. Schechter, M.D.
19	Expert Rep. of Loren S. Schechter, M.D.

Exhibit	Description
20	Expert Rebuttal Rep. of Loren S. Schechter, M.D.
21	Excerpt of Dep. Tr. of Dr. Johanna Olson-Kennedy, M.D., M.S.
22	Expert Rebuttal Rep. of Dr. Johanna Olson-Kennedy, M.D., M.S.
23	Excerpt of Bureau of Medical Services Manual, Ch. 100, CFAIN0001650 – 0001662, with yellow highlighting applied to relevant portions
24	Excerpt of Bureau of Medical Services Manual, Ch. 519, with yellow highlighting applied to relevant portions
25	Aetna, The Health Plan, and UniCare Composite Ex., excerpted with yellow highlighting applied to relevant portions
26	InterQual Composite Ex., DHHRBMS015368 – 015415
27	Bureau of Medical Services, "Medicaid 101 An Overview of West Virginia's Medicaid Program," CFAIN0009542 – 0009561
28	Medicaid.gov, "Mandatory & Optional Medicaid Benefits," DHHRBMS016220 – 23
29	Excerpt of State Fiscal Year 2021 Model Purchase of Service Provider Agreement between West Virginia and Aetna Better Health of W.V., DHHRBMS001121 – 001194, with yellow highlighting applied to relevant portions
30	Excerpt of State Fiscal Year 2021 Model Purchase of Service Provider Agreement between West Virginia and UniCare W.V., DHHRBMS001682 – 001755, with yellow highlighting applied to relevant portions
31	Excerpt of State Fiscal Year 2021 Model Purchase of Service Provider Agreement between West Virginia and The Health Plan, DHHRBMS002212 - 002285, with yellow highlighting applied to relevant portions
32	Email re: "[External] gender dysphoria question," Oct. 13, 2020, DHHRBMS012318
33	Cost of Care Composite Ex., DHHSBMS012441, DHHSBMS0124989, and DHHSBMS015463, excerpted and with yellow highlighting applied to relevant portions

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 31st day of May, 2022.

/s/ Walt Auvil
Walt Auvil

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

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

Plaintiffs,

v.

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

Exhibit 21

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

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

REQUESTS FOR ADMISSIONS

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

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

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

RESPONSE: Admitted.

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

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

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

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

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

By counsel

/s/ Kimberly M. Bandy
Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

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

Plaintiffs,

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

v.

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

Defendants.

CERTIFICATE OF SERVICE

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

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Nicole J. Schladt, Visiting Attorney
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(202) 429-9574 (fax)
sbuchert@lambdalegal.org

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

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

Plaintiffs,

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

v.

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

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

INTERROGATORIES

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

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

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

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

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

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

Carrie Mallory, Program Manager, Bureau for Medical Services

Karen Burgess, Certified Coder, Office of Program Integrity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By counsel

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

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

Plaintiffs,

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

v.

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

Defendants.

CERTIFICATE OF SERVICE

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

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

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

Plaintiffs,

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

v.

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

Defendants.

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

INTERROGATORIES

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

a. Diagnostic code(s);

b. Procedure code(s);

c. Medical necessity criteria.

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

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

a. Diagnostic code(s);

b. Procedure code(s);

c. Medical necessity criteria.

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

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

    a. Diagnostic code(s);

    b. Procedure code(s);

    c. Medical necessity criteria.

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

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

RESPONSE: Upon information and belief:

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

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

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

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

Plaintiffs,

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

v.

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

Defendants.

CERTIFICATE OF SERVICE

Now come Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 25th day of October, 2021, a true and exact copy of **DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES TO DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES** was served on counsel via electronic means as follows:

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

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

Plaintiffs,

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

v.

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

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

INTERROGATORIES

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

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

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

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

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

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

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

By Counsel

/s/Kimberly M. Bandy
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

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

Plaintiffs,

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

v.

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

Defendants.

CERTIFICATE OF SERVICE

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

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

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

Plaintiffs,

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

v.

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

Defendants.

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

INTERROGATORIES

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

a. Diagnostic code(s);

b. Procedure code(s);

c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE:

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

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

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

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

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

   a. Diagnostic code(s);

   b. Procedure code(s);

   c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE:

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

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

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

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

    a. Diagnostic code(s);

    b. Procedure code(s);

    c. Medical necessity criteria.

SUPPLEMENTAL RESPONSE:

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

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

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

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

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

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

Plaintiffs,

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

v.

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

Defendants.

CERTIFICATE OF SERVICE

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

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

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

Plaintiffs,

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

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

Defendants.

Exhibit
Ex 0004

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

DOCUMENT REQUESTS

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

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

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

c. All Documents and communications relating to consideration or processing by third-party administrators, contractors, and/or vendors of requests for Gender-Confirming Care by Plaintiff.

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

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

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

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

a. Documents and communications regarding the safety or efficacy of Gender-Confirming Care;

b. Documents and communications regarding the medical necessity of Gender-Confirming Care; and

c. Documents and communications regarding the cost of Gender-Confirming Care.

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

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

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

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

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

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

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

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

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

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

By counsel

/s/Kimberly M. Bandy
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SHAWN ANDERSON,
a/k/a Shauntae Anderson,
individually and on behalf of all others
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Defendants.

CERTIFICATE OF SERVICE

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

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

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

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

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

VIDEOTAPED ZOOM DEPOSITION OF CHRISTOPHER FAIN

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

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ALSO PRESENT:
ANDREW BAKER
(VIDEOGRAPHER)

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

MS. PRAKASH: Objection. Form.

THE WITNESS: I was assigned female at birth.

BY MS. CYRUS:

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

A. Yes.

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

A. Yes, I am transgender male.

[redacted]

[redacted]

Q. What is your age?

A. I'm 46.

Q. And where do you currently reside?

A. Huntington, West Virginia.

Q. Does anyone live with you?

A. No.

Q. What is your marital status?

A. Divorced.

Q. And how many times have you been married?

A. Once.

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

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

A. Yes.

Q. And when was that?

A. March of 2019.

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

A. Yes.

[redacted]

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

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

BY MS. CYRUS:

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

A. Yes, that was the first time a professional

recommended hormones to me, and surgery.

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

A. Medicaid.

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

A. Yes.

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

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

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

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

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

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

[redacted]

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

MS. PRAKASH: Objection. Foundation.

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

BY MS. CYRUS:

Q. Then did you go to an endocrinologist?

A. Yes.

[redacted]

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

MS. PRAKASH: Objection to form.

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

BY MS. CYRUS:

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

A. Yes.

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

transgender health care?

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

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

BY MS. CYRUS:

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

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

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

BY MS. CYRUS:

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

MS. PRAKASH: Objection. Form.

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

BY MS. CYRUS:

[redacted]

BY MS. CYRUS:

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

MS. PRAKASH: Objection. Form. Go ahead.

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

BY MS. CYRUS:

Q. If I were to --

A. It --

Q. I'm sorry. Go ahead.

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

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

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

A. I would --

MS. PRAKASH: Object to form.

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

BY MS. CYRUS:

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

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

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

A. Yes.

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

A. I believe top surgery is necessary.

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

A. The complete removal of my breast tissue and

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

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

MS. PRAKASH: Objection to form. Go ahead.

THE WITNESS: Yeah. Yes.

BY MS. CYRUS:

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

A. Yes, two letters.

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

A. In November of 2018.

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

A. And further on the surgery.

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

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

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

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

A. No.

[redacted]

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

A. Well, it would greatly alleviate it.

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

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

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

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

A. Yes.

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

A. Yes.

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

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

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

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

A. That's absolutely true, yes.

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

A. Yes.

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

A. That's true.

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

CERTIFICATION OF COURT REPORTER AND NOTARY PUBLIC

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

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

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

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

seven, chapter forty-seven of the West Virginia Code.

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

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

My Commission expires February 13, 2026.

Melanie E. Smith

Melanie E. Smith

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

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

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

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

Defendants.

VIDEOTAPED DEPOSITION OF SHAUNTAE ANDERSON

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

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

A. I agree --

MS. BUCHERT: Objection to form.

BY MS. CYRUS:

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

A. I'm a transwoman, yes.

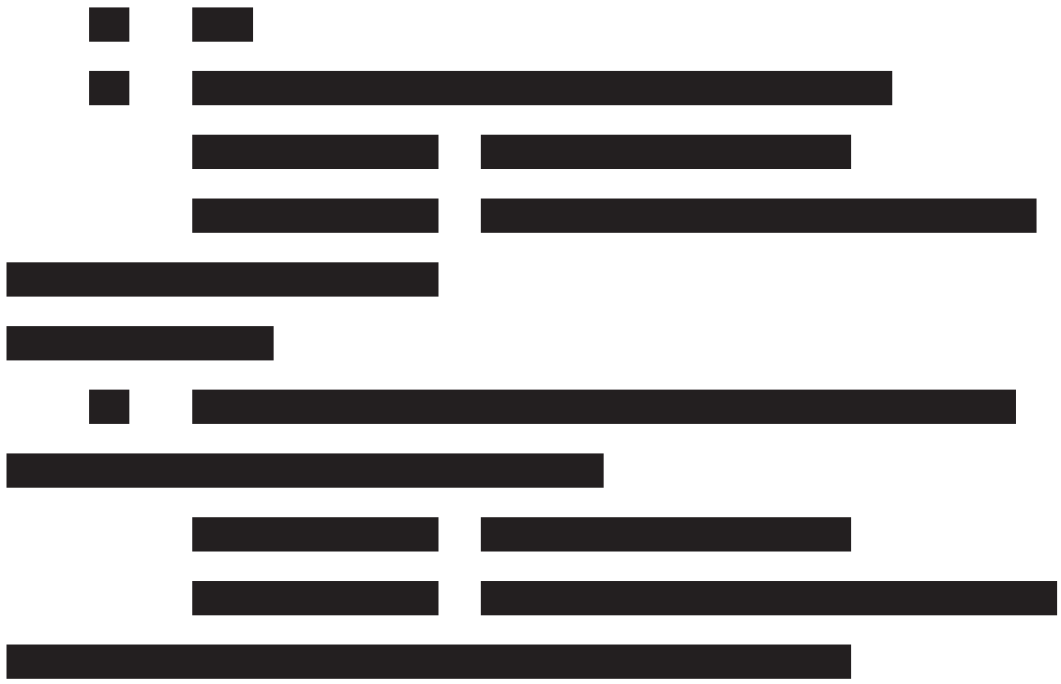
[redacted]

Q. And what is your age?

A. I'm 45.

Q. Where do you currently live?

A. Charleston, West Virginia.



BY MS. CYRUS:

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

A. On or around 2019.

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

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

Q. Do you know when you first became eligible

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

BY MS. CYRUS:

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

MS. BUCHERT: Objection.

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

BY MS. CYRUS:

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

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

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

MS. BUCHERT: Objection to form.

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

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

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

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

MS. BUCHERT: Objection to form.

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

BY MS. CYRUS:

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

MS. BUCHERT: Objection to form.

THE WITNESS: To my knowledge, yes.

BY MS. CYRUS:

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

A. Yes.

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

What does that condition mean to you?

MS. BUCHERT: Objection to form.

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

BY MS. CYRUS:

Q. I don't need you to.

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

Q. Does that have some impact on you?

A. A great deal of impact.

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

MS. BUCHERT: Objection to form.

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

hurtful.
BY MS. CYRUS:
Q. Is there somebody who is mocking you now?
MS. BUCHERT: Objection to form.
THE WITNESS: Everywhere I go. I live in a state full of people that are not always receptive of people of being transgender. That's why I try to live as stealth as possible.
BY MS. CYRUS:
Q. Are there certain procedures that you believe you need that will treat your gender dysphoria?
MS. BUCHERT: Objection to form.
THE WITNESS: Just the treatment that is prescribed and that's all the cosmetic that's considered medically necessary treatment.
BY MS. CYRUS:
Q. And what -- I'm sorry.
A. Go ahead.
Q. No. I was going to say what is that? Can you tell me specifically what the treatment is that you're referring to?
MS. BUCHERT: Objection to form.
THE WITNESS: Gender confirmation,

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

BY MS. CYRUS:

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

MS. BUCHERT: Objection to form.

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

BY MS. CYRUS:

Q. And is that the only one?

MS. BUCHERT: Objection to form.

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

BY MS. CYRUS:

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

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

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

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

MS. BUCHERT: Objection to form.

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

BY MS. CYRUS:

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

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

STATE OF WEST VIRGINIA, To-wit:

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

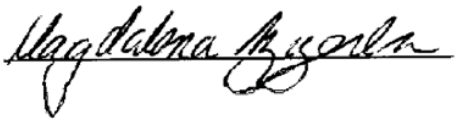
I do further certify that said proceedings were correctly taken by me in stenotype notes, that the same were accurately transcribed out in full and true record of the testimony given by said witness.

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

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

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

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



_____

Magdalena Szczerba
Registered Professional Reporter
Notary Public

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

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

Plaintiffs,

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

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF SECRETARY BILL J. CROUCH

DATE: March 17, 2022

TIME: 10:30 a.m. CST

PLACE: Veritext Virtual Videoconference

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

JOB NUMBER: 5096130

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

Q. Great. Glad that we established that. And, Mr. Secretary, do you use he/him pronouns?
A. No, I do not.
Q. What pronouns do you use?
A. I've never been asked that. For me?
Q. For you, yes. If I wanted to refer to you like Bill went to the store, instead of saying Bill, would I say he went to the store?
A. Yes, that would be fine.
Q. Great. Thanks. And you are the Cabinet Secretary of West Virginia Department of Health and Human Resources, is that correct?
A. That is correct, yes.
Q. How do you refer to the West Virginia Department of Health and Human Resources, because I know that's quite a mouthful?
A. How do I refer to them?
Q. Do you have a short terminology for that, like WVDHHR or DHHR?
A. DHHR, yes.
Q. Great. So if I use DHHR today, you'll know that I'm talking about the full West Virginia Department of Health and Human Resources?
A. I will, yes.
Q. Great. That will save us both a few words

today.

