UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK, *et al.*, *individually and on behalf of all others similarly situated,* Plaintiffs, v. WISCONSIN DEPARTMENT OF HEALTH SERVICES, *et al.*, Defendants.	Case No. 3:18-cv-00309-wmc Judge William Conley

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

TABLE OF CONTENTS

LIST OF REFERENCED DOCUMENTS AND EXHIBITS

Plaintiffs cite the following documents in their Proposed Findings of Fact and their Reply to Defendants' Response to Plaintiffs' Proposed Findings of Fact.

STIPULATIONS

Joint Stipulation to Findings of Fact (Apr. 23, 2019) ("SFOF")

PLAINTIFFS' EXPERT WITNESS REPORTS

Expert Witness Report of Stephanie L. Budge, PhD, LP (Jan. 14, 2019) ("Budge Rep.")

Expert Witness Report of Loren S. Schechter, MD (Jan. 12, 2019) ("Schechter Rep.")

Expert Witness Report of Daniel Shumer, MD, MPH (Jan. 14, 2019) ("Shumer Rep.")

Expert Witness Report of Jaclyn White Hughto, PhD, MPH (Jan. 14, 2019) ("Hughto Rep.")

Expert Witness Report of Joan C. Barrett and Elaine T. Corrough (Mar. 22, 2019) ("Barrett/Corrough Rep.")

DEFENDANTS' EXPERT REPORTS

Expert Report of David V. Williams (filed Aug. 22, 2018) [ECF No. 74-1]

Supplemental Expert Witness Decl. of David V. Williams (filed Nov. 19, 2018) [ECF No. 122]

DECLARATIONS

Named Plaintiffs

Decl. of Cody Flack (May 16, 2018) [ECF No. 22] ("Flack Decl.")

Supp. Decl. of Cody Flack (Oct. 16, 2018) [ECF No. 91] ("Flack Supp. Decl.")

Decl. of Sara Ann Makenzie (May 21, 2018) [ECF No. 23] ("Makenzie Decl.")

Second Supp. Decl. of Sara Ann Makenzie (Oct. 18, 2019) [ECF No. 92] ("Makenzie Supp. Decl.")

Decl. of Marie C. Kelly (Oct. 15, 2018) [ECF No. 93] ("Kelly Decl.")

Supp. Decl. of Marie C. Kelly (Apr. 22, 2019) ("Kelly Supp. Decl.")

Decl. of Courtney Sherwin (Oct. 18, 2018) [ECF No. 95] ("Sherwin Decl.")

Supp. Decl. of Courtney Sherwin (Jan. 25, 2019) [ECF No. 132] ("Sherwin Supp. Decl.")

Class Members

Decl. of Lexie Vordermann (Oct. 16, 2018) [ECF No. 99] ("Vordermann Decl.")

Decl. of Tori Vancil (Oct. 16, 2018) [ECF No. 97] ("Vancil Decl.")

Decl. of Emma Grunenwald-Ries (Oct. 15, 2018) [ECF No. 98] ("Grunenwald-Ries Decl.")

Supp. Decl. of Emma Grunenwald-Ries (Feb. 21, 2019) ("Grunenwald-Ries Supp. Decl.")

Medical Providers

Decl. of Linda Wesp, MSN, RN, APNP, FNP-C, AAHIV-S (Oct. 16, 2018) [ECF No. 94] ("Wesp Decl.")

Decl. of Kathy Oriel, MD, MS (Oct. 25, 2018) [ECF No. 109] ("Oriel Decl.")

Supp. Decl. of Katherine M. Gast, MD, MS (Feb. 22, 2019) ("Supp. Gast Decl.")

Decl. of Amy M. DeGueme, MD, ECNU (May 14, 2018) [ECF No. 29] ("DeGueme Decl.")

Decl. of Daniel P. Bergman, MS, LPC (May 14, 2018) [ECF No. 28] ("Bergman Decl.")

Decl. of Clifford King, MD, PhD (May 21, 2018) [ECF No. 30] ("King Decl.")

Decl. of Trisha E. Schimek, MD (May 21, 2018) [ECF No. 31] ("Schimek Decl.")

Decl. of Beth E. Potter, MD (May 23, 2018) [ECF No. 33] ("Potter Decl.")

DEPOSITION TRANSCRIPTS AND EXHIBITS

Rule 30(b)(6) Deposition of Wisconsin Department of Health Services (Apr. 16, 2019)

Ex. 1 – Ltr. from J. Sager to L. Wiggins, Jan. 4, 2017 (DHS001099-1101)

Ex. 2 – Timeline of Internal Handling of Gender Conforming Surgical Requests within Wisconsin Medicaid Fee for service

Ex. 3 – Ltr. from J. Sager to DHS Office of Legal Counsel, Sep. 25, 2017 (DHS003006-3007)

OTHER EXHIBITS

Declaration of Orly T. May, Esq. (May 23, 2018) [ECF No. 21] ("First May Decl."):

Ex. 1 – American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, "Gender Dysphoria" 451-459 (5th ed. 2013)

Ex. 20 – Administrative Law Judge B. Schneider Decision in C. Flack's Administrative Appeal of Defendants' Denial of Medical Assistance, Nov. 21, 2017

Ex. 23 – Nat'l Ctr. for Transgender Equality, *Exec. Summ. of Report of 2015 U.S. Transgender Survey* (2016)

Ex. 24 – Nat'l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey: Wis. State Report* (2017)

Second Declaration of Orly T. May, Esq. (Apr. 23, 2019) ("Second May Decl."):

Ex. 1 – Defendants' Responses to Plaintiffs' First Set of Interrogatories (Mar. 28, 2019)

Ex. 2 – Movement Advancement Project, *Equality Maps: Healthcare Law and Policies, Medicaid* http://www.lgbtmap.org/equality_maps/profile_state/WI (last visited Apr. 22, 2019)

Ex. 3 – Movement Advancement Project, *Wisconsin Equality Profile*, http://www.lgbtmap.org/equality_maps/profile_state/WI (last visited Apr. 22, 2019)

Ex. 4 – Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016, updated 2017)

Ex. 5 – Maggie Astor, *Danica Roem Wins Virginia Race, Breaking a Barrier for Transgender People*, N.Y. Times, Nov. 7, 2017, https://www.nytimes.com/2017/11/07/us/danica-roem-virginia-transgender.html

Ex. 6 – Antonio Olivo, *Danica Roem of Virginia to be first openly transgender person elected, seated in a U.S. statehouse*, Wash. Post, Nov. 8, 2017, http://wapo.st/2zEX1aD

Ex. 7 – Julie Moreau, *Over 150 LGBTQ candidates claim victory in midterm elections*, NBC News, Nov. 7, 2018, https://www.nbcnews.com/feature/nbc-out/over-100-lgbtq-candidates-claim-victory-midterm-elections-n933646

Ex. 8 – World Prof'l Ass'n of Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, (7th Version 2011)

Ex. 9 – Wylie C. Hembree, et al., "Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline," J. Clinical Endocrinology & Metabolism (2017) ("Endocrine Society Guidelines")

Ex. 10 – Email from K. Plunkett to J. Sager & L. Wiggins (Mar. 11, 2019) (attaching spreadsheet entitled Gender Reassignment Procedure Code List ("DHS Gender Reassignment Procedure Code List") (Mar. 11, 2019) (Bates range DHS000393-94)

Ex. 11 – Email from J. Sager to R. Currans-Henry, et al., Nov. 14, 2016 (DHS001008-1009)

Ex. 12 – Email from J. Sager to L. Wiggins, Jan. 4, 2016 (DHS001099-1100)

Ex. 13 – Wis. Dep't of Health Servs., Biennial Rule Review Document (Jan. 2018) (Bates number DHS000520)

Third Declaration of Orly T. May, Esq. (June 4, 2019) ("Third May Decl."):

Ex. 1 – Email from E. Lorman to M. Matke, et al. attaching a copy of the Wis. Dep't of Health Servs. Biennial Rule Review Document (DHS00520), Feb. 14, 2019 (DHS000517-19)

Declaration of Abigail A. Moats (Apr. 23, 2019) ("Moats Decl.")

Ex. 1 – Plaintiffs' Subpoena to Molina Health Care of Wisconsin

Ex. 2 – HMO Denials Summary Chart

Plaintiffs respectfully submit the following Reply to Defendants' Response [ECF No. 183] to Plaintiffs' Proposed Findings of Fact ("PFOF") [ECF. No. 153] in support of their Motion for Summary Judgment.

PLAINTIFFS' GENERAL OBJECTION TO DEFENDANTS' CITATIONS TO THE INADMISSIBLE AND UNRELIABLE TESTIMONY OF DR. MICHELLE OSTRANDER

In their responses to Plaintiffs' proposed findings of fact, Defendants attempt to rely on the inadmissible and unreliable testimony of Dr. Michelle Ostrander to suggest the existence of a factual "dispute" where no genuine dispute of material fact exists. In an attempt to fully or partially dispute 34 different facts below,[1] Defendants cite Dr. Ostrander's four-page declaration, which contains no opinion at all, in violation of Fed. R. Civ. P. 26(a)(2)(B); the four Hayes, Inc. reports she attached to her report (but did not author herself), which are inadmissible hearsay; and the studies cited *within* those documents, which are inadmissible hearsay within hearsay. In general, Defendants attempt to rely on these sources to dispute whether gender-confirming surgeries are medically necessary, going so far as to try to rely on Dr. Ostrander's purported testimony to dispute the need for surgeries for the individual plaintiffs and class members and the effect of those surgeries on these individuals' gender dysphoria and overall well-being. *See* Defs.' Resps. to PFOF Nos. 123, 130-31, 152, 157, 163, 172-74, 183, 185.

For the reasons detailed in Plaintiffs' accompanying brief in support of their motion to strike Dr. Ostrander's report and exclude her testimony ("Mot. to Strike Br."), her purported testimony is wholly inadmissible and is, in any event, unreliable. Dr. Ostrander is not a clinician, has no expertise or experience in gender dysphoria or transgender health. She expressly offers *no* opinion on whether gender-confirming surgeries are medically necessary—and is admittedly

[1] They are PFOF Nos. 5, 6, 8, 35, 51, 58, 59, 60, 65, 66, 69, 70, 72, 73, 76, 77, 78, 97, 99, 121, 122, 123, 130, 131, 135, 152, 157, 160, 163, 172, 173, 174, 183, and 185.

unqualified to do so. Indeed, she "take[s] no position on the medical necessity of any particular medical procedure or service for any particular patient, including the named plaintiffs in this case." Decl. of Michelle Ostrander, Ph.D. ¶ 12 [ECF No. 186] ("Ostrander Decl."). She is offering no opinion on the safety or efficacy of gender-confirming surgeries, and it is expressly *not* her opinion that gender-confirming surgeries are unsafe or ineffective at treating gender dysphoria. Mot. to Strike Br. at 1, 11. Her limited opinion, even if otherwise admissible, is irrelevant as it pertains only to the state of the evidence on gender-confirming surgeries as of various dates in 2014 and 2018. Mot. to Strike Br. at 11, 30; Ostrander Decl. at ¶¶ 5-8. She offers no current opinions on any topic. Mot. to Strike Br. at 11, 14; Ostrander Decl. at ¶¶ 11-12.

Because Dr. Ostrander's report and testimony are inadmissible under Fed. R. Civ. P. 26(a)(2)(B), Fed. R. Evid. 702, Fed. R. Evid. 802, and *Daubert*, her testimony cannot be used to create a genuine issue of material fact on any topic. *See Stasior v. Nat'l R.R. Passenger Corp.*, 19 F. Supp. 2d 835, 853 (N.D. Ill. 1998) (citing *Mid–State Fertilizer Co. v. Exch. Nat'l Bank of Chi.*, 877 F.2d 1333, 1337-40 (7th Cir. 1989); *Dukes v. Ill. Cent. R.R. Co.*, 934 F. Supp. 939, 946 (N.D. Ill. 1996) ("Expert testimony which is not admissible cannot create genuine issues of fact sufficient to preclude summary judgment.") As Dr. Ostrander does not have, or attempt to derive, any conclusions about the medical necessity of gender-confirming surgeries from the Hayes reports she cites and the studies cited therein, neither can Defendants. Nor can they use her testimony, as a non-clinician offering no opinion on medical necessity, to create any dispute about the need for or effect of gender-confirming surgeries on plaintiffs or anyone else.

Even if the Hayes reports attached to Dr. Ostrander's report were not inadmissible hearsay, they are not reliable—a conclusion shared by a number of federal courts. Mot. to Strike Br. at 19-26. *See, e.g.*, *Cruz v. Zucker*, 195 F. Supp. 3d 554, 574-75 (S.D.N.Y. 2016),

reconsideration on other grounds granted, 218 F. Supp. 3d 246 (S.D.N.Y. 2016); *K.G. ex rel. Garrido v. Dudek*, 981 F. Supp. 2d 1275, 1285-86 (S.D. Fla. 2013); *Potter v. Blue Cross Blue Shield of Mich.*, No. 10-cv-14981, 2013 WL 4413310, at * 9-11 (E.D. Mich. Mar. 30, 2013); *Berge v. United States*, 879 F. Supp. 2d 98, 134-36 (D.D.C. 2012), *amended and vacated in part on other grounds on reconsideration*, 949 F. Supp. 2d 36 (D.D.C. 2013); *Whitley v. Carolina Care Plan, Inc.*, No. C/A 3:06-257-CMC, 2006 WL 3827503, at *30 (D.S.C. Dec. 28, 2006). And the studies cited *within* the Hayes reports, which Defendants refer to multiple times in their responses below, are hearsay within hearsay and are wholly inadmissible. They cannot serve as a basis for creating a factual dispute.

Thus, as fully explained in Plaintiffs' motion to strike brief, the Court should summarily reject Defendants' attempts to rely on Dr. Ostrander's testimony to create any factual dispute.

INTRODUCTION

1. Named Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin bring this class action lawsuit on behalf of themselves and a proposed class of "[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria," Pls.' Mot. for Class Cert. 1 [ECF No. 89], challenging Wisconsin Medicaid's categorical exclusion of coverage for gender-confirming medical and surgical treatments for gender dysphoria. Am. Compl. with Class Action Allegations ¶ 1 [ECF No. 85].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

2. Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the "Challenged Exclusion"), a provision of Wisconsin's Medicaid regulations, categorically excludes coverage for transition-related medical care, including "[t]ranssexual surgery" and "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics." Joint Stip. to Findings of Fact (Apr. 23, 2019) ("SFOF") ¶¶ 62-63.

RESPONSE: Defendants OBJECT to the statement that Wis. Admin. Code § DHS 107.10(4)(p) is part of the "Challenged Exclusion." Plaintiffs did not include this law in their Amended Complaint. (Dkt. 1 ¶ 1.) The parties did not stipulate to this code provision as being part of "the Challenged Exclusion." (SFOF ¶10.) Subject to that objection, for the purposes of summary judgment, Defendants do not dispute the remainder of proposed finding.