A. All right, good.

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

A. That is correct, yes.

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

A. That is correct.

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

A. That is correct.

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

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

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

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

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

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

Q. Great.

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

Q. Can you tell me what CMS stands for?

A. Center for Medicare/Medicaid.

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

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

Q. And did you also mention HRSA?

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

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

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

come back and get started again.

A. Thank you.

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

BY MS. SCHLADT:

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

A. Certainly.

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

A. No, not exactly.

Q. Good thing I asked.

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

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

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

A. Correct.

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

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

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

is that right?

A. That's correct.

Q. And what does their work encompass?

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

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

A. Certainly.

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

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

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

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

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

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

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

A. A variety, yes.
Q. Okay. But you do call her and you do email her, is that right?
A. Sure, certainly.
Q. So as far as your role in relation to the Medicaid program, I understand that West Virginia Code Section 929(a)(1) states that, "The Cabinet Secretary is responsible for developing a managed care system to monitor the services provided by the Medicaid program to individual clients." Does that sound accurate to you based on what you know?
A. Yes, there are a great number of places in the statute where the Secretary has the overall authority, certainly.
Q. And what does developing a managed care system to monitor services provided by the Medicaid program, what does that look like practically for you in your role?
A. Well, we did that several years ago, I don't think we've redid that for a while, and usually in state government a very large contract like that gets bid out, we accept proposals, go through a very fairly elaborate process to make sure that those decisions are made in the best interest of the state, best interest of the people of West Virginia. So we want to make sure that

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

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

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

A. Yes.

Q. Okay. And another --

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

Q. Okay. I appreciate that clarification. I may

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

A. That sounds accurate, yes.

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

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

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

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

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

A. Okay.

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

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

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

A. That sounds accurate, yes.

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

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

A. I think so, yes.
Q. What do you know about the exclusion?
A. I didn't know much until recently. Again, this had not been brought to my attention, I was not aware there was an exclusion. I do understand now after our folks did some digging trying to see what that exclusion was or when that exclusion took place, it was well before my tenure began in this position. So I do understand that surgery is excluded. Is that what you're referring to?
Q. Sure. So the exclusion I'm referring to is the exclusion of gender confirming care as I've described it. You just referenced this, but it sounds, I'll just ask, do you know how the exclusion was developed?
A. I do not, I do not.
Q. Do you have any understanding of when it was developed?
A. I was told it was somewhere around 2004, 2006, somewhere in that era. No one seems to know any more detail than that, I certainly don't know any more detail than that.
Q. Do you know why the exclusion is maintained today?
A. I do not.
Q. Why don't West Virginia Medicaid health plans

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

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

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

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

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

Q. Do you view gender confirming care as optional

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

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

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

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

A. No, I have not.
Q. Have you ever consulted with an expert on care for transgender people?
A. No, I have not.
Q. Are you aware of any research or analysis within the Department regarding providing access to gender confirming care for West Virginia Medicaid participants?
A. No, I am not.
Q. Have you had any internal discussions with staff about the issue of gender confirming care?
A. About the issue?
Q. Mm-hmm.
A. Only with the commissioner in preparation for this deposition.
Q. Okay. Have you ever spoken with representatives of any other Medicaid program about gender confirming care?
A. No, I have not.
Q. Have you personally conducted any research about the cost of providing gender confirming care?
A. No, I have not.
Q. Are you aware of any research within the Department regarding the cost of providing gender confirming care?
A. No, I am not.

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

A. No, I have not.

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

A. No, I have not been.

Q. Has the Department?

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

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

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

A. No, I am not.

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

A. No, I have not.

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

A. No, I'm not.

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

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

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

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

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

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

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

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

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

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

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

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

Plaintiffs,

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

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF COMMISSIONER CYNTHIA BEANE

DATE: March 29, 2022

TIME: 8:00 a.m. CST

PLACE: Veritext Virtual Videoconference

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

JOB NUMBER: 5096149

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

A. Yes.
Q. We'll also be discussing managed care organizations today. What is a managed care organization?
A. Managed care organization is an insurance organization that Medicaid uses to help manage our population and the clients enroll into the managed care organization to, to administer their benefits.
Q. If I refer to a managed care organization by the abbreviation MCO, will you know what I mean?
A. Yes.
Q. We'll also be talking today about the exclusion of care in the West Virginia Medicaid program for transgender people. Are you familiar with the exclusion being challenged in this case?
A. Yes.
Q. What's your understanding of that exclusion?
A. We only exclude the surgery. We cover other transgender services such as the hormones, the counseling that we do, it excludes the transgender surgery.
Q. If I refer to that as exclusion throughout the day today, will you know what I mean?
A. Yes, if you say exclusion of transgender services, I'm going to assume you're talking about the

surgery.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. I do.

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

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

A. Yes.

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

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

Q. How long have you held that position?

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

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

A. Yeah, I guess I did.

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

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

Q. Who asked you to take that role?

A. Deputy Secretary Jeremiah Samples.

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

A. No, they have not.

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

A. My answer would remain the same.

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

A. Yes.

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

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

and be the spokesperson for Medicaid services in West Virginia.

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

A. Yes.

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

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

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

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

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

Q. Who do you report to?

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

Q. Are there any others that you report to?

A. Those two gentlemen are it.

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

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

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

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

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

Deputy Secretary Samples?

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

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

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

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

A. Probably about 20.

Q. How many BMS employees do you supervise?

A. Five direct supervision.

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

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

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

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

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

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

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

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

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

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

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

care units.

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

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

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

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

Q. That tends to happen with biographies.

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

Q. No.

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

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

(Exhibit 1 marked for identification.)

BY MS. BORELLI:

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

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

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

Tara.

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

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

BY MS. BORELLI:

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

A. Okay.

Q. Is this on the BMS Website?

A. Yes, I believe it is.

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

A. You did.

Q. Is that an accurate description of your responsibilities?

A. Yes.

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

A. Yes.

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

with the ACA?

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

A. Correct.

Q. Can you explain what Medicaid expansion is?

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

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

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

A. Fair description.

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

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

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

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

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

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

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

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

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

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

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

state plan change before we began the coverage.

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

A. Yes.

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

A. Yes.

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

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

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

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

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

A. Yes.

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

A. You did.

Q. Are you prepared to testify about this topic?

A. Yes.

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

Q. And do those reasons also apply to transgender

people?
A. Yes.
Q. I'd like to go ahead and introduce our next exhibit. I'll let you know when to click on the folder to pull it up.
(Exhibit 3 marked for identification.)
Q. All right. Commissioner Beane, if you click on the marked exhibits folder you should be able to open the document that has been marked now as Plaintiff's Exhibit 3. Let me know when you've had an opportunity to open that document.
A. I have it open.
Q. You can see the title on the first page that says, "Medicaid 101"?
A. Yes.
Q. Do you recognize this document?
A. Yes, I do.
Q. Is this a publication of BMS?
A. Yes.
Q. Please turn to Page 3 as indicated in the lower left-hand corner of the document.
A. I'm there.
Q. I'm going to read the first paragraph on that page, please read along with me, "State Medicaid programs are often seen as low-hanging fruit when

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

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

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

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

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

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

A. Yes, you did.

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

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

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

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

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

A. Those are the two big ones.

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

Q. Does BMS prepare the Medicaid plan?

A. Yes, we prepare the state plans.

Q. And did you approve the Medicaid plan?

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

Q. Are you prepared to testify about this topic?

A. Yes.

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

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

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

A. Correct.

Q. Can you explain what that means?

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

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

A. Yes.

Q. Does BMS serve any other purpose?
A. Other than to enact the Medicaid program, no.
Q. And would you describe BMS as having a mission?
A. Yes.
Q. And how would you describe the mission of BMS?
A. The mission of BMS, and this is probably not going to totally match the mission statement that's online if you're going to pull it up later, but the mission of BMS is to assure quality healthcare and access to healthcare to West Virginians and to be good stewards of the state dollar and be good stake, and be a good partner with all our stakeholders.
Q. Does West Virginia Medicaid offer coverage on a fee for service basis?
A. We do.
Q. What does that mean?
A. So the Medicaid program right now, about 85 percent of all of our members are with a managed care organization, meaning that managed care organization that they sign up for and they get to choose which one they want will help them with their benefits, will help assist them, will pay their claims and will make sure that they have access to all the Medicaid services and help them with access if they have problems like finding a doctor or something like that.

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

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

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

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

A. Correct.

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

enrolled through the MCO?

A. We do.

Q. And are those contracts entered annually?

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

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

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

A. Correct.

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

MS. CYRUS: Object to the form of the

question. But you can answer.

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

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

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

A. I do not believe so.

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

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

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

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

A. Correct.

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

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

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

A. Correct.

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

A. Correct.

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

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

Q. Sure.

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

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

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

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

A. Correct.

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

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

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

once you've familiarized yourself with what it is?

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

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

A. Correct.

Q. Sorry, was that a yes?

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

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

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

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

A. I believe so.

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

through the EPSDT request?

A. Correct.

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

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

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

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

A. Yes.

Q. And do you recognize this document?

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

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

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

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

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

MS. BORELLI: Thank you, Lou Ann.

Q. Did I read that correctly?

A. Yes.

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

A. Yes.

Q. When was the exclusion first created?

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

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

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

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

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

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

A. I'm not.

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

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

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

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

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

A. We have not reviewed that particular policy.

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

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

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

A. I have opened it.

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

A. I've looked at it.

Q. Have you seen this document before?

A. I have.

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

A. I did.

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

read that correctly?

A. You did.

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

A. You did.

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

A. I am.

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

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

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

A. I'm sorry, what?

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

you would --

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

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

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

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

A. Correct.

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

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

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

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

A. Correct.

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

A. Correct.

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

A. Correct.

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

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

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

Q. And did you just use the abbreviation MAT?

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

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

A. Correct.

Q. And did you find any such letter?

A. I did not.

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

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

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

A. Not that I'm aware of.

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

A. Correct.

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

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

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

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

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

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

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

A. No, we receive FMAP for that.

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

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

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

A. Correct.

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

A. You are correct.

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

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

we took the edit off in 2017.

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

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

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

A. Correct.

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

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

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

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

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

A. I did.

Q. Did BMS have to approve the change to begin

covering hormone therapy for gender dysphoria?

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

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

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

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

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

A. No.

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

A. Yes.

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

(Exhibit 17 marked for identification.)

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

A. I see it.

Q. Great. Please take a moment to review this

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

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

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

A. Not that I'm aware of.

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

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

A. Not that I'm aware of.

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

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

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

A. Maybe.
Q. And just to clarify, so have you ever covered puberty delaying treatment or the treatment for precocious puberty?
A. I'm sorry, what?
Q. Have you ever covered puberty delaying treatment for precocious puberty?
MS. CYRUS: Object to the form of the question. If you know, you can answer.
A. I don't know if I know that answer, I don't know if I know what that even means.
Q. Okay. Give me just one moment to look over my notes. All right. We're going to introduce our next exhibit. I will let you know when it's loaded.
(Exhibit 18 marked for identification.)
Q. All right. Go ahead and click on the exhibits folder and you should see a document marked as Plaintiff's Exhibit 18. Let me know when you've had a moment to open the document and familiarize yourself with it.
A. I have familiarized myself with it.
Q. In the lower right-hand corner the first page of the document has a Bates stamp DHHRBMS012319. Do you see that?
A. It's 319, did you say 311?

Q. If I did, I misspoke, it should be DHHRBMS012319, is that correct?
A. Yes.
Q. Do you recognize this document?
A. Yes.
Q. And what is it?
A. It's an email trail around a specific case of a request for I believe it was an 11-year-old who wanted to delay puberty.
Q. Okay. Please go to Page 2 of the pdf, and that should be Bates stamped DHHRBMS012320. Do you see that?
A. Yes.
Q. And do you see an email from Dr. James Becker dated October 7, 2020?
A. Yes.
Q. He states, "Cindy, I'm still considering the appeal that is on my desk today. I was able to review the recommendations of the American Academy of Pediatrics in regard to treatment of TGD. They do support the use of medication to delay pubertal development. The guidelines is filled with precautions about side effects and possible future consequences. They make the point that the effect of these medications is reversible if the medication is stopped. They argue that this approach may give providers and counselors a

chance to ensure that the patient is fully committed to this change and understands what they are choosing. I think on the basis of that information, I am inclined to approve the treatment with a host of warnings about provider responsibility for monitoring safety and efficacy." Did I read that correctly?

A. Yes.

Q. Referring again to that page, did you respond the same day to say, "Please hold on the approval and let me discuss with leadership"?

A. Correct.

Q. Who were you referring to when you referenced leadership in that email?

A. My guess is I probably ran this by Deputy Secretary Samples.

Q. Do you think you might have conferred with anyone else or likely just Deputy Secretary Samples?

A. I remember this case being discussed with Deputy Secretary Samples and then we also had a call on this case with Dr. Becker and internal individuals here at BMS, I believe Jennifer Myers was on the call, and then I also think we discussed it in our leadership team which consisted of the people on this email along with Brad is not on the email, but he would have been on the leadership team when Dr. Becker brought it up.

Q. So it sounds like one of the consultations that you would have done was with Deputy Secretary Samples, is that correct?

A. Correct.

Q. And do you recall what he said when you consulted with him?

A. I don't recall. I'm pretty sure I outreached and just asked him his thoughts and I don't recall that he gave an answer either way. He probably pushed it back in our court as to make the decision.