REPLY: There is no dispute of a material fact here as Wis. Admin. Code § DHS 107.10(4)(p) merely repeats the exclusion contained in Wis. Admin. Code § DHS 107.03(23), and Plaintiffs, on May 23, 2019, filed a consent motion for leave to file a second amended complaint [ECF No. 189], to conform the definition of the Challenged Exclusion to contain all of the relevant provisions of the Wisconsin Medicaid regulations.

3. Although the Wisconsin Department of Health Services ("DHS"), the agency charged with the administration of Wisconsin Medicaid, concedes that untreated or inadequately treated gender dysphoria is associated with serious mental health harms, including psychological distress, depression, anxiety, self-harm, and suicidality, SFOF ¶¶ 18, 57; Rule 30(b)(6) Dep. of Wis. Dep't of Health Servs. (Apr. 16, 2019) ("DHS Dep.") 26:9-22, and recognizes that the medical community views gender-confirming surgeries as safe and effective treatments for gender dysphoria, SFOF ¶ 60, the agency continues to categorically deny coverage for *all* surgical procedures intended to treat gender dysphoria. SFOF ¶ 64; DHS Dep. 20:2-21:7. Moreover, it is Wisconsin Medicaid's policy to exclude gender-confirming hormone treatments from coverage, SFOF ¶ 80, despite DHS's recognition that hormone therapy is a medically necessary treatment for gender dysphoria for many transgender people. SFOF ¶ 61; DHS Dep. 19:22-20:1, 21:18-25.

RESPONSE: Partial dispute. Defendants did not agree that "the medical community" views gender-confirming surgeries as safe and effective treatments for gender dysphoria. Defendants only agreed as to the American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, and other major medical organizations. (SFOF ¶ 60.) Defendants did not agree that it categorically denies coverage "for *all* surgical procedures intended to treat gender dysphoria," as the Challenged Exclusion does not apply to beneficiaries under age 21. (SFOF ¶ 65.) Defendants did not agree that "it is Wisconsin

Medicaid's policy to exclude gender-confirming hormone treatments from coverage," only that it excludes *some* hormone therapy treatments for gender dysphoria. (SFOF ¶ 80.) Only hormone therapy associated with transsexual surgery is excluded under the Challenged Exclusion. (Dkt. 166-1:22.) Defendants dispute that Wisconsin Medicaid does not cover hormone therapy for transgender individuals with gender dysphoria. (Dkt. 85 ¶¶ 67, 90, 106; 99 ¶ 14.) For the purposes of summary judgment, Defendants do not dispute the remainder of proposed finding.

REPLY: There is no genuine dispute of a material fact here because (1) the question of whether the views of the listed major medical organizations reflects the position of "the medical community" is a semantic, not substantive one; (2) there is no dispute that the Challenged Exclusion, on its face, excludes coverage for gender-confirming surgeries and hormone treatments "associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics," and (3) there is unrebutted evidence on the record showing that Wisconsin Medicaid beneficiaries have been denied coverage for hormones unrelated to surgery based on the Challenged Exclusion.

First, there is no dispute that the American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, and other major medical organizations consider gender-confirming surgeries as safe and effective treatments for gender dysphoria. Whether this reflects the position of "the medical community" is a matter of semantics and does not rise to the level of a genuine dispute. Defendants have offered no evidence to rebut Plaintiffs' evidence that the prevailing medical consensus is that these services are safe and effective treatments.

Second, there is no dispute that the Challenged Exclusion, on its face, applies to all Wisconsin Medicaid beneficiaries. Plaintiffs do not dispute Defendants' position that DHS does

not currently *apply* the Challenged Exclusion to beneficiaries under age 21, although that is immaterial to this proposed fact, which addresses the services that are excluded under the policy. There is no dispute that "DHS interprets 'transsexual surgery' to mean any surgical procedure intended to treat gender dysphoria," SFOF ¶ 64, and enforces the Challenged Exclusion accordingly.

Third, Plaintiffs do not dispute Defendants' position that DHS does not exclude *all* hormone treatments from Medicaid coverage for fee-for-service members. However, undisputed record evidence indicates that Wisconsin Medicaid HMOs have denied coverage to beneficiaries for gender-confirming hormone treatments unrelated to transsexual surgery. *See* Decl. of Abigail Moats ¶ 12 & Ex. 2 [ECF No. 167] (documenting HMO denials for surgeries, hormones, and other treatments based on the Challenged Exclusion from 2014 to present).

4. Wisconsin Medicaid covers the same treatments excluded by the Challenged Exclusion when medically necessary to treat other conditions. SFOF ¶ 81; DHS Dep. 26:5-8, 68:23-70:4.

RESPONSE: Do not dispute that it is Wisconsin Medicaid's policy to exclude from coverage *certain* medical services, treatments, and/or procedures when deemed medically necessary by a beneficiary's medical provider to treat gender dysphoria, but to cover the same procedures when they are deemed medically necessary by a beneficiary's medical provider to treat certain conditions other than gender dysphoria. (SFOF ¶ 81) Assert that some treatments are excluded for all Medicaid beneficiaries, regardless of sex or transgender status. *See* Wis. Admin. Code § DHS 107.06(5)(i) (establishing that electrolysis is a non-covered service). For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not raise any disputed fact. The surgical procedures excluded from coverage under the Challenged Exclusion that Wisconsin Medicaid covers for other conditions include mastectomy, reduction mammoplasty, breast reconstruction, hysterectomy, oophorectomy, salpingo-oophorectomy, orchiectomy, penectomy, and vaginoplasty. SFOF ¶¶ 81-84. The example of a non-covered service for all Medicaid beneficiaries listed in Defendants' response—electrolysis—is not a surgical procedure and, as such, is presumably not subject to the Challenged Exclusion. Plaintiffs are unaware of any surgical or hormone treatments for gender dysphoria that are considered by DHS to be non-covered services for all Medicaid beneficiaries.

5. DHS has offered no justification for its policy of excluding treatments for gender dysphoria that are covered for other conditions. In fact, the agency is unaware of any information that the Challenged Exclusion was ever motivated by concerns about the safety, efficacy, or cost of covering gender-confirming treatments, SFOF ¶¶ 70-78, 87-88, and it does not consider the treatments experimental. Op. & Order, July 26, 2018, at 26 n.22 ("PI Op.") (noting party admission by Defendants' counsel at preliminary injunction hearing).

RESPONSE: Dispute. Defendants note that the term "experimental" refers to the definition in Wis. Admin. Code § DHS 107.035. Plaintiffs' cited evidence does not support its proposed finding that DHS has offered no justification for its policy of excluding treatments for gender dysphoria that are covered for other conditions. (*See* SFOF ¶¶ 70–78, 87–88.) From 1995, DHS documented its motivation underlying the Challenged Exclusion as excluding services and products that were determined not to be medically necessary and, therefore, not medically efficacious under Wis. Admin. Code § DHS 101.03(96m). (Dkt. 21-13:2; 21-14:2–3.) DHS also documented that the Challenged Exclusion would result in "decreased costs" for state government. (Dkt. 21-14:2.) So while there is no record of what information DHS considered when making the determination that these services were medically unnecessary and cost effective, it is undisputed that such determinations were made. (Dkt. 21-13:2; 21-14:2–3) DHS's

expert witnesses, referenced in SFOF ¶¶ 75 and 77, support DHS's justifications for the Challenged Exclusion of cost savings and questions of medical efficacy of "transsexual surgery" and related hormone therapy as treatment of gender dysphoria. (Dkt. 74-1, 122; Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.)

REPLY: Defendants' response raises no genuine issue of material fact because (1) Defendants have already conceded that they do not consider gender-confirming treatments "experimental," (2) there is no evidence that Defendants were *motivated* by genuine concerns of cost or medical necessity when they promulgated the exclusion, (3) there is no genuine dispute that gender-confirming surgeries can be medically necessary, and (4) there is no dispute that the potential cost impact to Wisconsin Medicaid of covering gender-confirming surgeries, even by their own expert's estimate, is immaterial from an actuarial standpoint.

First, Defendants have admitted to this Court and stipulated that they have never considered gender-confirming treatments to be "experimental." Whether the definition of experimental arises from Wisconsin regulations or is used by its common meaning is immaterial.

Second, the record contradicts Defendants' assertion that cost savings *motivated* the Challenged Exclusion when it was promulgated. At best, the document cited by Defendants, ECF No. 21-14, is a form document for all regulatory changes that required the agency to check whether the proposed rule would "increase costs" or "decrease costs" to the state government. Of these two choices, the agency checked the latter, but in the narrative section below indicated that the exclusions contained in the proposed rule (of which the exclusion on gender-confirming care was just one) were collectively "expected to result in nominal savings for state government." ECF No. 21-14 at 2. In a transmittal form accompanying that document, the agency further explained that, "[a]ctually the program has hardly ever paid for any of these services or for those

purposes, but questions about coverage continue to come up." ECF No. 21-14 at 3. There is nothing in the record to suggest this was anything more than a pro forma statement in the regulatory materials, let alone a *motivating* factor for the Challenged Exclusion.

Likewise, Defendants have offered no admissible or credible evidence that a genuine determination that gender-confirming surgeries are unproven, unsafe, or ineffective *motivated* the State's promulgation of the Challenged Exclusion. Indeed, their own admissions contradict that assertion, as DHS admits it is not aware of any information that the "determination" that the excluded services were "medically unnecessary" was based "on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services," or that the agency determined the excluded services to be experimental, unsafe, or ineffective at treating gender dysphoria. SFOF ¶¶ 70-73. Defendants' contention in their response that the agency's characterization of the excluded services as "medically unnecessary" is synonymous with a reasoned finding or determination that they were "not medically efficacious" is unsupported by the record.

Third, there is no genuine dispute that gender-confirming surgeries can be medically necessary treatments for gender dysphoria. Moreover, the record evidence—including the testimony of DHS's medical director in a 30(b)(6) deposition of the agency—demonstrates that the position of Wisconsin Medicaid's medical directors is that gender-confirming surgeries can be medically necessary, and that the Challenged Exclusion conflicts with current medical practice and the generally accepted standards of care for treating gender dysphoria. DHS Dep. 62:24-64:22. In addition, Dr. Sager, DHS's former medical director, acting in her official capacity, determined gender-confirming surgeries were medically necessary in at least two individual circumstances. DHS Dep. 51:17-52:15; 58:18–59:15. The testimony of Defendants'

expert witness, Dr. Michelle Ostrander, must be excluded for the reasons stated in the General Objection above and Plaintiffs' accompanying motion to strike. Dr. Ostrander offers no opinion on the medical necessity, safety, or efficacy of gender-confirming surgeries at any point, let alone at the time the Challenged Exclusion was promulgated, nor does she take any position whatsoever on hormone treatments. Mot. to Strike Br. at 10, 11, 29.

Fourth, with respect to cost savings, there is no genuine dispute of a material fact: even accepting Defendants' estimated cost savings associated with the Challenged Exclusion as true, there is no dispute that those savings (0.01 to 0.03 percent of the State's annual Medicaid spending) are actuarially immaterial.

6. To the contrary, the medical directors at DHS charged with making clinical coverage determinations for Wisconsin Medicaid beneficiaries consider gender-confirming hormone and surgical treatments for gender dysphoria to be medically necessary, DHS Dep. 44:22-46:6, and that the Challenged Exclusion conflicts with current medical practice and the accepted standards of care for treating gender dysphoria, DHS Dep. 62:24-64:22. As DHS itself admits, its recent enforcement of the Challenged Exclusion has been motivated exclusively by political, not clinical, considerations. DHS Dep. 32:19-33:7, 45:17-19, 50:5-23 & Ex. 3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute that these were the personal opinions of Dr. Julie Sager, but dispute that DHS's recent enforcement of the Challenged Exclusion has been motivated exclusively by political considerations. The Challenged Exclusion is part of the Wisconsin Administrative Code that DHS is required to apply, so its motivation in applying the Challenged Exclusion is to follow the law. (Dkt. 165, DHS Dep. 33:3–7.) Since the time the Challenged Exclusion was promulgated in 1995, DHS provided two justifications: (1) cost to the Medicaid program; and (2) medical efficacy. Specifically, DHS documented its motivation underlying the Challenged Exclusion as excluding services and products that were determined not to be medically necessary and, therefore, not medically efficacious. (Dkt. 21-13:2; 21-14:2–3) DHS also documented that the Challenged

Exclusion would result in "decreased costs" for state government. (Dkt. 21-14:2.) DHS's expert witnesses, referenced in SFOF ¶¶ 75 and 77, support DHS's justifications for the Challenged Exclusion of cost savings and medical. (Dkt. 74-1, 122; Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.)

REPLY: Defendants' response creates no genuine issue of material fact because the evidence they cite, including the inadmissible, unreliable, and irrelevant report of Dr. Michelle Ostrander, does not rebut the proposed fact.

First, there is no dispute that recent enforcement of the Challenged Exclusion was not based on clinical considerations. As to whether the enforcement decisions were purely political, the Rule 30(b)(6) transcript and referenced exhibits/documents speak for themselves.

Second, for the reasons explained in Plaintiffs' reply in PFOF No. 5 above, the record does not support Defendants' assertion that cost savings or concerns about safety or efficacy were motivating factors for the Challenged Exclusion when it was promulgated. In fact, the record contradicts Defendants' assertion that cost savings *motivated* the Challenged Exclusion when it was promulgated. The testimony of Defendants' expert witness, Dr. Ostrander, must be excluded for the reasons stated in the General Objection above and Plaintiffs' accompanying motion to strike.

7. Nevertheless, DHS enforces the Challenged Exclusion to the present day. SFOF ¶ 11. DHS and the third-party managed care organizations ("HMOs") that administer Wisconsin Medicaid plans continue to deny coverage to transgender beneficiaries for gender-confirming hormone treatments, surgeries, and related services pursuant to the Challenged Exclusion. SFOF ¶ 89; Defs.' Resp. to Pls.' Interrogatory No. 5.

RESPONSE: Dispute that DHS or third-party managed care organizations can enforce the Challenged Exclusion when applied to beneficiaries under age 21. (SFOF ¶ 65.) Dispute that hormones are systematically denied to beneficiaries under the Challenged Exclusion. (Dkt. 85 ¶¶

67, 90, 106; 99 ¶ 14.) Only hormone therapy associated with transsexual surgery is excluded under the Challenged Exclusion. (Dkt. 166-1:22.) For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response creates no genuine issue of material fact because Defendants do not dispute the record evidence that Wisconsin Medicaid HMOs *do* deny Wisconsin Medicaid coverage for gender-confirming treatments for beneficiaries under 21 pursuant to the Challenged Exclusion, regardless of whether DHS thinks they "can." There is no dispute that the Challenged Exclusion, on its face, applies to all Wisconsin Medicaid beneficiaries. Plaintiffs do not dispute Defendants' position that DHS does not currently *apply* the Challenged Exclusion to beneficiaries under age 21. However, undisputed record evidence indicates that Wisconsin Medicaid HMOs have denied coverage for gender-confirming surgeries and hormone treatments unrelated to surgery to a number of beneficiaries, including beneficiaries under 21. *See, e.g.*, Decl. of Lexie Vordermann ¶¶ 9-11 [ECF No. 99] (denial of surgery to beneficiary under 21); Decl. of Abigail Moats ¶ 12 & Ex. 2 [ECF No. 167] (documenting HMO denials for surgeries, hormones, and other treatments based on the Challenged Exclusion from 2014 to present). There is also no dispute that DHS has never provided guidance to HMOs on the scope of the excluded services under the Challenged Exclusion, SFOF ¶¶ 68-69, leaving HMOs to construe the scope of the exclusion on their own. In any event, the material, undisputed fact is that DHS and its participating HMOs enforce the Challenged Exclusion to the present day, categorically denying coverage for gender-confirming care to transgender beneficiaries with gender dysphoria. SFOF ¶¶ 11, 79, 80.