Q. And then it sounds like it was also discussed with what you described as the leadership team, is that correct?

A. Correct.

Q. And that included the people that are on this email chain.

A. So Dr. Becker would bring issues like this to the leadership team, and so it would be the three deputies, Dr. Becker and Riley Romeo who is my general counsel who makes up the BMS leadership team, and myself.

Q. And who are the three deputies?

A. Fred Lewis, Sarah Young and Becky Manning.

Q. And do you recall what the discussion was with the leadership team about this particular case?

MS. CYRUS: I'm going to object to the extent that if Riley Romeo was involved, and he's general counsel for BMS and if he gave legal advice, I'm going to object to attorney-client privilege. But beyond that, you can answer.

A. Honestly, I don't recall what was all discussed other than Dr. Becker probably brought it up as an issue that we need to be figuring out what we're going to do with this individual case that was laid on his desk.

Q. And was a decision eventually made about this individual case?

A. Yes.

Q. And do you recall who made the decision about this case?

A. I did.

Q. And what was the, what was your decision about this case?

A. We did not cover -- I believe it ended up not being a pharmaceutical, but a device perhaps, and we did not cover, we did not cover the request to delay puberty.

Q. And when you made that decision, what was the basis for your decision?

A. Just the discussions with Dr. Becker and the nurses and the concern about the age of the individual

A. It's all about how we, how we do the eligibility based on MAGI income, but different components of MAGI income of what you can exclude and include in order for individuals to be eligible for the expansion.

Q. Thank you. That's helpful. Please scroll down to Page 42 out of 45 of the pdf.

A. My apologies, I didn't scroll down enough on the first one, and so this is another, it starts another letter here. What page am I on here? Sorry. It's on Page 19 started another letter.

Q. That's helpful. Thank you for the clarification. And scroll with me, if you will, to Page 42 of the pdf. And in case the system doesn't tell you what page you're on as you scroll, you'll be looking for a page that has a Bates ending with the numbers 220.

A. Okay, I'm there.

Q. And do you see a title at the -- actually, for clarity, let me make sure I've got the complete Bates stamp. The complete Bates stamp on this page is DHHRBMS016220. Do you see a title at the top of the page that says, "Mandatory and optional Medicaid benefits"?

A. I do.

Q. Is that followed by a listing of mandatory benefits?

A. It is.
Q. And can you describe again what mandatory benefits are?
A. Those are benefits that CMS says you have to cover this benefit in order to participate in the Medicaid program.
Q. And does this look to you like an accurate and complete list of the mandatory benefits required by CMS?
MS. CYRUS: Object to the form of the question. If you know, you can answer.
A. It does, it looks like what's probably on CMS's Website.
Q. And then below that list do you see a list of optional benefits?
A. I do.
Q. And these are optional benefits provided by BMS, correct?
A. By BMS?
Q. Yes.
A. No. These are just optional benefits that the state can choose to provide, these are not necessarily West Virginia BMS optional benefits.
Q. And you testified that BMS does provide a number of optional benefits, correct?
A. We do.

Q. Which benefits on this list do you recognize as optional benefits that BMS provides?

A. Well, we definitely provide prescription drugs. The clinic services, I would have to look at how they're defining that because we have a number of clinics, but I would like to make sure that it's not a clinic that we wouldn't cover, I'm not sure what the definition of that is on this particular Website.

We do physical therapy, occupational therapy, speech and hearing. We do have respiratory care, we do have a number of screening and preventative services, we do cover podiatry. We have a limited optometry benefit, we have a limited adult dental benefit, we do not cover eyeglasses, we do have a chiropractic service, we do have private duty nursing, we do have personal care, we do have hospice.

I would have to see the definition of this case management, but we do have a targeted case management service. We do have ID services, we do have ICF, IMD services. We do not have 1915(i) services, we do not have 1915(j) services, we do not have 1915(k) services. I do not believe we have TB related services, I'm not sure what those, I mean, I know what it is, but I'm not sure of what services they're talking about there. We do cover inpatient psychiatric care for individuals that

are 21, and we do have health home services.

Q. And are you aware of any other optional services that BMS provides that you haven't just listed?

A. They do not have -- we have 1915(c) home and community based waivers and I don't believe they have the 1915(c) services on this list, and we also have a 1115 demonstration waiver for SUD, substance use disorder services as well, and neither of those are on this list.

Q. Is counseling including counseling for gender dysphoria, would that follow one of the services under the mandatory list or under the optional list of benefits?

A. It would be both. So our, under your mandatory list you'll see federally qualified health centers. Our FQHC's also provide behavioral health and they receive a separate encounter for behavioral health, so they could be receiving those services under, the counseling under the mandatory there.

And then under optional benefits, let's see, where was that. They would receive it mainly through our diagnostic screening, preventative and rehab services. And so rehab services, a lot of your behavioral health services are considered rehabilitative in nature and they're under the rehab part of your state

many years ago, and we were sued and then after that we did a state plan. I don't recall, I wasn't in the position I'm in now and so when that happened I don't recall if it was a settlement or if we lost or, but I do know we did a state plan to cover those surgeries.

Q. And that meant that state plan had to be approved by CMS, correct?

A. Correct.

Q. All right. So just to clarify one more thing. You said in preparing for your testimony today you were looking at various documents by CMS and that were transmitted to BMS, and you didn't see any documents prohibiting or requiring coverage for gender confirming care, correct?

A. I do not believe there are any documents that prohibit it, but I do not believe there are any documents that mandate it either.

Q. Okay. So the decision to not cover the care resides with BMS, correct?

MS. CYRUS: Object to the form of the question.

A. Yes.

Q. Was that correct?

A. Correct.

Q. All right. I think we're going to turn now to

Q. Towards the bottom of the page you'll see text that reads, "No. 7, admit that the Medicaid plan only covers care that is medically necessary." Did I read that correctly?

A. Correct.

Q. And the response reads, "Response. Admitted, however, these defendants deny any suggestion that Medicaid covers all care as medically necessary." Did I read that correctly?

A. You are correct.

Q. Are you prepared to testify about this request?

A. Yes.

Q. With respect to your request for admission specifically, what did you do to prepare to testify today?

A. I'm familiar with what services we cover and do not cover.

Q. To make sure that I understand this response, can you confirm that in order for care to be covered by Medicaid it must be medically necessary?

A. Yes, we cover medically necessary services.

Q. In other words, if coverage is covered by Medicaid, the care has been deemed medically necessary, correct?

A. Correct.

Q. And if the care is not medically necessary it would not qualify for coverage under Medicaid, correct?

A. Correct. The one exception to that would be an EPSDT 4-4 plus over on ameliorating the condition, that's a little bit broader term of medically necessary. But in the end it's still medically necessary to ameliorate the condition, it's just a little bit broader.

Q. That's helpful. Based on the exclusion for gender affirming surgery from the Medicaid plan, is gender affirming surgery excluded regardless of whether it's medically necessary for a specific member?

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

A. We do not cover that surgery regardless of whether or not there's a physician or a review team saying it's medically necessary.

Q. We can move on now to another exhibit. So we'll go ahead and look at it when it's ready.

(Exhibit 22 marked for identification.)

Q. Okay. Go ahead and click on the exhibit folder and you should be able to open what's been marked as Plaintiff's Exhibit 22.

A. I have it open.

Q. Please take a moment to review the document and

Q. You said the legislature rejected an opportunity to provide blood pressure cuffs this session that would have cost around $500,000?

A. It was a little over 500,000, I can't remember the exact number, Lou Ann, but it was 500 and change, maybe 520, something like that.

Q. Okay. And what is the status of Medicaid's budget, you made reference to it earlier?

A. We currently have actually -- sorry, it's late in the day. We currently have a surplus, but we are predicting that we will be in the red in two years from now.

Q. Okay. And what does that mean that you will be in the red in two years?

A. We will have a budget deficit.

Q. Would that indicate that BMS would have to cut existing services?

MS. BORELLI: Object to form.

A. We would either have to cut existing services or receive additional appropriations from the legislature to continue services of this.

Q. Based on the existing budget, would Medicaid have to add funds to cover transgender surgeries?

MS. BORELLI: Object to form.

A. We would have to add dollars in order to cover

surgery was funded?

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

A. I'm sure once the SPA was approved, then it's funded like our other medical services with the state and federal match.

Q. Have you ever performed research about the cost of gender affirming surgery?

A. I have not.

Q. Have you ever reviewed research about the cost of gender affirming surgery?

A. I at one time asked Dr. Becker if he could look into like how much the states that are covering this, how much their spend was, but I don't recall ever receiving anything from him with regards to it.

Q. Are you aware of anyone else within BMS who has researched the cost of gender affirming surgery?

A. Not that I'm aware of.

Q. And is there anything you considered related to the cost of gender affirming surgery that we haven't discussed?

A. I don't believe so.

Q. All right. I think those are all the questions we have for the moment, preserving our right to ask further questions if Lou Ann has additional questions

for you now.

MS. CYRUS: I don't have any further questions and we will have her read.

(Proceedings concluded for the day at 2:21 p.m., 03-29-2022)

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Commissioner Cynthia Beane on the 29th day of March 2022, and that the witness was by me first duly sworn to tell the whole truth;

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

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

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

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

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

WITNESS MY HAND AND SEAL THIS 29th day of March 2022.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

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

Plaintiffs,

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

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF DR. JAMES BECKER

DATE: March 30, 2022

TIME: 7:00 a.m. CST

PLACE: Veritext Virtual Videoconference

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

JOB NUMBER: 5096167

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

Q. Okay. So, Dr. Becker, we're going to talk a little bit about your background, okay?

A. Yes.

Q. Dr. Becker, you are the medical director of BMS at the West Virginia Department of Health and Human Resources, correct?

A. That's correct.

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

A. It's quite a long list, but I'll try to tell you the things that I concentrate on predominantly.

Q. Okay.

A. So I've been there for 14 years and over the 14 years my obligations and responsibilities have evolved a little. Part of my work involves review of coverage decisions for any number of medical treatments or diagnostics. And so I spend quite a bit of my time actually reviewing coverage codes and talking about medical evidence as it relates to these codes.

I also have responsibility for interaction with the medical providers who are enrolled in our system. I spend a fair amount of time on the phone talking to them, explaining our policies, trying to get their participation and get them involved in some of our special projects that we do.

I also review pharmacy and pharmacy cases. Pharmacy appeals come to me with great regularity. We cover about a million prescriptions each month and so there will be some that need to be reviewed, so they do come to me. I have interaction with other agencies like CMS, I have interaction with various support groups that state Medicaid programs rely on, things like the Medicaid Medical Director Network, ASTHO, which is the State Health Officers Organization, a variety of those kind of agencies. So as you can tell, it's highly variable.

Q. Okay.

A. And it's grown. When I first began the only obligation I had when I first began working for Medicaid was to, was to look at files regarding surgical procedures that didn't match normal codes, and that's still a part of my job, but it's not much of a job.

Q. I understand that. And so just a quick follow-up on that. So you said that you've been with BMS for 14 years, am I correct?

A. That's correct.

Q. And have you been with BMS in your capacity now, so as the medical director for 14 years?

A. Yes.

Q. Okay. Dr. Becker, who is your direct

supervisor?

A. My direct supervisor would be Commissioner Beane.

Q. Okay. And how often do you report to her on your work?

A. At least weekly.

Q. Okay.

A. And often more than that. I am onsite in the office, officially I'm there two days a week, and then I do some work by telehealth or, you know, on the computer. And so when I'm there my office is two doors down from her office and it's very easy for me to walk by and talk to her or see her when I get a cup of coffee or something like that, so we regularly converse.

Q. I understand. Do you have standing meetings with Commissioner Beane?

A. I do, every, every Monday afternoon would be the typical schedule and it would be a meeting for about an hour, hour and a half to go over any issues that we have.

Q. Got it. Thank you for that. Dr. Becker, does anyone report to you?

A. Because the way that my position is structured there, I don't have real responsibility for overseeing a lot of people. I don't have anyone who directly reports

to me whose time sheet I sign off on or anything like that, but there is a group that is a policy team that meets with me every Wednesday morning. And so while I don't have direct responsibility for any of them, they all work in their own units, they do report to me every Wednesday morning on issues that we need to make decisions about.

Q. Okay. Who's part of the, I guess who makes up the policy team that indirectly reports or has those meetings with you?

A. Well, Jennifer Myers is probably one of the key people, Carrie Mallory is a key person, Stacy Hanshaw, Virginia Evans, Richard Ernest, Garland Holley. Do you want me to do an exhaustive list? It's about 12 or 13 people.

Q. That's helpful. Thank you for that, Dr. Becker. Who are the other team members in your specific department?

A. Excuse me, I think I missed the question, did you say who are?

Q. Yes.

A. Depends. I had a nurse practitioner until recently and she has resigned, retired, and we had a psychologist and he has resigned. So I think I would have to report today, I don't have anyone.

Q. Okay. So is it fair to say then that there were nurse practitioners and at least a psychologist within BMS who regularly met with you?

A. Yes, definitely.

Q. Thank you. And who were those people?

A. They would have been Paula Hamady, she's a nurse practitioner, Ken Devlin, who's a psychologist.

Q. Okay.

A. They specifically met with me. And on the periphery I have a psychiatrist whom we've contracted with to deal with adult, to deal with child and adolescent psychiatric issues, his name is Kelly Melvin, Dr. Melvin. And we have a family practitioner who helps with our pharmacy reviews, her name is Hyla Harvey. Dr. Harvey does most of the difficult pharmacy reviews now.

Q. Okay. I do not think I caught the last name of -- you said Dr. Harvey? I mean the first name of Dr. Harvey.

A. Hyla, H-Y-L-A.

Q. Dr. Becker, have you held a previous job with BMS other than medical director?

A. No, I have not.

Q. Okay. Dr. Becker, we're going to talk about some of your other current positions, okay?

A. Sounds fine to me.

seminar there, no. I've had, I've had some of these workshops that I've attended, but as far as just formal enroll, pay tuition, take a class, get a grade, have a transcript, no, I can't really identify anything.

Q. Okay. Dr. Becker, we're here to take a deposition of an organizational representative for BMS, do you understand that?

A. Say that again, you broke up there.

Q. Sure, no problem. We're here to take a deposition of an organizational representative for BMS, do you understand that?

A. Yes, I do understand.

Q. And you have been designated to give testimony as the organizational representative for BMS on certain topics that we'll discuss today, do you understand that?

A. Yes, I do.

Q. When were you notified that you would be giving testimony as the organizational representative for BMS on some of the topics plaintiffs have identified?

A. I was probably notified four or five months ago when there was a question in a request that had come to our legal unit and I was, I was told that they might ask me to testify to one or two of the questions.

Q. Okay. What did you do to prepare to testify today as the organizational representative?

Q. Okay.
A. So I agree with her, it probably was 2004.
Q. Okay. Why was it, to the best of your knowledge, why was the exclusion created?
A. I don't know that I can speak to that, but my personal impression is that it arose principally out of the pharmacy questions about administering medications that seemed like they were not aligned with the person's gender. So we had some restrictions on what medications we allow people to receive and we put some edits in place to try to regulate that.
For instance, we don't expect, we don't expect men to fill prescriptions for birth control pills, and so a gender edit gets in place for that. Or if there's a mismatch between hormones that we expect to see in use or, you know, drugs that might be unsafe, we have edits to try to restrict the exposure of a potentially unsafe situation. So I think that was the real reason that things were developed in that respect.
Q. What was considered when the exclusion was originally adopted?
A. I did not have a part in that, so I can't answer.
Q. Okay. Dr. Becker, as the organizational representative for BMS are you aware of whether the

decision to maintain the exclusion was ever revisited?

A. I'm not aware.

Q. Okay. Dr. Becker, BMS continues to maintain the exclusion today, correct?

A. You're referring to the surgical exclusion?

Q. Mm-hmm, yes.

A. Yes, we do.

Q. Dr. Becker, as the organizational representative for BMS can you explain why BMS has decided to maintain the exclusion today?

MS. BANDY: I just want to place an objection that some of the designated topics were addressed by Sarah Young. I mean, to the extent that it's encompassed within Exhibit 1 of the interrogatories, he can answer, but I just want to place that objection.

ATTORNEY SMITH: Noted.

Q. You can answer.

A. So the way that coverage decisions are made is based on medical necessity. And CMS identifies medical necessity as, it's a difficult, it's a difficult definition, but it's a legal construct that guides the decision for coverage based on evidence of effectiveness and safety for the procedures requested. And so in the sense that surgical procedures have not been included as

A. I do or would, I don't recall having reviewed any.

Q. Because BMS does not cover surgical care for treatment of gender dysphoria, the appeal would be denied or claim not paid, correct?

A. That's correct.

Q. And the appeal would be denied regardless of medical necessity, correct?

A. Well, that is not necessarily true. If the case involves medical necessity for the surgery, it would get reviewed, but it will probably get an initial denial from the contractor who handles those requests for prior authorization. There is a process in place for cases to come to a higher level of appeal. And so the provider who is, who has determined that this is a necessary procedure can come back around with another request and ask for a higher level appeal and consideration.

Q. So to confirm, you never reviewed, you never reviewed an appeal regarding surgical appeal?

A. I don't recall ever reviewing an appeal for surgical care.

Q. And to go back to your last answer for the question before, that higher level appeal would need to be denied, correct?

A. It would likely be denied.

may have been a typo. GD refers to gender dysphoria.

Q. You state that you would be inclined to approve the treatment, correct?

A. I do, I said I do support the use of medication, or they do, referring to the Academy of Pediatrics, they do. And then later I said I think on the basis of the information that I'm inclined to approve the treatment with a host of warnings to the provider about provider responsibility for monitoring safety and efficacy.

Q. Why did you review the recommendations of the American Academy of Pediatrics?

A. It was one of the, it was one of the guidelines that seemed to take on the subject of delaying the onset of puberty reliably. The Academy of Pediatrics is highly respected and it was my feeling that that was a good place to start in getting advice about using a medication of this type off label.

Q. This research was undertaken by you to aid in determining whether to approve the treatment, correct?

A. That's correct.

Q. Dr. Becker, it was later determined that this care would not be covered for this participant, correct?

A. That's correct.

Q. Who ultimately made that decision?

A. The medication that was requested is delivered

care approved?

A. I don't know because they have, the MCO's have their own medical directors and when it comes to the medical questions, medical coverage questions, they, they make the decisions. So it came in as a pharmacy appeal incorrectly, and even though I was in favor of it, the decision would be made by the MCO.

Q. Let's return to the American Academy of Pediatrics recommendation that you reviewed.

A. Yes.

Q. What do you recall about that recommendation?

A. I just, I don't have it in front of me and I wouldn't have memorized it. So I do remember that it seemed to have a good and clear description of gender dysphoria and the challenge of treating gender dysphoria in young patients, and I do remember that it had a fairly clear statement about the potential benefit of halting the development of pubertal changes and the use of GnRH agents as a possible option for that.

I do recall also that it cautioned that they likely should not be used for more than a few years and that, and that led me to assume that we would be talking about coverage for potentially two years for this individual and then some decision has to be made about other lines of treatment. And it was a well documented

publication, it was clear to me and, you know, that was the basis for my decision.

Q. Did the American Academy of Pediatrics recommend coverage of puberty delaying treatment be available in at least some cases?

A. I think they did, yes.

Q. Dr. Becker, if a participant has a diagnosis of precocious puberty would BMS approve the use of Vantas for that condition?

A. Yes, we would.

Q. Just not for the treatment of gender dysphoria, correct?

A. Correct. At least it would be approved for gender dysphoria. If the patient -- well, let's put it this way. If this patient had been traditional Medicaid and we were making the decision about coverage of medical cost, my recommendation would have been this is appropriate with proper precautions and we'll go ahead and cover, that would be my recommendation. You can see that in the subsequent trail here of the email.

Q. All right.

A. And that's, it's available, hormone therapy is available with proper indication.

Q. I'm going to introduce another exhibit.

(Exhibit 4 marked for identification.)

Q. Okay. I believe you should see what has been marked as Exhibit 0004.

A. Yes, I do.

Q. Okay. I'm showing Dr. Becker what has been marked as Exhibit 0004 titled, "Defendants' ninth supplemental response to plaintiffs' first set of requests for production to Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, Bureau for Medical Services." Dr. Becker, you have been designated to testify about the response to request for production 6. Please take a moment to review this document, specifically Page 3. Do you recognize this document?

A. Yes, I do.

Q. Did you review this document in connection with your testimony as the organizational representative for BMS today?

A. I have.

Q. On Page 3 you'll see text that reads, "All documents and communications relating to the exclusion and/or gender confirming care considered by the individuals responsible for adopting and/or maintaining the exclusion in the health plans. Please identify the responsive documents by Bates number, this includes but is not limited to, A, documents and communications

regarding the safety or efficacy of gender confirming care; B, documents and communications regarding the medical necessity of gender confirming care; and C, documents and communications regarding the costs of gender confirming care." Did I read that correctly?

A. Yes, you did.

Q. And are you aware that counsel identified you as the organizational representative to testify about documents produced by BMS in response to request for production 6?

A. Yes.

Q. Are you prepared to testify about this response?

A. Yes, I think so.

Q. With respect to request for production 6 specifically, what did you do to prepare to testify today?

A. I have reviewed the various documents and research relationships that we had established asking for information to help guide us on the issues of gender dysphoria, gender transitions and the way we apply and other states apply policies.

Q. Please look at that page again while I read the response to request for production 6, "Supplemental response. Upon information and belief seen in the following documents that have previously been produced

as part of Exhibit 86, DHHRBMS012313 through 012314; DHHRBMS012318; DHHRBMS012322 through 012323; DHHRBMS012333; DHHRBMS012338; DHHRBMS012434 through 012447; DHHRBMS012483 through 012501; DHHRBMS012648 through 012653; DHHRBMS012665 through 012668; DHHRBMS012711 through 012823; DHHRBMS013523 through 013524; DHHRBMS015304; and DHHRBMS015453 through 1589. The following documents are designated confidential, DHHRBMS012649 through 012653; and DHHRBMS012714 through 12823." Did I read that correctly?

A. I think you did. That was really pretty good that you got through that, that's quite a list.

Q. Yeah, it's a long list. To your knowledge is this list of documents and communications considered by the individuals responsible for adopting and maintaining the exclusion correct?

A. To my knowledge it is.

Q. To your knowledge is this list of documents and communications considered by the individuals responsible for adopting and maintaining the exclusion complete?

A. To my knowledge, it is.

Q. Okay. I am going to introduce another exhibit.

(Exhibit 5 marked for identification.)

ATTORNEY SMITH: Unfortunately, Kelley, I think I mistakenly must have just pressed introduce

Q. I will represent to you this corresponds to the third range of Bates numbers identified in response to RFP6. Do you recall that we discussed this document earlier today?

A. Yes, I do.

Q. This email chain was written in connection with puberty delaying treatment, correct?

A. Yes, that is correct.

Q. And no other forms of gender affirming care such as surgery, correct?

A. That is right.

Q. This email chain was created with reference to review of an appeal of a denial of coverage, correct?

A. Yes, that is correct.

Q. This email chain was not part of a process of considering whether to remove the exclusion from the Medicaid program, correct?

A. When you say remove the exclusion, you're suggesting remove exclusion for surgical?

Q. Yes.

A. No, it was not.

Q. Did BMS review the Endocrine Society guidelines in connection with this email chain?

A. Yes, ultimately we did.

Q. In your review of the Endocrine Society

guidelines in connection with this email chain, what do you recall?

A. All I recall is that the Endocrine Society also considered delaying the onset of puberty as an appropriate form of treatment for individuals in the diagnosis of gender identity disorder.

Q. Okay. I am going to introduce another exhibit.

(Exhibit 6 marked for identification.)

Q. Dr. Becker, do you see what has been marked as Exhibit 0006?

A. Yes, I do.

Q. I am showing Dr. Becker what has been marked as Exhibit 0006, it is an email with the subject, "Gender dysphoria." In the lower right-hand corner the document is Bates stamped DHHRBMS012333. Do you see that?

A. Yes, I've got it.

Q. Okay. I will represent to you that this corresponds to the fourth range of Bates numbers identified in response to RFP6. Please take a moment to review this email. Do you recognize this email?

A. Yes, I do, that's the further discussion of the case that we had been discussing regarding Vantas.

Q. Please turn to the first full paragraph where it reads, "That is why it's such a difficult decision. The provider quotes guidelines from the Endocrine Society

the ninth Bates range identified in RFP6. Please take a moment to review this email. Do you recognize this email?

A. Yes, I do. I think I was involved in the beginning of the discussion and then it got away from me a little bit, but yes.

Q. Okay. Please scroll down to the page with the Bates stamp DHHRBMS012666 where it reads, "Unfortunately Jim and I discussed this case today before I saw your email. I did determine that this isn't coverable through pharmacy services because Vantas is a medical claim, it requires surgical implementation. We were in favor of approving their request, however." Did I read that correctly?

A. You did. I'm having a little difficulty moving the page up here, for some reason my computer doesn't want to do that.

Q. Okay.

A. There we go.

Q. Okay.

A. Okay, now I got back to it. So let me make sure. "Unfortunately Jim and I discussed the case today before I saw your email." Yes, okay, I've seen it and reviewed it a couple of times.

Q. Okay. I will read it again just to make sure

that I conveyed the portion correctly.

A. Okay.

Q. "Unfortunately Jim and I discussed this case today before I saw your email. I did determine that this isn't coverable through pharmacy services because Vantas is a medical claim that requires surgical implementation. We were in favor of approving their request, however." Did I read that correctly?

A. Yes, you did.

Q. If Vantas was coverable through pharmacy services would it have been approved?

A. It would have.

Q. And you were in favor of approving this care, correct?

A. Yes, I thought it was appropriate care based on what I saw in the guidelines.

Q. I'm going to introduce another exhibit.

(Exhibit 8 marked for identification.)

Q. Do you see what has been marked as Exhibit 0008?

A. Let me refresh the page here. For some reason when I go to refresh it switches pages. Okay. I'm getting some kind of error on this Veritext. Instead of giving me a little arrow that I can move around with, it's giving me a line and -- there's the arrow. Okay, I just got it back. Whatever it was, it's fixed.

Q. Okay.
A. We won't question it. Okay, now I have 8.
Q. Okay. I am showing Dr. Becker what has been marked as Exhibit 0008, it is an email with the subject, "Gender dysphoria question." In the lower right-hand corner the document is Bates stamped DHHRBMS012318. Do you see that?
A. I do.
Q. I will represent to you that this corresponds to the second Bates range identified in response to RFP6. Please take a moment to review this email.
A. So I've reviewed it.
Q. Do you recognize this email?
A. I do.
Q. Please look at the paragraph where it reads, "We've held off on approving the Vantas implant for this child getting treated at UPMC. Based on conversations with several experts, it is a standard of care." Did I read that correctly?
A. Yes, you did.
Q. Who are the experts you referred to in this email?
A. Well, Dr. Yoost, and I don't think I can recall, I spoke to somebody in endocrine at West Virginia University, but I don't have the name and I didn't put

the name in there. I don't think I, I don't really recall it, but I probably could resurrect it if needed.

Q. Okay. And just to confirm, those were the only two experts you spoke with?

A. Those are the two, yes.

Q. Turning back to the body of your email, what did you mean by a standard of care?

A. Standard of care is a designation of certain medical care as meeting the criteria to be considered excellent healthcare and appropriate healthcare. If something falls under the standard we rarely recognize it because the person doesn't do as well or doesn't respond. But the standard of care is kind of a broad definition, we know it when we see it and we all strive to deliver care that meets the standard of care.