8. Categorical exclusions on gender-confirming health care, including the Challenged Exclusion, are medically harmful and inconsistent with the contemporary medical and scientific understanding of gender identity, applicable peer-reviewed scientific and medical research, and the medical and scientific consensus that this care is medically necessary for

transgender people with gender dysphoria. Expert Report of Stephanie L. Budge 18-19 (Jan. 14, 2019) ("Budge Rep."); Expert Report of Loren S. Schechter, MD 18-19 (Jan. 12, 2019) ("Schechter Rep."); Expert Report of Daniel Shumer, MD, MPH 16-17 (Jan. 14, 2019) ("Shumer Rep."); Expert Report of Jaclyn White Hughto, PhD, MPH 25-27 (Jan. 14, 2019) ("Hughto Rep."); *see also* DHS Dep. 28:14-16, 30:6-15, 33:8-34:3 (recognizing the current medical view that gender-confirming treatments are medically necessary to treat gender dysphoria).

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) Given the poor quality of this evidence, these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. As Defendants have not offered any admissible evidence to rebut the expert opinions of Plaintiffs' gender dysphoria experts, and thus have failed to dispute those experts' shared opinion that gender-confirming surgeries are safe, effective, and medically necessary treatments for gender dysphoria for many transgender people, there is no genuine dispute of a material fact.

9. Wisconsin is currently one of just nine states with categorical Medicaid exclusions on gender-confirming health care. Movement Advancement Project, *Equality Maps: Healthcare Laws and Policies, Medicaid*, http://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (click on "Medicaid" tab) (last visited Apr. 22, 2019 [Ex. 2 to Second Decl. of Orly T. May, Esq. (Apr. 23, 2019) ("Second May Decl.")].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

BACKGROUND

Jurisdiction and Venue

10. The Court has jurisdiction over the claims asserted herein under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4). SFOF ¶ 90.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

11. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, and Rules 57 and 65 of the Federal Rules of Civil Procedure. SFOF ¶ 91.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

12. Under 28 U.S.C. § 1391, venue is proper in the Western District of Wisconsin. SFOF ¶ 1.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

The Parties

The Named Plaintiffs

13. Plaintiff Cody Flack is an adult resident of Green Bay, Brown County, Wisconsin. SFOF ¶ 92.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

14. Plaintiff Sara Ann Makenzie is an adult resident of Baraboo, Sauk County, Wisconsin. SFOF ¶ 93.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

15. Plaintiff Marie Kelly is an adult resident of Milwaukee, Milwaukee County, Wisconsin. SFOF ¶ 94.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

16. Plaintiff Courtney Sherwin is an adult resident of Janesville, Rock County, Wisconsin. SFOF ¶ 95.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

Defendants

17. Defendant Wisconsin Department of Health Services ("DHS") is the Wisconsin state agency charged with the administration of Wisconsin Medicaid consistent with federal and state requirements. SFOF ¶¶ 2, 7.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

18. DHS is a recipient of federal funds, including Medicaid funding for Wisconsin Medicaid. SFOF ¶ 3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

19. Defendant Andrea Palm, sued in her official capacity, is the Secretary-Designee of DHS. As Secretary, she is responsible for implementing the Medicaid Act consistent with federal Medicaid requirements and state law, Wis. Stat. § 46.014. SFOF ¶ 4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

20. DHS receives federal funding from the U.S. Department of Health and Human Services, including reimbursement of over half of the State of Wisconsin's Medicaid expenditures. SFOF ¶ 8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

WISCONSIN MEDICAID

21. Established in 1965 under Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396w-5 (the "Medicaid Act"), Medicaid is a joint federal-state program that provides medical assistance to eligible low-income individuals. SFOF ¶ 5.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

22. Medicaid enables states to furnish medical services to persons whose incomes and resources are insufficient to meet the cost of necessary medical services by reimbursing participating states for a substantial portion of the costs of providing medical assistance. 42 U.S.C. §§ 1396-1, 1396b; SFOF ¶ 6.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

23. Wisconsin, like every other state, participates in Medicaid. SFOF ¶ 7.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

24. Wisconsin's medical assistance statute, Wis. Stat. §§ 49.43-.65, and its implementing regulations, Wis. Admin. Code § DHS 101.01-109.74, govern Wisconsin Medicaid. SFOF ¶ 9.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

25. Currently, Wisconsin Medicaid has approximately 1.2 million enrollees. SFOF ¶ 12; DHS Dep. 22:21-23:3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

26. The current annual Wisconsin Medicaid expenditures are approximately $9.7 billion, including federal reimbursements. SFOF ¶ 13. The State of Wisconsin pays, on average, 40.6 percent of that total, with the federal government contributing the balance. Expert Report of David V. Williams 3 (Aug. 22, 2018) [ECF No. 74-1]; Expert Witness Report of Joan Barrett & Elaine Corrough 5, 7 (Mar. 22, 2019). Based on current expenditures, Wisconsin's annual portion is approximately 40.6 percent of $9.7 billion, or approximately $3.9 billion per year.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

27. Wisconsin Medicaid beneficiaries are enrolled in either a fee-for-service plan administered directly by DHS or an HMO Medicaid plan offered through one of 15 third-party managed care organizations. DHS Dep. 14:19-15:16, 18:4-8. Currently, approximately 20 percent of Wisconsin Medicaid beneficiaries are enrolled in a fee-for-service plan. DHS Dep. 15:12-14. The other 80 percent are in an HMO Medicaid plan. DHS Dep. 15:12-17.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

28. Fee-for-service plans are administered directly by DHS without the aid of a third-party administrator. DHS Dep. 15:3-11. Prior authorization requests for fee-for-service members are reviewed directly by DHS's prior authorization review staff. DHS Dep. 15:25-16:10.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

29. DHS's prior authorization reviewers typically use the agency's published guidelines to determine the clinical appropriateness of a requested service and to make coverage determinations. DHS Dep. 15:25-17:9. Requests for services without published guidelines, including gender-confirming surgeries, are reviewed by medical doctors on the clinical staff of the Bureau of Benefits Management ("BBM") in DHS's Division of Medicaid Services. DHS Dep. 17:10-18:3. BBM is the bureau within DMS that enforces benefits policies and creates clinical coverage guidelines. DHS Dep. 6:21-7:17. BBM is responsible for enforcing the Challenged Exclusion at issue in this case. DHS Dep. 7:18-8:22.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding, with the clarification that BBM and medical doctors and clinical staff have to work within the benefits allowed by statute and the administrative code when reviewing prior authorization requests for beneficiaries in fee-for-service plans. (Dkt. 165, DHS Dep. 17:7–9.)

REPLY: Plaintiffs do not dispute the State's clarification.