Q. Please look at the last line in the paragraph that says, "If this child had a diagnosis of precocious puberty, we would allow use of this medicine for that condition." Did I read that correctly?

A. Yes, you did.

Q. And I believe you stated this earlier, but just to confirm, West Virginia Medicaid covers treatment for precocious puberty?

A. That's correct.

Q. What is the average age of a patient who might

admission 1 accurately describes the position of BMS on the medical necessity of treatment for gender dysphoria, correct?

A. That's correct.

Q. The last sentence of the response to request for admission 1 states, "This request is admitted with the understanding that this area of treatment continues to evolve." Please scroll down to Page 4. Are you on Page 4?

A. I'm getting there.

Q. Okay.

A. Page 4.

Q. Okay. Do you see the date August 27, 2021 on that page?

A. Oh, okay. There it is on the text, yes, on the 27th day of August 2021.

Q. Okay. Since this response was served on August 27, 2021 has anything about the science evolved?

A. None that I'm aware of.

Q. I'm going to introduce another exhibit.

(Exhibit 18 marked for identification.)

Q. Doctor, are you familiar with InterQual?

A. Yes, I am.

Q. Okay. Do you see Exhibit 0018? And it also might be at the top again of the marked exhibits folder.

A. Yeah, I've got the document.
Q. Okay. So this is an InterQual sheet with the subset, "Gender affirmation surgery and requested service vaginoplasty for gender affirmation surgery." InterQual criteria is nationally accredited criteria for determining medical necessity for procedures, correct?
MS. BANDY: Object to the form.
A. Yes, it is.
Q. I'm sorry, I didn't catch your answer, Dr. Becker?
A. Yes, it is, that's what we use it for.
Q. Okay. What is the importance of using nationally accredited criteria?
A. Well, it creates consistency in standard.
Q. Does BMS use InterQual?
A. BMS does use InterQual and InterQual is used by our contractor for reviewing requests for surgery.
Q. And who is your contractor for reviewing requests for surgery?
MS. BANDY: Object to form.
A. The contractor would be Kepro.
Q. Okay. How does BMS use InterQual criteria?
MS. BANDY: Object to form.
A. InterQual criteria is one of the documents, one of the standards that we review against in determining

necessity for prior authorization.

Q. InterQual is used on the fee for service side of Medicaid, correct?

MS. BANDY: Object to form and object to the line of questioning, that it's not within the topic areas designated.

Q. You can answer.

A. Yes, it does get used on the fee for service side.

Q. How is InterQual criteria factored into decision making regarding whether care is medically necessary?

MS. BANDY: Object to form.

A. In my experience with it, it's used as one of the indicators that the requested service has been reviewed and meets some standards. My role sometimes is in deciding where InterQual doesn't really apply. So I do get, I do get cases in which there are disputes based on incorrect application of InterQual, just for your information is one, one of the things that we subscribe to and rely on.

Q. What are some cases where InterQual criteria would not apply?

MS. BANDY: Object to form.

A. Typically InterQual criteria don't apply when the diagnosis is wrong. And so cases that come to me at

Q. And hormone replacement therapy can be treatment for gender dysphoria, correct?

A. Yes, it can.

Q. Is it fair to say then that BMS recognizes that at least some forms of gender confirming care, which can include hormone replacement therapy, can be medically necessary care for treatment of gender dysphoria?

A. Yes, that's true.

Q. Okay. I would like to take a break, but while we're on a break, Dr. Becker, could you start gathering the materials that you said you reviewed?

A. I will, I will make a call. Like I say, I'm not in the office, I'll call and try to get my folks to gather that.

MS. BANDY: And can I just ask for a clarification of the request that prompted the, the request that you are trying to look at those documents, just so I know what the request was?

ATTORNEY SMITH: Okay. It was in connection to Topic 12 and Dr. Becker essentially stated that there were materials that he reviewed, but couldn't remember what exactly the names or titles of those materials were. So that's the reason for this request.

MS. BANDY: Was there a specific question that he was responding to at the time, do you know?

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Dr. James Becker on the 30th day of March 2022, and that the witness was by me first duly sworn to tell the whole truth;

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

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

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

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

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

WITNESS MY HAND AND SEAL THIS 30th day of March 2022.

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

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

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

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

by and through their corporate representative

FREDERICK LEWIS

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

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

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

FREDERICK LEWIS,

duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PRAKASH:

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

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

A. I sure can.

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

A. Yes.

Q. Okay. Great.

A. Fair enough.

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

A. Frederick Samuel Lewis.

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

Q. And are you prepared to testify about that today?
A. I believe so, yes.
Q. Great. And then you are also designated to testify about certain discovery responses, written responses, that were submitted on behalf of the Bureau for Medical Services. Do you recall being designated for that?
A. Yes.
Q. Okay. And are you prepared to talk about that today?
A. Yes.
Q. Great. So I understand that you are the deputy commissioner of Plan Management and Integrity at the West Virginia Bureau for Medical Services; is that right?
A. That's correct.
Q. Okay. And the "Plan" in your title refers to the West Virginia State Medicaid Plan?
A. It refers to the MCOs that we contract with.
Q. Okay.
A. Arguably, it could be the state Medicaid Plan too. I have always related it to the MCOs. We called them plans.

Q. I see. And the MCOs are managed care organizations?
A. Yes.
Q. Bureau for Medical Services I'm going to refer to as "BMS" today so if I say that, will you understand what I mean?
A. Yes.
Q. Okay. Great. And how long have you been the deputy commissioner at BMS?
A. Today, I am 10 days shy of four years.
Q. And though you referenced the MCOs in describing what the "Plan" in your title refers to, are you familiar with the operation of the West Virginia Medicaid Plan?
A. I am, for the most part. There's still areas I'm learning. I came from outside of Medicaid, but I think I've learned a lot in the last four years. So I'm going to give you my best and if I don't know, I'll tell you.
Q. Great. And BMS is within the West Virginia Department of Health and Human Resources, correct?
A. Correct.
Q. And that is a state agency, the Department of Health and Human Resources is?
A. Yes.

Q. BMS is responsible for the administration of West Virginia's Medicaid program?
A. Yes.
Q. Mountain Health Trust is the managed care program for West Virginia Medicaid, right?
A. That's correct. It also is the umbrella for CHIP participants.
Q. And you referenced MCOs earlier. Enrollees in West Virginia Medicaid who are also in the managed care program of Mountain Health Trust need to sign up with an MCO; is that right?
A. That's correct.
Q. And there are three of them: Aetna Better Health of West Virginia, The Health Plan, and UniCare; is that right?
A. That's right.
Q. And how would you describe the role of those three MCOs with respect to West Virginia Medicaid?
A. They all are here to manage the Medicaid membership that has been placed in their custody, and that happens through the -- through the members' election to participate with whichever one of those they may choose. And if they don't choose, there's an auto selection criteria.

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

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

A. Correct.

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

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

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

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

A. It's called Maximus.

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

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

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

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

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

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

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

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

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

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

A. Correct.

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

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

Q. Okay.

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

Q. Okay. And is anybody in the room with you right now?
A. I've been by myself all day.
Q. All right. Thank you.
So I understand that hormone therapy for -- as a treatment for gender dysphoria was not always covered for West Virginia Medicaid participants. Is that right?
A. I have the same understanding, yes.
Q. Okay. And I understand that that changed in November of 2017; is that right?
A. Yes. Well -- yes. I think it was the 7th of 2017. I'm sorry. November 7, 2017, or thereabouts.
Q. So on or around that date, hormone therapy as the treatment for gender dysphoria started being covered for West Virginia Medicaid participants, right?
A. Correct.
Q. Okay. And that was across all three of the MCOs, right?
A. Well, by then, the pharmacy benefit was a fee-for-service benefit, so, yes, correct. And it would have also encompassed the fee-for-service population outside of managed care too.

therapy?

A. No.

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

A. Correct. Correct.

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

A. I do not.

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

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

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

A. And that was the director at the time,

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

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

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

A. No.

Q. Okay. What did you and Vicki discuss?

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

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

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

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

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

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

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

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

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

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

Q. And were those questions coming from members?

A. Coming from members and maybe providers as well.

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

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

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

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

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

A. I don't.

Q. Have you ever raised that question with

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

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

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

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

BY MS. PRAKASH:

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

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

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

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

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

Q. Do they oversee any coverage determinations?

A. They don't oversee coverage determinations.

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

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

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

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

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

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

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

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

Q. No, that's okay.

A. My apologies.

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

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

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

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

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

A. That, I'm not sure.

Q. Who would know that?

A. Tanya Cyrus.

Q. What's --

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

Q. Who else reports to you?

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

Q. And --

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

Q. Okay. And who do you report to?

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

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

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

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

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

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

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

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

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

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

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

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

by and through their corporate representative

BECKY MANNING

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

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

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ALSO APPEARED:

Nicholas Guillory, Law Fellow

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

Q. And I understand that you've been with DHHR for over 20 years; is that right?
A. That's correct.
Q. Okay. So we're going to go through a few of your previous roles at the department. So prior to being deputy commissioner, is it true that you were chief financial officer for West Virginia Medicaid?
A. Yes.
Q. And did you hold that position from June 2018 to January 2021?
A. Yes.
Q. What were your job duties as chief financial officer?
A. I oversaw directly the supervision and work of budget preparation, director -- I oversaw the work of the director of purchasing, cash receipts, expenses, accounts payable, and accounts receivable.
Q. And prior to being chief financial officer for West Virginia Medicaid, is it true that you were the deputy director of Office of Human Resource Management?
A. That's correct.
Q. And did you hold that job position from

June 2015 to June 2018?

A. That's correct.

Q. What were your job duties in that role?

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

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

A. That's correct.

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

A. That's correct.

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

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

Q. And prior to being director of Budgets, were you the director of Financial Services for the Bureau for Public Health?
A. Yes.
Q. And did you hold that job from October 2007 to November 2013?
A. Yes.
Q. What were your job duties in that role?
A. To support all of the offices within the Bureau for Public Health as related to their financial means: budgeting, grant support, financial reports, p-card, travel, accounts payable, accounts receivable.
Q. Prior to that, were you the director of Financial Services for the Bureau for Behavioral Health and Health Facilities?
A. Correct.
Q. And did you hold that role from August 2004 to October 2007?
A. That's correct.
Q. Were your job duties similar to the ones you were just describing as director of Financial Services for the Bureau for Public Health?
A. Yes.
Q. Okay. And then prior to that, were you an

accountant in the Office of Behavioral Health?
A. Yes, that's correct.
Q. And were you an accountant from March 2002 to August 2004?
A. That's correct.
Q. What were your job duties as an accountant in the Office of Behavioral Health?
A. Behavioral Health has a lot of grants, so it was my responsibility to prepare those grant agreements and work with DHHR Finance.
Q. Have you ever held any other positions, other than the ones we just went through, within the Department?
A. No.
Q. Is your highest degree a master of business administration from Marshall University?
A. It is.
Q. And you graduated in 2003?
A. That's correct.
Q. Do you also have a bachelor of science and accounting from Concord University?
A. That's correct.
Q. And you graduated from there in 2000?
A. That's correct.
Q. Okay. Ms. Manning, we're going to shift

A. Yes, ma'am.
Q. Now, Ms. Manning, you're here today to -- excuse me. Let me start that over.
I'm here today to take a deposition of an organizational representative for BMS. Do you understand that?
A. Yes, ma'am.
Q. And you've been designated as the organizational representative to give testimony on certain topics that we're going to discuss today.
Do you understand that you've been designated for particular topics?
A. Yes, ma'am.
Q. I believe you just answered this, but were you notified that you would be giving testimony as BMS's organizational representative in October 2021?
A. Yes, ma'am.
Q. Was that the first time you were notified that you would be giving testimony?
A. Yes, ma'am.
Q. Now we're going to use Exhibit Share for the first time so it always takes a little bit longer the first time.
A. Okay.

following that.

Do you see that?

A. Yes, ma'am.

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

Did I read that correctly?

A. Yes, ma'am.

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

A. Yes, ma'am, I am.

Q. How is West Virginia Medicaid funded?

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

Q. And what percentage of West Virginia

Medicaid's funding comes from the federal government?

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

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

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

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

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

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

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

A. No.

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

A. Approximately 20 percent.

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

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

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

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

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

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

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

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

A. Correct.

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

A. Okay.

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

purposes.

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

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

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

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

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

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

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

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

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

Q. And what does FMAP stand for?

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

Q. And you mentioned you received an additional 6.2.

A. Mm-hmm.

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

A. From a financial standpoint.

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

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

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

Q. Okay. So --

A. Because --

Q. Oh, go ahead.

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

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

A. Okay.

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

(Exhibit 3 was marked for identification.)

A. Okay. I have it.

Q. This document is titled Defendants' Response to Plaintiff's First Set of Interrogatories to Defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services.

Did I read that correctly?

A. Yes.

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

A. (Reviewing document.)

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

A. (Reviewing document.) Okay. I'm ready.

Q. Do you recognize this document?

A. I do.
Q. Is this document a copy of Defendants' Responses to Plaintiff's First Set of Interrogatories?
A. It is.
Q. So I directed your attention to page 2 where you'll see text that reads as follows: Number 2, "Describe in detail the factual basis for each governmental interest that defendants contend supports the exclusion.
"Response: These defendants state that they provide coverage that is mandated for coverage by the Centers for Medicare and Medicaid Services (CMS). These defendants are constrained by budgetary/cost considerations."
Did I read that text accurately?
A. Yes.
Q. So the second sentence there states that BMS is constrained by budgetary/cost considerations. Does that response describe what you were just explaining to me?
A. Yes, ma'am.
Q. Okay. Do you agree with that response?
A. I do.
Q. As the organizational representative, can

equivalent, the Department of Personnel puts out the cost that we'll use for each pay grade type so that's not a sub- -- you know, it's not a subjective cost. It wouldn't be what I wanted to pay them.

So they give us the -- like the type of position and then the market salary that we would use for the purpose of fiscal notes and then the benefit percentages. So that way each agency within state government is using apples-to-apples comparisons.

Q. Has BMS priced out the cost of providing gender affirming care?

A. I have not. In order to do that, I would need a list of codes that I would be pricing.

Q. So are you saying that you personally haven't researched the cost of providing gender affirming care?

A. Correct.

Q. Do you know of anybody else at BMS who has researched the cost of providing gender affirming care?

A. I do not.

Q. If you wanted to get a list of codes related to gender affirming care, could you do

Q. Are you aware of Dr. Becker pricing out codes related to gender affirming care?

A. I can't speak for Dr. Becker and what Dr. Becker has done. I can only speak for, like, what projects I know, that when I have a question, that he has a team of people that work on that sort of stuff.

Q. So sitting here today as the organizational representative, you are not aware or have knowledge of Dr. Becker looking at codes related to gender affirming care and pricing them out; is that correct?

A. Correct. And I can't -- I mean, I can't speak for Dr. Becker.

Q. Okay. I want to turn your attention briefly to the exhibit we had up marked BM0003.

A. Okay.

Q. And we were looking at page 2, the response to number 2. Do you have that up?

A. I do.

Q. As the organizational representative for BMS, are you aware of any other governmental interest supporting the exclusion that were not identified in defendants' discovery responses here on this exhibit?

A. (Reviewing document.) I'm not aware. No.
Q. Okay. Let's turn back to the very first exhibit, BM0001, or Plaintiffs' Second Amended Notice of 30(b)(6) Deposition, and I'm going to ask you to turn to page 4, please.
You've been designated to testify about Requests for Production 7 and 27 under Topic 18. Do you see Topic 18 at the bottom of page 4?
A. Yes, ma'am.
Q. And Topic 18 reads, "All interrogatory requests, requests for admission, and requests for production of documents directed to defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services, and any discovery responses, responsive documents, filings, or productions, by or on behalf of defendants William Crouch, Cynthia Beane, and West Virginia Department of Health and Human Resources, Bureau for Medical Services."
Did I read that correctly?
A. Yes, ma'am.
Q. Are you aware that as part of testifying about the discovery responses in Topic 18, Counsel for BMS designated you as the organizational

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I hereby certify that I reported the remote deposition of BECKY MANNING, on April 12, 2022, via Veritext Virtual Videoconference, and that the witness was by me first duly affirmed to tell the whole truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was preserved.

WITNESS MY HAND AND SEAL THIS 20th day of April, 2022.

Merilee S. Johnson, RDR, CRR, CRC, RSA
Notary Public, Hennepin County, Minnesota
My commission expires January 31, 2026

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

Christopher Fain, individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 3:20-cv-00740

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF BRIAN THOMPSON

DATE: April 13, 2022

TIME: 8:00 a.m. CST

PLACE: Veritext Virtual Videoconference

REPORTED BY: KELLEY E. ZILLES, RPR (Via Videoconference)

JOB NUMBER: 5128144

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NOTE: The original deposition transcript will be delivered to Attorney Smith, Esq., as the taking attorney.

being challenged?

A. I believe so, yes.

Q. Okay. And what is your understanding of that exclusion?

A. My understanding is that we, we do not pay for, we do not cover the medical part of this, the surgeries, but we do cover hormone therapy.

Q. Okay. So if I refer to the exclusion throughout today you'll understand what I mean?

A. Yes, from a broad standpoint, yes.

Q. Okay. So, Mr. Thompson, you are the director of pharmacy services of BMS at the West Virginia Department of Health and Human Resources, correct?

A. Correct.

Q. All right. And what responsibilities fall under your role within BMS?

A. So I'm expected to make policy regarding pharmaceutical coverage, I manage the budget for the pharmacy department and I have staff that configure benefits for certain drugs and I also make policy around exceptions to our criteria. In those cases a lot of times things are used off label, which we are given some leeway as to how, how to choose to cover as a state.

Q. Got it. And who is your direct supervisor?

A. Fred Lewis.

list and I remember seeing, you know, there was a lot of exhibits.

Q. Okay.

A. I think I have seen this one, yes.

Q. Okay. And have you been told that you've been designated to speak as the organizational representative of BMS in response to certain topics contained in this deposition notice?

A. Yes, yeah.

Q. Okay, great. So we'll come back to this document throughout the day as we get through each topic, but I just wanted to show it to you, okay?

A. Okay. I thought the one I saw had my name on it too.

Q. Let's see. So this is interesting, this is the one that doesn't actually have your name on it. Okay. All right. I'm going to pull up the right one that has your name on it. Actually, if it's okay, can we take a quick five-minute break.

A. Sure.

Q. Great. Thank you very much, I'll be right back.

ATTORNEY SMITH: Kelley, can we go off the record.

(A break was taken at 8:20 a.m.)

ATTORNEY SMITH: All right. So I am going

to introduce another exhibit.

(Exhibit 2 marked for identification.)

BY ATTORNEY SMITH:

Q. Okay. Mr. Thompson, if you refresh your page for Exhibit Share you should see a new exhibit, it will have the Exhibit Number BT0002.

A. Yep, I see it.

Q. Great, okay. I have just introduced plaintiffs' second amended notice of 30(b)(6) deposition, Exhibit Number BT0002. If you want to take a minute to review this document as well, Mr. Thompson, please feel free to do so.

A. Okay.

Q. Okay. So do you recognize this document?

A. Yes.

Q. And do you see your name at No. 10?

A. I do.

Q. Okay, great. So this is the document that we will come back to throughout the rest of the day and specifically as we discuss each topic, okay?

A. Okay.

Q. All right. As an organizational representative did you meet with any Medicaid participants who are transgender to prepare for today?

A. No, I have several acquaintances that are

prior authorization forms is there a field that collects information regarding diagnosis?

A. Yeah, yes. So some drugs have specific prior authorization forms designed to help the flow of questions for that drug, but we have a general PA form which can be used for any drug, anything that you're using off label or whatever and there is a little spot where you put in what it's being used for and also what you previously used for treatment of whatever you're asking it for.

Q. Okay. And just to confirm what I think I heard you say earlier, if a patient required hormone replacement therapy for treatment of gender dysphoria only, they would receive treatment for that hormone replacement therapy, correct?

A. Oh, definitely, yes.

Q. Okay. BMS sometimes covers puberty delaying care for the treatment of gender dysphoria, correct?

A. Yes, we have. It's a little bit more, there's a little bit more safety concern when you're dealing with children because there are long-term effects from delaying puberty. So every case with something like this is always going to be reviewed by the medical director for safety.

Q. Okay. And who is the medical director?

Q. But you said that puberty delaying coverage could conceivably be covered through EPSDT, is that correct?

A. I say that only because I've always been told that anything could get approved through EPSDT if you could defend why it was medically necessary.

Q. Okay.

A. But the other thing you have to remember is with EPSDT it's not really necessary if they have full Medicaid and it's already something we cover, it's generally used for those things that we don't already cover or for children that don't have full Medicaid.

Q. You testified earlier that requests for puberty delaying treatment are subject to a review process, correct?

A. Yeah. Well, every drug is subject to some sort of drug utilization review, whether it's automatic or electronic edits or because it requires a prior authorization. And in those cases they would require prior authorization just because a lot of those are injectable if you're talking about the delaying, they're typically injectable, long-acting injectable agents.

Q. Does that mean that under the right circumstances puberty delaying treatment could be approved to treat gender dysphoria?

A. Yes, I would say so.
Q. I'm going to introduce another exhibit.
(Exhibit 4 marked for identification.)
Q. All right. Do you see what has been marked as Exhibit BT0004?
A. Let me refresh. Yep, I have it.
Q. Okay. I'm showing you what has been marked as Exhibit BT0004, it is an email with a subject, "Gender dysphoria." In the lower right-hand corner of the document is Bates stamped DHHRBMS012665. Do you see that?
A. I do.
Q. Okay. Please take a moment to review this email.
A. Yes.
Q. Okay.
A. This is the one I was referring to, yes.
Q. So you recognize this email, correct?
A. Yes.
Q. Okay. So please scroll down to the page with the Bates stamp DHHRBMS012666.
A. Okay.
Q. All right. I am going to read a portion of that email, it says, "Unfortunately Jim and I discussed this case today before I saw your email. I did determine

Please take a moment to review this email. And just so you know, it's pretty much the first three pages.

A. Yeah, I recall seeing this.

Q. Okay. So you recognize this email?

A. I do.

Q. Okay. I'm going to direct your attention to the message in the middle of the chain on Page 2, you'll see the Bates number at the bottom DHHRBMS021583.

A. Okay.

Q. Okay. So it reads, "Thank you. It is fine to override the edit when hormones are prescribed for transgender members." Did I read that correctly?

A. You did, yes.

Q. Okay. Who's the email from?

A. That is from Vickie Cunningham who was the director of pharmacy at the time and it's sent to the director of Rational Drug Therapy Program at the time to Stephen Small.

Q. Okay. Is the edit being discussed in the email the gender edit that we've discussed?

A. That's what I was about to say, I can't say from the text that they're talking about a gender edit, but that would be my assumption that that's what they're talking about.

Q. Okay. And the removal of the gender edit allows

for the coverage of pharmaceuticals for treatment of gender dysphoria, correct?

A. Yes. So there are, as I said before, there are reasons to have gender edits for safety purposes. You would typically not want to give testosterone to say a woman of child bearing age because it could cause harm to the pregnancy, so there is a reason to have a gender edit. This looks to me that Vickie was telling them that in cases where there was gender dysphoria that she is approving the general coverage of gender dysphoria with hormone therapy.

Q. You testified a little bit earlier that there can be gender edits and specifically that they can vary in terms of what state and federal policies I believe, do you remember that?

A. I think I misspoke when I said federal. I meant the national database that we use, First Databank, sometimes sends I believe, and I don't know which drugs they put gender edits on, but I believe they do send information saying this drug should not be used in females, this one should not be used in males because there are, there are differences.

Sometimes inherently if you're using a drug that say affects testosterone, like I said, you can affect pregnancies, so that would not be considered safe. But

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Brian Thompson on the 13th day of April 2022, and that the witness was by me first duly sworn to tell the whole truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was reserved.

WITNESS MY HAND AND SEAL THIS 13th day of April 2022.

Kelley E. Zilles, RPR
Notary Public, Washington County, Minnesota
My commission expires 1-31-2025

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

Christopher Fain, individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 3:20-cv-00740

William Crouch, et al.,

Defendants.

REMOTE DEPOSITION OF SARAH YOUNG

DATE: March 11, 2022

TIME: 8:00 a.m. CST

PLACE: Veritext Virtual Videoconference

REPORTED BY: KELLEY E. ZILLES, RPR (Via Videoconference)

JOB NUMBER: 5096099

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NOTE: The original deposition transcript will be delivered to Carl Charles, Esq., as the taking attorney.

(Exhibit 1 marked for identification.)

Q. Okay. So hopefully you can see there in the marked exhibits folder what has been marked as Exhibit PL0001. Do you see that there?

A. I do, yes.

Q. Okay.

MR. CHARLES: Kelley, I'm showing the witness what has been marked as Exhibit 0001, it's a copy of a document entitled, "Bureau for Medical Services policy manual, Chapter 100."

Q. Please take as much time as you need to look at the document and I will wait until you tell me you've sufficiently reviewed it.

A. I am familiar with the document.

Q. Okay. Thank you, thank you. I just don't want to, throughout the day I will say take a moment, but what I mean by that is take the sufficient moments you need to review it.

A. Thank you.

Q. Okay. Do you recognize this document?

A. I do, yes.

Q. And what is this document?

A. This is a chapter of our provider manual, it's available on our Website, and it is a guiding document for services that we cover and billing instructions for

providers. It is not all inclusive and I believe there's a disclaimer at the bottom that says to that effect, but this is our general information chapter.

Q. Thank you. Do you have any reason to believe this is not a true and correct copy of that document?

A. It appears to be the same one that we have on our Website.

Q. Thank you. Okay. So now if you would, please, turn to Page 10 of this document. The page numbers are in blue at the bottom right-hand corner, the text is a little bit, it's kind of small there in the bottom right-hand corner.

A. Okay, sorry.

Q. No, no, take your time.

MS. BANDY: Is there a Bates number on that? That might be helpful.

MR. CHARLES: Yes, sorry. So it's CFAIN001661.

MS. BANDY: Okay, we got it.

BY MR. CHARLES:

Q. Okay. Ms. Young, do you see in the middle of the page the numbers 1661?

A. Yes.

Q. And the title, "General noncovered services"?

A. Yes.

Q. Okay. So if you would just read along with me, I'm going to read aloud, but if you'll just follow along, please. Underneath that heading, "The West Virginia Medicaid program does not cover certain services and items regardless of medical necessity." Did I read that correctly?

A. Yes.

Q. Okay. And then some examples are identified below. I'm not going to read all of those examples, I'm going to continue to the next page where that list continues. Just let me know when you're on the next page.

A. I am.

Q. Okay. And then the third bullet from the top, do you see what that bullet is?

A. I do.

Q. And could you just read that out loud for me?

A. "Transsexual surgery."

Q. Okay. Thank you very much. So I'm going to put that document away for a moment and introduce another document.

(Exhibit 2 marked for identification.)

Q. Okay. Do you see what has been marked as Exhibit PL0002?

A. Yes.

Q. Okay. Can you just tell me what it -- well, sorry. Take a minute to look at it, please, first.

A. Okay.

Q. Thank you. And then can you just tell me what this document is?

A. It appears to be the Aetna Better Health of West Virginia member handbook.

Q. And for which plan year, please?

A. 2020 to 2021.

Q. Okay. And can you tell me what, to the extent you know, what Mountain Health Trust - Medicaid means there at the bottom?