30. Currently, BBM's clinical staff members are Dr. Lora Wiggins (Chief Medical Officer of BBM), Dr. Julie Sager (Medical Director of BBM), and Dr. Steven Tyska (Medical Director of BBM). DHS Dep. 6:16-24; 10:15-11:9; 12:13-21. The job responsibilities of BBM's medical directors include overseeing the clinical appropriateness and content of DHS policies administered by BBM, setting clinical policy, and supporting DHS's prior authorization staff when there are requests outside of the agency's written published guidelines or some clarification of a clinical nature is needed. DHS Dep. 6:25-7:17. Dr. Wiggins, Dr. Sager, and Dr. Tyska are the only doctors in BBM. DHS Dep. 12:13-21.

RESPONSE: Partial dispute. Do not dispute that at the time of this deposition, Dr. Lora, Dr. Julie Sager, and Dr. Steven Tyska were the only medical doctors in BBM. But Dr. Sager has since left DHS and Dr. Tyska is the new Medical Director. (Dkt. 165, DHS Dep. 12:19–21; 63:23–25.)[2] The cited deposition excerpts do not support that these doctors are BBM's only "clinical" staff members, just that they were the only medical doctors in BBM. For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Plaintiffs do not dispute Defendants' clarification, but note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

31. Currently, the following managed care organizations offer one or more Wisconsin Medicaid plans: Anthem Blue Cross Blue Shield of Wisconsin (formerly Community Connect); Dean Health Plan, Inc.; Care Wisconsin Health Plan; Children's Community Health Plan; Group Health Cooperative of Eau Claire; Group Health Cooperative of South Central Wisconsin; MercyCare Insurance Company; MHS Health Wisconsin; Molina Healthcare of Wisconsin (formerly Abri); Network Health Plan; iCare (Independent Health Care Plan); Quartz Health Solutions, Inc.; Security Health Plan of Wisconsin; Trilogy Health Insurance, Inc.; and UnitedHealthcare Community Plan. SFOF ¶ 66; Defs.' Resp. to Interrogatory No. 8. In addition, the following managed care organizations previously offered one or more Wisconsin Medicaid plans from January 1, 2009 to present: Children's Community Health Plan Central; Compcare; CommunityConnect; Physicians Plus Insurance Corporation; Dean Health Plan SE; Gundersen; HTHP; and Unity. *Compare* SFOF ¶ 66 *with* Defs.' Resp. to Interrogatory No. 8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

[2] Effective April 24, 2019, Dr. Sager is no longer employed by DHS.

32. These managed care organizations oversee, manage, and administer Medicaid benefits to the Wisconsin Medicaid beneficiaries enrolled in their respective plans. DHS Dep. 18:9-23. Prior authorization requests are reviewed, and approved or denied, by each managed care organization's own clinical staff. DHS Dep. 18:9-25. Coverage determinations must meet DHS's minimum standards and are made according to DHS's published guidelines (if any). DHS Dep. 18:9-25.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

33. When a managed care organization denies a prior authorization request, the beneficiary has the option of submitting their request to DHS to determine whether it would have been covered by DHS for a fee-for-service beneficiary. DHS Dep. 19:1-10. If DHS determines the requested treatment is medically necessary and would have been covered for a fee-for-service beneficiary, it compels the managed care organization to cover the treatment. DHS Dep. 19:1-21.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

34. As prior authorization requests denied by managed care organizations are not reportable to DHS unless the beneficiary seeks DHS's review of the denial, DHS does not have information about all coverage denials made pursuant to the Challenged Exclusion. Defs.' Resp. to Interrogatory No. 5.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

GENDER IDENTITY

35. Gender identity is an innate, internal sense of one's sex—*i.e.*, being male or female—and is a basic part of every person's core identity. Shumer Rep. at 3; Budge Rep. at 6; Hughto Rep. at 6.

RESPONSE: Partial dispute. According to plaintiffs' own submissions,

> [o]ne's self-awareness as male or female changes gradually during infant life and childhood. This process of cognitive and affective learning evolves with interactions with parents, peers, and environment. A fairly accurate timetable exists outlining the steps in this process. Normative psychological literature, however, does not address if and when gender identity becomes crystallized and what factors contribute to the development of a gender identity that is not congruent with the gender of rearing. Results of studies from a variety of biomedical disciplines—genetic, endocrine, and neuroanatomic—support the

> concept that gender identity and/or gender expression likely reflect a complex interplay of biological, environmental, and cultural factors.

(Dkt. 166-9:7; *see also* Ostrander Decl. Ex. B:16.) For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine dispute of a material fact because their partial dispute is based on semantics, not substance, and they have failed to provide admissible evidence to rebut the expert opinions of Plaintiffs' experts. Plaintiffs do not dispute that Defendants' response accurately quotes from the Endocrine Society's Clinical Practice Guidelines, but refers the Court to that document for its full text in context. In any event, Defendants' partial dispute is not a substantive one, but a semantic one as to what constitutes "innate." Plaintiffs do not dispute that transgender people come to understand or acknowledge their gender identity at different points in their lives or that one's gender identity may be the result of various factors. Plaintiffs refer to the full expert reports of Dr. Shumer, Dr. Budge, and Dr. Hughto, the content of which Defendants do not dispute. To the extent the State's response relies on Dr. Ostrander's report, the Court should disregard that citation, as Dr. Ostrander's report and testimony should be excluded under Fed. R. Civ. P. 26(a)(2)(B), Fed. R. Evid. 702 and 802, and *Daubert*, for the reasonings explained in Plaintiffs' accompanying motion to strike her report and exclude her testimony.

36. Gender identity is considered an immutable characteristic. Shumer Rep. at 4-11; Budge Rep. at 6; Schechter Rep. at 1 n.1. As Dr. Shumer explains, "where an individual experiences progressive gender dysphoria during or after puberty—and, in turn, consistently and persistently lives in accordance with their gender identity—the permanence of the individual's cross-gender identity is extremely likely." Shumer Rep. at 11. Accordingly, "[g]iven the literature regarding the biological underpinnings of gender identity, adults with a diagnosis of gender dysphoria have not chosen to be transgender, but rather have an immutable difference in gender." Shumer Rep. at 16.

RESPONSE: Dispute. (*See* Response to PFOF ¶ 35, above.)

REPLY: Defendants' response does not state a genuine dispute of a material fact because their partial dispute is based on semantics, not substance, and they have failed to provide admissible evidence to rebut the expert opinions of Plaintiffs' experts. Plaintiffs do not dispute that Defendants' response accurately quotes from the Endocrine Society's Clinical Practice Guidelines, but refers the Court to that document for its full text in context. In any event, Defendants' partial dispute is not a substantive one, but a semantic one as to what constitutes an "immutable characteristic." Plaintiffs do not dispute that transgender people come to understand or acknowledge their gender identity at different points in their lives or that the one's gender identity may be the result of various factors. Plaintiffs refer to the full expert reports of Dr. Shumer, Dr. Budge, and Dr. Hughto, the content of which Defendants do not dispute. To the extent the State's response relies on Dr. Ostrander's report, the Court should disregard that citation, as Dr. Ostrander's report and testimony should be excluded under Fed. R. Civ. P. 26(a)(2)(B), Fed. R. Evid. 702 and 802, and *Daubert*, for the reasonings explained in Plaintiffs' accompanying motion to strike her report and exclude her testimony.