A. Mountain Health Trust is the name of our managed care program.

Q. Okay. So the managed care program oversees the managed care organizations, is that right?

A. Yeah, it's an all encompassing term. You'll hear it referred to as the Mountain Health Trust plan or, it's to differentiate between fee for service and managed care.

Q. Oh, that's helpful. Okay. So fee for service does not fall under the Mountain Health Trust?

A. Correct.

Q. Okay. Thank you for that.

MR. CHARLES: Again, Kim, turning to

organization, Ms. Young. Can you tell me what your job title is, please?

A. Deputy commissioner of policy and operations.

Q. Okay. And what responsibilities fall under your role within BMS?

A. Under the policy side I have staff who oversee all of the coverage policies that we have, that also includes our eligibility policy. And on the operation side I have oversight of all of the technical systems that we use to manage the program.

Q. Can you tell me what technical systems you oversee, that seems like a big bucket of work, can you just say a little bit more of what you mean by that?

A. It is. We have the Medicaid managed information system, you may see it referred to as MMIS, that is our claims processing system. Within that we have our provider enrollment documents or files as well. I do not see the, oversee the member eligibility system, but our staff do have input into the Medicaid portion of that system. There are various other systems that we oversee that touch on member eligibility as well.

Q. So there's another individual who specifically oversees eligibility, right, that formally falls under someone else, is that correct?

A. The policy for member eligibility falls under?

Q. No, I'm sorry, not the policy. I'm looking at -- sorry. There's a director of Medicaid eligibility, so I guess what I'm asking is like what is the difference between what you just said and that person's role?

A. So the employee at BMS who is the director of member eligibility, she reports to me.

Q. Oh, I see. Okay. And can you just tell me who that is so I don't have to keep referring to them by their title?

A. Anita Hayes.

Q. Thank you. Okay. So she reports to you?

A. Correct.

Q. Are there, can you tell me the other directors that you oversee?

A. Sure. Do you want names and titles?

Q. Yeah, please.

A. Okay. Anita is my director of Member Eligibility; Jennifer Myers is the director of Provider Services -- oh, I'm sorry, we change our titles often.

Q. I think she's Professional Services, right?

A. Thank you, yes, yes. And I have Brandon Lewis is our Medicaid Enterprise Systems director; I have Marcus Canaday who is the director of our Money Follows the Person program; Randall Hill who is director of our

Home and Community Services Based program, and Cynthia Parsons who was director of our Behavioral Health and Long-Term Care Services. I believe that is everyone.

Q. That's quite the list. Okay. Thank you very much for that. So then who do you directly report to?

A. Commissioner Cindy Beane.

Q. Okay. And just in a sort of general way, do you have a formal structure for how often you report to Commissioner Beane, you know, I'm not referring here to informal communications you might have with her, I'm just speaking, you know, do you have a monthly, you know, formal reporting structure or a quarterly structure, something of that nature?

A. We have a weekly leadership team meeting to which we escalate issues that the commissioner or the other deputies are not already aware of, but there is a lot of informal escalation of issues.

Q. That makes sense. Thank you. How long have you been in your role as deputy commissioner for policy and operations?

A. Officially I was interim for a number of years, I believe official was 2016 or 2017.

Q. If you had to ballpark your interim years, could you give me just a rough estimate?

A. I believe it started in 2014.

Q. That works. Thank you. And were you employed with BMS before you started as the interim director?

A. Yes, I was.

Q. And what was your position within BMS before that?

A. I came to BMS in 2012 and at that time I was in the position of assistant to the commissioner, and then at some point I was promoted to a director position before becoming interim deputy.

Q. Okay. So you were assistant to the commissioner beginning in 2012. Can you just tell me briefly what that, what your duties were therein?

A. Sure. I ensured that the commissioner was aware of issues that were not escalated to her in other ways. And at that time I also oversaw the Medicaid expansion duties, the state plan amendments and the policies around that.

Q. And before your position as assistant to the commissioner, were you also employed in some capacity with BMS or were you with a different organization?

A. I was still with DHHR, but not with BMS, I was with a different Bureau.

Q. And what Bureau was that?

A. At the time it was called Bureau For Children & Families.

additional schooling beyond your bachelor degree?

A. I do have hours towards a master degree, but I have not completed the master's.

Q. And when you complete those hours do you have to do it through a particular institution or how is that credentialed, if you can just say briefly?

A. It's not through my employment, but I was taking hours remotely through West Virginia University.

Q. Okay, I see. And at some point it could be that you'll acquire sufficient hours to confer a master's degree, is that how that would work?

A. Generally, yes.

Q. Okay. So as you sort of likely put together, because I just jumped right into things, your deposition is that of an organizational representative for BMS. Do you understand that?

A. I do, yes.

Q. Okay. So I'm, you know, not asking you the person, Ms. Young, I'm asking you the BMS representative questions today. And so your counsel has designated you to give testimony as the organizational representative for BMS on certain topics, do you understand that?

A. Yes.

Q. Okay. Do you recall when you were notified that you'd be giving this testimony today as an

A. That's my understanding, yes.

Q. Okay. Thank you. And are you aware of, as of right now of any managed care organizations doing that for gender confirming care, so using a bucket not, not West Virginia Medicaid designated funds for the coverage of gender confirming care?

A. Not that I'm aware of, no.

Q. Okay. Will providers who are contracted and eligible within the requirements we talked about for West Virginia Medicaid receive reimbursement for gender confirming care that they provide to West Virginia Medicaid recipients who are transgender?

A. Let me make sure I understand. They will be reimbursed for covered services. If they are billing for a gender confirming procedure that is not covered, they will not be reimbursed for that procedure.

Q. Okay. So as a specific example, would a provider who submits for reimbursement be reimbursed for billing for counseling, for example, for gender dysphoria for someone who receives West Virginia Medicaid coverage?

A. Yes, they would, that is a covered service.

Q. Okay. And what about gender confirming hormones?

A. Hormone therapy is a covered service.

Q. Okay. And what about gender confirming surgical procedures?

A. That is not a covered service.

Q. Okay. So then just backing up a little bit, Ms. Young. So on the provider side of determining benefits, how does BMS or West Virginia Medicaid, I guess I can, sorry, I can just say BMS, how does BMS determine benefits on the provider side year-to-year?

A. So big picture speaking, it's based on the covered services for members. And then based on the covered service we drill down to the codes that are specific to those individual services, and then further drill down to the type of practitioner or provider that is eligible to provide that in West Virginia. Or based on, I'm sorry, based on our West Virginia policies, we do have out of state providers, but we do drill down to that specific type of provider. And then there are, so there's different codes that come out each year and they're evaluated to see if it falls within that process that I explained.

Q. Okay. And do those determinations reflect consideration of Center for Medicare and Medicaid Services requirements?

A. Yes. So the Center for Medicare, Medicaid Services dictates, which are mandatory services, and we

A. Yeah, it's a big question because I think we were aware on a personal and a professional level as to what was going on and we were approached by a number of state providers, members, different advocacy groups or different interested parties. There was specific funding that was made available around that time as well, so it was getting a lot of attention and obviously we were being asked to do what we could to address it as well.

Q. Thank you for that. So for a change like that which, I mean, tell me if this is right, you said that was a larger system change in the benefit structure for both enrollees and providers. Do you recall that CMS had to be consulted about that change?

A. Yes.

Q. Okay.

A. Yeah, specifically this type of authorization. We were aware of at least one other state at the time that had requested for the authority to do something like this. This demonstration waiver is a very lengthy process and CMS was involved from the very beginning of conceptualizing it through public comment and approving the actual application for the waiver.

Q. I see. And so thinking about CMS's role specifically as it relates to gender confirming care, to

your knowledge does CMS require that gender confirming care be excluded from any state Medicaid plan?

A. Not that I'm aware of.

Q. Okay. And are you aware of any other state Medicaid plans that include or provide coverage for gender confirming care? And I should say, I know this is tricky, but you the representative of BMS, not you, Ms. Sarah Young, in your personal capacity.

A. And I apologize, I don't, I have not done research on what other states cover and the degree to which they do cover.

Q. Okay. And have you seen any discussion of that specific nature come through emails from other members in the leadership team?

A. Regarding other states?

Q. Other states, yes, yes, mm-hmm.

A. Not that I recall.

Q. Okay. And then when the Bureau for Medical Services undertook the change to cover hormone therapy, do you know if CMS was consulted in that change?

A. My understanding of that is that we had always covered the hormone therapy until a change was made at some point, and I don't know when that was, that change was made that we didn't cover it. So then when the change was made it was basically reverting back to the

regardless.

Q. Got it. Okay. Thank you. And then sort of zooming out again, if BMS excludes a particular service, are the MCO's required to abide by that exclusion?

A. Yes, if they are reimbursing out of their Medicaid money.

Q. Okay. Sorry, Ms. Young, give me just a second. How are you doing, Ms. Young, would you like a break now or would you like to continue for about another 20 minutes and then we break for lunch?

A. I can continue.

Q. Okay. Thank you. So if you would look back again at the marked exhibits, the most recent one that we had open there, the second amended notice of deposition. We're still on Page 2. Oh, no, I'm sorry, we're on Page 3, if you would, and I'm looking at topic No. 5. Do you see it up there?

A. Yes, it begins with, "Your efforts to administer."

Q. It does. Could you just finish reading the rest of that topic for me, please.

A. "Your efforts to administer the Medicaid program in West Virginia and/or affirm your compliance with the Medicaid Act and the Patient Protection and Affordable Care Act."

that reimbursement is available to providers who provide those services to our members. We provide member education, provider education, we have a number of documents on our Website to guide those policies and procedures, and we contract with a number of systems and vendors that help us operationalize those policies.

Q. That was a nice succinct job for what I understand to be a very large undertaking. So it's fair to say then that BMS oversees all matters pertaining to Medicaid recipients' access to West Virginia Medicaid services?

A. Yes.

Q. Okay. Does BMS establish a process for individuals to apply for West Virginia Medicaid eligibility?

A. We do in partnership with a sister Bureau who actually does the application processing.

Q. Oh, I think you mentioned that earlier. What is the name of that Bureau?

A. The original name was Bureau For Children & Families, I believe their current name is Bureau for Family Assistance.

Q. Okay. And that is not housed within BMS?

A. No, it is under the umbrella of DHHR, it is separate and distinct from BMS.

interrogatories to Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, Bureau for Medical Services interrogatories." Did I read that correctly?

A. Yes.

Q. Okay. So if you'll scroll down to what is numbered Page 3, please.

A. Okay.

Q. I'm looking at No. 11 there. If you'll just follow along, I'll read this one, although I suspect you're going to be better at knowing codes than I am, but I'll give it a shot. "Taking necessary steps to comply with applicable privacy laws for each year since 2016 through the present, identify the number of health plan participants who have submitted one or more claims with a diagnosis code for gender dysphoria or gender incongruence. This includes, but is not limited to, the following diagnoses: F64.0, transsexualism (ICD-10-CM); F64.2, gender identity disorder of childhood (ICD-10-CM); F64.8, other gender identity disorders (ICD-10-CM); F64.9, gender identity disorder, unspecified (ICD-10-CM); HA60, gender incongruence of adolescence or adulthood (ICD-11); and HA61, gender incongruence of childhood (ICD-11)." Did I read that mostly correctly?

A. You did, yes.
Q. I'm sorry, I need to technically ask you, did I read that completely correctly?
A. Yes.
Q. Okay. Thank you. So the response begins on Page 3 and says there, "Upon information and belief," and then continues to Page 4 there at the top. Can you just read to me the years and the corresponding number of members, please.
A. 2016, 30 members; 2017, 50 members; 2018, 243 members; 2019, 439 members; 2020, 602 members; 2021 through 9/30, 686 members."
Q. Thank you. So quickly, let me go back to this request here. I just want to make sure we have a shared understanding. So this is, plaintiffs asked defendants to identify the number of health plan participants who have submitted one or more claims with a diagnosis code for gender dysphoria or gender incongruence, do you understand that part of the request?
A. I do, yes.
Q. Good, thank you. So then let's just look at the number for 2021, please, and that's through September, I understand that to be September 30th of 2021. Is that how you understand that date reference there?
A. Yes, I would too, yes.

Technologies.

Q. Okay. And does BMS have, does BMS have access to Gainwell and Kepro? I guess what I mean is, the way you described the MCO's is that they have their own similar process, but it's separate and run through their systems. Is it accurate then to say that fee for service is under BMS and BMS does sort of provide oversight and management and can access both Gainwell and Kepro as necessary?

A. Yes, that's correct.

Q. Okay. All right. As far as you're aware, are there other vendors that BMS works with to understand and utilize accurate criteria in evaluating costs for reimbursement?

A. I believe that there are other vendors on the pharmacy side.

Q. Okay.

A. And they may have another person to speak to that. On the medical side we do engage consultants from time to time, we have a project management contract, so they might do research for us and help us with researching various topics. But offhand, I can't think of another contracted entity that helps with the medical evaluation.

Q. Sure. Let me just ask you about the one I'm

aware of. Are you familiar with InterQual?

A. Yes.

Q. And is that, what is InterQual, as you understand it?

A. As I understand at a very high level, InterQual criteria is a nationally accredited criteria for determining medical necessity for procedures and that is the criteria that our contractor Kepro uses.

Q. Oh, okay. And do you know if the MCO's use InterQual as well for those criteria for assessing medical necessity?

A. I don't know which specific criteria they use. I would believe that their contract states that they must use a nationally accredited criteria.