37. Everyone has a gender identity. Budge Rep. at 6; Hughto Rep. at 6.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

38. Most people's gender identity is consistent with the sex they were assigned at birth. Budge Rep. at 5; Hughto Rep. at 6.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

39. Transgender people have a gender identity that is different from their assigned sex (i.e., the sex designation recorded on an infant's birth certificate, sometimes referred to as "natal sex"). A transgender man is a man whose assigned sex was female but has a male gender identity. A transgender woman is a woman whose assigned sex was male but has a female gender identity. SFOF ¶ 55.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

DISCRIMINATION AGAINST TRANSGENDER PEOPLE

40. In Wisconsin, 0.43% of the state's 4.5 million adult population, or approximately 19,363 people, were estimated to be transgender as of the end of 2017. Hughto Rep. at 18. An estimated 5,000 Wisconsin Medicaid beneficiaries are transgender adults. Hughto Rep. at 18-19.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

41. Transgender people have historically been subjected to discrimination in virtually every facet of life and continue to face pervasive discrimination today, including in employment, education, housing, health care, and their own families and communities. Hughto Rep. at 10-17; *see also* Nat'l Ctr. for Transgender Equality, *Exec. Summ. of Report of 2015 U.S. Transgender Survey* (Dec. 2016) ("USTS Exec. Summ.") [ECF No. 21-23].

RESPONSE: Defendants OBJECT to the use of the term "discrimination" to the extent is a legal conclusion. Subject to that objection, for the purposes of summary judgment, defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine issue of material fact as Defendants do not dispute the substance of the proposed fact. Plaintiffs' use of the term "discrimination" in this context is a factual statement, not a legal conclusion, as it refers to transgender people's reported experiences with discrimination in various aspects of life, but whether the term is a factual or legal one is immaterial.

42. Wisconsin has no express state-level protections against gender identity discrimination, and only 19 percent of the State's population lives in a city or county with a local nondiscrimination ordinance prohibiting gender identity discrimination. Movement Advancement Project, *Wisconsin's Equality Profile*, http://www.lgbtmap.org/equality_maps/profile_state/WI (last visited Apr. 22, 2019) [Ex. 3 to Second May Decl.]

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary materials cited are inadmissible hearsay.

REPLY: Defendants' response does not state a genuine issue of material fact because Plaintiffs may present the facts contained in this source in an admissible form at trial, the Court can take judicial notice of the lack of express protections on gender identity discrimination in state and local laws in Wisconsin, and Defendants do not dispute the substance of this proposed fact. The cited Movement Advancement Project webpage reflects a compilation of state and county/local laws, and the Court can take judicial notice of state, county, and city laws, or the lack thereof. There can be no dispute that Wisconsin has no state nondiscrimination statutes expressly prohibiting gender identity discrimination, as there are none. *See* Wis. Stat. §§ 111.31(1)-(5) (employment); 106.50(1) (housing); 106.52(3) (public accommodations); 106.56 (postsecondary education); 106.58 (education). Defendants do not dispute that only three Wisconsin counties (Dane, Milwaukee, and Winnebago), and eight cities (Appleton, Cudahy, De Pere, Janesville, Madison, Milwaukee, Racine, and Sun Prairie) have some form of gender identity protections under local law, or the central point of this proposed fact that the majority of Wisconsin residents live in a location with no such protections.

43. In Wisconsin, more than a quarter of transgender adults live in poverty, more than twice the overall national poverty rate. Nat'l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey: Wisconsin State Report* 1 & n.3 (Oct. 2017) [ECF No. 21-24] ("2015 USTS-WI").

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary materials cited are inadmissible hearsay.

REPLY: Defendants' response does not state a genuine issue of material fact because Plaintiffs may present the facts contained in this source in an admissible form at trial, specifically

through the expert testimony of Dr. Jaclyn White Hughto, and the Court may take judicial notice of the 2015 U.S. Transgender Survey results.

First, Dr. Hughto cited and relied on the 2015 US Transgender Survey, published by the National Center on Transgender Equality ("NCTE"), in forming her expert opinion. *See* Hughto Report at 12, 16, Ex. B at 4. To the extent that it helped form the basis for her opinion, as an expert in social epidemiology and public health with expertise in transgender health, she can testify about its contents. *See* Fed. R. Evid. 703.

Second, because these statistics represent original survey results conducted by NCTE, a nationally respected organization, and the results of the survey are not reasonably in dispute, the Court may take judicial notice of them under Fed. R. Evid. 201. Indeed, this Court has already credited statistics from this document, *see* PI Op. & Order, July 25, 2018, at 33-34 [ECF No. 70], and several other courts have specifically cited to it. *See e.g. F.V. v. Barron*, 286 F. Supp. 3d 1131, 1137 (D. Idaho 2018) (noting the statistics in the report are "reliable"); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) (citing the report to provide basic statistic on trans experiences); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018) (same). The Seventh Circuit has also cited statistics from a similar survey published by the National Center on Transgender Equality on students' experiences in schools. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)).

44. One in five transgender residents in Wisconsin is unemployed. 2015 USTS-WI at 1.

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary materials cited are inadmissible hearsay.

REPLY: *See* Plaintiffs' Reply to PFOF No. 43.

45. Nearly 60 percent of transgender people in Wisconsin have recently experienced mistreatment by law enforcement officers who perceived or knew them to be transgender. 2015 USTS-WI at 2.

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary materials cited are inadmissible hearsay.

REPLY: *See* Plaintiffs' Reply to PFOF No. 43.

46. In the health care context, 30 percent of transgender adults in Wisconsin had been denied insurance coverage for being transgender in the past year; a third of those who had seen a medical provider in the previous year had at least one negative experience related to being transgender; and nearly a quarter had opted not to see a doctor when needed out of fear of mistreatment in the past year. 2015 USTS-WI at 3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

47. More than half of transgender respondents to the 2015 U.S. Transgender Survey who sought insurance coverage for gender-confirming surgery in the previous year were denied that coverage. Hughto Rep. at 16; Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 93 (Dec. 2016) [Ex. 4 to Second May Decl.].

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary materials cited are inadmissible hearsay.

REPLY: *See* Plaintiffs' Reply to PFOF No. 43.

48. Transgender people in the United States experience widespread stigma resulting from the incongruence between their gender identity and the gender typically associated with their assigned birth sex. Hughto Rep. at 10.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

49. Physical harassment, verbal harassment, sexual assault, and violence against transgender people is common. Hughto Rep. at 12.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute that transgender people are subjected to physical harassment, verbal harassment, sexual assault, and

violence, but OBJECT to the remainder of this proposed finding as conclusory and lacking sufficient foundation in the evidentiary materials cited.

REPLY: Defendants' response states no genuine issue of material fact because Defendants have not offered any evidence to rebut her testimony and have not challenged Dr. Hughto's opinion. The State's "objection" only regards whether harassment and violence against transgender individuals is *common*. Plaintiffs' expert, Dr. Hughto, squarely addresses this fact and will testify about her opinion and the basis for it at trial. Hughto Report at 12. As Defendants do not offer any evidence to rebut her testimony and have not challenged Dr. Hughto's opinion, they have failed to state a genuine dispute of material fact in their response.

50. Transgender people are a politically powerless minority. Currently, only three openly transgender people have ever held a seat in a state legislature (all currently in office), none in Wisconsin. Maggie Astor, *Danica Roem Wins Virginia Race, Breaking a Barrier for Transgender People*, N.Y. Times, Nov. 7, 2017, https://www.nytimes.com/2017/11/07/us/danica-roem-virginia-transgender.html (last visited Apr. 23, 2019) [Ex. 5 to Second May Decl.]; Antonio Olivo, *Danica Roem of Virginia to be first openly transgender person elected, seated in a U.S. statehouse*, Wash. Post, Nov. 8, 2017 (last visited Apr. 23, 2019) [Ex. 6 to Second May Decl.]; Julie Moreau, *Over 150 LGBTQ candidates claim victory in midterm elections*, NBC News, Nov. 7, 2018, https://www.nbcnews.com/feature/nbc-out/over-100-lgbtq-candidates-claim-victory-midterm-elections-n933646 (last visited Apr. 23, 2019) [Ex. 7 to Second May Decl.]. To Plaintiffs' knowledge, no openly transgender person has been elected to any statewide or national office in the United States.