Q. Okay. What's the importance of using a nationally accredited criteria for those indicia?

A. I think it speaks to the validity and the quality of the product that it is nationally accredited. It's not a homegrown made-up process, it's something that is readily available and has been peer reviewed and all the things that might go into their accreditation.

Q. Thank you. Do you know how long, again, estimate, ballpark is fine, do you have a sense of how long Kepro has been using InterQual? And let's focus, I'm sorry, just on your tenure, I don't expect you to

answer beyond that.

A. Sure. I'm not aware of them using another criteria.

Q. Okay.

A. I've only ever heard of the InterQual criteria.

Q. Okay. Let me, I'm just going to introduce another exhibit here, if you'll give me just one moment.

(Exhibit 12 marked for identification.)

Q. So, Ms. Young, there should be an exhibit now in the marked exhibits folder labeled PL0012.

A. I can see it.

Q. Okay. I'm guessing not, but have you seen this document before?

A. No, I don't believe so.

Q. Okay. If you would please just take a, it's only, it's basically three pages, if you'll take just a quick minute and just review it to your satisfaction and then I've just got a couple of questions.

MS. CYRUS: Are there Bates numbers on that?

MR. CHARLES: No. I think it was in the production that came -- it is not Bates stamped, no.

MS. CYRUS: Okay. Thank you.

A. Okay.

Q. Okay. So what is this document?

a couple parts of this last paragraph, so bear with me. "InterQual procedures criteria," do you see that there?

A. Yes.

Q. Okay. "InterQual procedures criteria are derived from the systematic continuous review and critical appraisal of the most current evidence based literature and include input from our independent panel of clinical experts. To generate the most appropriate recommendations, a comprehensive literature review of the clinical evidence was conducted." Did I read those two sentences accurately?

A. Yes.

Q. Okay. Thank you. I'm going to introduce a couple more exhibits here related to InterQual, if you'd just give me one moment. Okay. So looking at this information from InterQual and in the context of what you shared about what Kepro contracts with InterQual for, did BMS consider the recommendations included in InterQual's medical necessity criteria when determining that coverage for transsexual surgery or for sex transformation were not included in West Virginia Medicaid?

A. I can't speak to the practice when the decision was put in policy in 2004, but I can say that since then we would have not, we would have not reviewed the

criteria for noncovered services.

Q. Okay.

A. So I would imagine InterQual criteria includes every single possible procedure that could be performed and we would only have contracted with Kepro to review the criteria for covered services.

Q. Okay. So in terms of the scope of this topic as it refers to denials of coverage, I know we've talked a number of times about what coverage isn't provided under the West Virginia Medicaid plan. Do you know or are you aware of any instances where BMS has ever communicated with a managed care organization regarding denials for surgical procedures for the treatment of gender dysphoria when it's otherwise medically indicated? Let me rephrase, I'm sorry, I made that a little complicated.

So are you aware of a time where an MCO or, I mean, obviously a person working for the managed care organization has reached out to BMS to say, you know, we have this person, this procedure is medically indicated for them, we understand this limitation in the coverage, what should we do, are you aware of any instances of that kind of request coming from an MCO?

A. Not off the top of my head. I mean, we do receive a number of inquiries, you know, to confirm what

A. Again, I considered everything that we have written on the topic and I was aware that other individuals on the leadership team were aware of this and, you know, in the absence of anyone saying that this is illegal or against regulations, I believe it to be legal.

Q. Okay. So were you able to find any research that was done by BMS about the legality of the exclusion of gender confirming care in West Virginia Medicaid?

A. No, nothing specific to this.

Q. So are you aware of any research that was undertaken to support the particular coverage decision?

A. No, it was honestly more the absence of any guidance or notification from CMS that I found to speak to the legality of it.

Q. Okay. Let me back up just a little bit. From the previous topic that we were discussing, you were not able to find, don't know of any reasons why the exclusion was developed?

A. Correct.

Q. Okay. And you also were not able to find and are not aware of any, what was considered I guess in making the decision to include that exclusion in the Medicaid manuals we were discussing?

A. Correct.

over 600,000 individuals, and so as I spoke, the limited budget that we have, we have to ensure that it will cover the benefits that we have promised and outlined in our policies that we do cover. So the addition of anything extra or anything on top of that is what limits us, you know, we have to be able to do what we said we were going to do.

Q. Sure. And has BMS done research about the cost of providing gender affirming service in West Virginia Medicaid?

A. Not that I'm aware of.

Q. Sorry, can we go back. You said there was a match that happened. Can you just, as you've been doing such a generous job of today, explain generally to me what that refers to?

A. Sure. So each state is allocated a federal match based on a bunch of factors, but basically the economics of the state. So states that are the poorer states get a greater match. I believe the bottom is 50/50, so prosperous states get a 50 percent match on the state dollars. So our budget, the amount of claims that we have to reimburse or capitation that we have to pay on a monthly basis we are required, generally speaking let's say our match is 75 percent, so we would be required to pay 25 percent of that and we can draw

for the treatment of gender dysphoria, that claim would not be denied by BMS solely on the basis that it was for the treatment of gender confirming care?

A. Correct.

Q. Okay. So for those, for that particular coding, the gender dysphoria coding of those visits is accepted, not rejected by BMS West Virginia Medicaid?

A. Correct.

Q. Okay. And as far as you know, does BMS cover office visits related to gender confirming care?

A. Can you be specific as to the type of office.

Q. Sure. So, for example, I know this is tricky, but I'm asking about the office visits to an endocrinologist, not for the purpose of prescribing hormones, but for the purpose of monitoring, blood work, kidney, kidney and liver testing, thyroid. Would those kind of medical visits, again, I'm trying not to get into what the other witness is going to talk about, would those visits be covered under the existing policy?

A. Yes.

Q. Okay. And as far as you're aware, Ms. Young, has BMS in its administration of West Virginia Medicaid provided any partial or total coverage for any surgical procedure for the treatment of gender dysphoria?

A. Not that I'm aware of.

Q. Okay. But as you said earlier today, if the diagnostic code was something different, given other variables we've discussed, it has the potential to be covered?

A. Correct, yes.

Q. Okay.

(Exhibit 19 marked for identification.)

Q. I'm going to introduce a couple of documents. There should be another exhibit there in the shared folder.

MR. CHARLES: And this will be marked, Kelley, as Plaintiff's Exhibit 0019.

Q. So as a part of your testimony in topic 18, you have been designated to testify in regard to BMS's response to request for production No. 2, and that is included on this document that I'm showing you right now. Do you have it in front of you?

A. I do, yes.

Q. Okay. And do you have that same understanding -- sorry, I should be asking you. Do you understand that you've been designated to testify about request for production No. 2?

A. Yes.

Q. Okay. So I'll just read this, "Defendants' seventh supplemental response to plaintiffs' first set

REPORTER'S CERTIFICATE

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

I hereby certify that I reported the Zoom deposition of Sarah Young on the 11th day of March 2022, and that the witness was by me first duly sworn to tell the whole truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

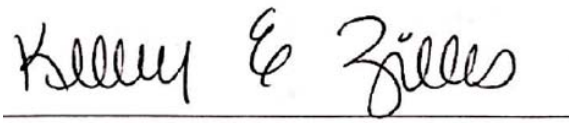
That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was reserved.

WITNESS MY HAND AND SEAL THIS 11th day of March 2022.



Kelley E. Zilles, RPR
Notary Public, Washington County, Minnesota
My commission expires 1-31-2025

In the Matter of:

CHRISTOPHER FAIN

vs

WILLIAM CROUCH, et al.

DR. DAN KARASIC

April 15, 2022

5010 Dempsey Drive
Cross Lanes WV 25313
304-415-1122

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN; ZACHARY MARTELL; BRIAN McNEMAR, SHAWN ANDERSON a/k/a SHAUNTAE ANDERSON; and LEANNE JAMES, individually and on behalf of all others similarly situated,

Plaintiffs,

vs. Civil Action No. 3:20-cv-00740

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; CYNTHIA BEANE, in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES; JASON HAUGHT, in his official capacity as Director of the West Virginia Public Employees Insurance Agency; and THE HEALTH PLAN OF WEST VIRGINIA, INC.,

Defendants.

"CONFIDENTIAL"
VIDEOTAPED DEPOSITION OF DR. DAN KARASIC
BY VIDEO CONFERENCE

The videotaped deposition of Dr. Dan Karasic was taken on April 15, 2022, at 12:02 p.m., at 5010 Dempsey Drive, Cross Lanes, West Virginia.

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gender-related conditions?

ATTORNEY SMITH: Object to form.

A. So I just was -- I thought about that and looked at patients that I saw over a couple of days, and about two-thirds of my private practice patients are transgender.

Q. Do all of those patients who are transgender treat with you for gender dysphoria or gender incongruence?

ATTORNEY SMITH: Object to form.

A. No. Many of them are transgender but are seeing me for -- for example, mood and anxiety disorders or other psychiatric conditions.

Q. And I think that from reading your report there is a difference between someone having a transgender identity and someone having gender dysphoria; is that correct?

ATTORNEY SMITH: Object to form.

A. Yes.

Q. Can you explain what that difference is?

A. Sure. So being transgender is an identity. It's how someone identifies. And

gender dysphoria is used both to describe a symptom, but also to describe a DSM-5 disorder of gender dysphoria.

Q. Is there a difference between gender dysphoria as a symptom and gender dysphoria as a diagnosis?

ATTORNEY SMITH: Object to form.

A. Yes. The DSM diagnosis requires that the person be -- the distress that somebody is experiencing from gender dysphoria be clinically significant or affecting social or occupational -- causing social or occupational impairment.

Q. Does clinical significance mean that it's causing those social or occupational impairments?

A. So it can be social or occupational impairment, or it can be so much distress that you go to the doctor. So that's what's clinically significant.

Q. So there are patients who experience gender dysphoria as a symptom, but do not have the clinical significance that rises to the level of a DSM-5 diagnosis; is that correct?

M.D. Do you have Exhibit 1 in front of you?
A. Yes.
Q. I'm looking at page 5, paragraph 21. And I'll read the first sentence, Gender identity is a person's deeply felt, inherent sense of being a girl, woman or female, a man or male, a blend of male or female or an alternative gender.
And that is citing to the American Psychological Association, 2015.
A. Yes.
Q. And the next sentence says, Gender identity does not always align with sex assigned at birth. Gender identity, which has biological bases, is not a product of external influence and not subject to voluntary change.
First, did I read that correctly?
A. Yes.
Q. Okay. So when you were talking about cultural psychiatry and taking into consideration the experience of individuals with transgender identities, you talked about some external things, such as rejection from family, peers, school, health experiences.

And I'm asking if you can explain to me the difference between those external influences and the internal sense of self that you have stated as the definition of a gender identity?

ATTORNEY SMITH: Object to form.

A. Sure. So as described in this definition from the American Psychological Association, gender identity is an internal sense of self. Societal discrimination is -- or rejection is people's reactions to someone's perceived identity. So, you know, there is an internal experience that a transgender person has as well as, you know, an experience in society.

Q. And I think that I'm understanding you correctly. What my real question here is, is I guess about the reasons that gender identity exists at all. Can you explain what actually forms gender identity?

ATTORNEY SMITH: Object to form.

A. So the -- there isn't a simple answer in terms of what forms a gender identity. You know, people know that there are biological

underpinnings. And there have been sometimes interesting differences that illuminate what forms gender identity. Somebody with complete androgen insensitivity for example is XY in terms of their chromosome, but assigned female at birth. And they may not even know that their chromosomally XY until they go to a fertility doctor in adulthood.

So what we have -- I'd say we have ideas of components, but it certainly -- part of our ongoing learning experience of all the different factors that lead to someone's particular gender identity.

Q. What percentage of transgender individuals have that androgen -- is it -- instability, was that the word you used?

ATTORNEY SMITH: Object to form.

A. Complete androgen insensitivity. Most of those people do not identify as transgender. Most people with complete androgen insensitivity identify as female. And it -- so that's a case where somebody is chromosomally XY, but their cells don't have androgen receptors. And so the presence of androgens

bipolar disorder.

So those are examples certainly where, you know, mental disorder would preclude gender-affirming care at least until it was -- until or unless it could be treated so they were able to give informed consent.

Q. Again, if I'm understanding correctly, it's not that someone with bipolar disorder, that means that they can't have gender-affirming care? It's that their bipolar disorder has to be stable before they're provided gender-affirming care?

ATTORNEY SMITH: Object to form.

A. Yes. And in Standards of Care 7, it's listed as being, you know -- well controlled is the adjective that they use. But the importance is that they -- that they're able to give informed consent, that they're able to participate in care in terms of aspects of what is well controlled.

Q. And since you just mentioned it, I'll ask you a question. The Standards of Care, that's a bit of a misnomer, isn't it?

ATTORNEY SMITH: Object to form.

A. Was that a question?
Q. Yes.
A. Well --
ATTORNEY SMITH: Object to form.
A. -- I think if we look historically that WPATH and its predecessor organization established the Standards of Care as standards of care for the field. I think that they've also been described as practice guidelines.
Q. I don't think anyone will disagree that they're practice guidelines. But just saying we publish the Standards of Care probably doesn't mean that it is the standard of care and that if someone does not comply with that that they're committing malpractice, right?
ATTORNEY SMITH: Object to form.
A. So I think there is still -- there's still a belief that they are trying to set standards of care as well as practice guidelines. And within the standards of care, there certainly is a flexibility and deference to clinical judgment.
So it's not something that is -- well, I don't remember exactly how you put it. But I

I, Martha Fourney, Certified Court Reporter and Notary Public, do hereby certify that the foregoing deposition of the above-named witness, was duly taken by me in machine shorthand, was recorded via Zoom, and that the same were accurately written out in full and reduced to computer transcription.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, nor do I have a financial interest in the action.

My commission expires May 27, 2022

Martha Fourney
Certified Court Reporter/Notary Public