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary materials cited are inadmissible hearsay. Defendants FURTHER OBJECT to the last sentence of the proposed finding on the grounds that Plaintiffs fail to support the proposed finding with admissible evidence in violation of Fed. R. Civ. P. 56(c)(1)(A). Subject to that objection, Defendants dispute. Plaintiffs' own cited evidence shows that transgender people have some political power. (*See* Dkt. 166-7.)

REPLY: Defendants' response fails to raise a genuine dispute of material fact as the Court can take judicial notice of the fact that no openly transgender person has ever held statewide elected office in Wisconsin, as that is a fact "generally known within the trial court's territorial jurisdiction," Fed. R. Evid. 201(b)(1), as confirmed by the articles in major national news sources cited by Plaintiffs that all report that only a handful of openly transgender people have been elected to office anywhere. A federal court specifically cited the same *New York Times* article referenced by Plaintiffs in reaching its conclusion that transgender people lack political power, noting that "there are very few transgender elected officials. Only two openly transgender candidates have ever been elected; both won seats in a state legislature." *M.A.B. v. Talbot Cty. Bd. of Educ.*, 286 F. Supp. 3d 704, 721 (D. Md. 2018). Further, the State's insinuation that that the NBC News article [ECF No. 166-7]—which, in relevant part, notes there are only three openly transgender people that have ever held seats in a state legislature, none in Wisconsin—creates a genuine factual issue about whether transgender people "have some political power," which by any measure they do not, is simply wrong and a conclusion that cannot be reached by any reasonable factfinder.

GENDER DYSPHORIA AND ITS TREATMENT

Overview of Gender Dysphoria

51. Gender dysphoria is a condition experienced by transgender people marked by distress related to the incongruence between the person's assigned sex and gender identity, SFOF ¶ 56; DHS Dep. 26:9-25, which can be alleviated when the person is able to live, and be treated by others, consistently with the person's gender identity. Budge Rep. at 9-10; Hughto Rep. at 8-10. Many, although not all, transgender people with gender dysphoria require medical treatments, including hormone therapy and surgery, as part of their gender transition. DHS Dep. 26:23-27:5; Budge Rep. at 11-16; Hughto Rep. at 9-10.

RESPONSE: Defendants do not dispute that gender dysphoria is a condition experienced by transgender people marked by distress related to the incongruence between the person's

assigned sex and gender identity. Dispute the remainder of this proposed finding. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert opinions of Plaintiffs' experts, Dr. Budge and Dr. Hughto, and thus have failed to dispute those experts' shared opinion that gender-confirming surgeries are safe, effective, and medically necessary treatments for gender dysphoria for many transgender people. Nor have they rebutted the deposition testimony of Dr. Julie Sager, DHS's former medical director, cited in the proposed fact.

52. Gender dysphoria is the clinically significant distress or impairment in social, occupational, or other areas of function associated with the incongruence between a transgender person's gender identity and assigned sex. SFOF ¶ 56; DHS Dep. 26:9-25.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

53. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition ("DSM-5"), published in 2013, defines and describes "gender dysphoria" as follows:

> *Gender dysphoria* refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available. The current term is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se.

Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, 5th edition* 451 (2013) ("DSM-5") [relevant excerpts at ECF No. 21-1] ; SFOF ¶ 16. A true and correct copy of the Gender Dysphoria chapter of the DSM-5 is attached as Exhibit 1 to the Declaration of Orly May (May 23, 2018).") [ECF No. 21-1] ("First May Decl."); SFOF ¶ 16.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

54. The DSM-5 contains the diagnostic criteria for Gender Dysphoria in Adolescents and Adults (302.85 (F64.1)) and the diagnostic features of this diagnosis. SFOF ¶ 17; *see also* Budge Rep. at 7-9; Hughto Rep. at 7-8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

55. Many transgender individuals experience gender dysphoria at some point in their lives. Schechter Rep. at 5.

RESPONSE: Dispute. According to the WPATH guidelines, "[o]nly *some* gender-nonconforming people experience gender dysphoria at *some* point in their lives." (Dkt. 166-8:12.)

REPLY: Defendants' response does not state a genuine issue of material fact because their dispute is purely semantic. Dr. Schechter's expert opinion, which Defendants have not challenged, is that "[m]any transgender individuals experience gender dysphoria at some point in their lives," and he will testify on that opinion and the basis for it at trial. Schechter Rep. at 5.

Plaintiffs' other expert, Dr. Hughto, has offered similar opinions and will testify on them at trial. *See* Hughto Rep. at 7 ("Many transgender people receive a formal diagnosis of gender dysphoria as listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the World Health Organization's International Classification of Diseases (ICD-10) (under the now-outdated name "gender identity disorder")."). Her opinions are also unchallenged by Defendants. Regardless, whether "some" or "many" transgender people experience gender dysphoria at some point in their lives is immaterial, as the Challenged Exclusion categorically denies *all* transgender Wisconsin Medicaid beneficiaries with gender dysphoria surgical treatments for gender dysphoria.

56. Individuals who are diagnosed with gender dysphoria present with a variety of symptoms, and typically indicate an intense need to present themselves and be viewed by others in accordance with their gender identity (that differs from their sex assigned at birth). Budge Rep. at 8.

RESPONSE: For purposes of summary judgment, do not dispute that "[i]ndividuals who are diagnosed with gender dysphoria present with a variety of symptoms." Dispute the remainder of this proposed finding. According to the WPATH guidelines, "[t]reatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve change in gender expression or body modifications." (Dkt. 166-8:12).

REPLY: There is no genuine or material dispute here. Plaintiffs agree that specific medical treatments for gender dysphoria are individualized. Defendants have offered nothing to rebut or question Dr. Budge's separate point that individuals with gender dysphoria "typically indicate an intense need to present themselves and be viewed by others in accordance with their gender identity (that differs from their assigned sex at birth)," which is, in fact, a central element

in each of the diagnostic criteria for Gender Dysphoria in Adolescents and Adults in the DSM-5. *See* DSM-5 Gender Dysphoria Chapter [ECF No. 21-1].

57. Untreated or inadequately treated gender dysphoria is associated with serious mental health harms, including serious mental distress, depression, anxiety, self-harm, and suicidality, SFOF ¶¶ 18, 57; *see also* Budge Rep. at 8-9, 13-14, including psychological distress that causes dysfunction socially and in employment. DHS Dep. 26:9-22.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

58. Symptoms of gender dysphoria can be mitigated, and often prevented altogether, for transgender people with access to appropriate individualized medical care as part of their gender transitions, including hormone and surgical treatments for gender dysphoria. Budge Rep. at 11-16; Hughto Rep. at 9-10; DHS Dep. 26:23-27:5.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B: 9–10; Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert opinions of Plaintiffs' experts, Dr. Budge and Dr. Hughto, and thus have failed to dispute those experts' shared opinion that gender-confirming

surgeries are safe, effective, and medically necessary treatments for gender dysphoria for many transgender people. Nor have they rebutted the deposition testimony of Dr. Julie Sager, DHS's former medical director, cited in the proposed fact.

59. While the most current research shows positive psychosocial outcomes for patients who obtained medically necessary hormone therapy and gender confirmation surgery for gender dysphoria, including improved mental health, reduced suicidal ideation, and improved quality of life, research also shows that the failure to provide transition-related medical care can lead to significant harm. Budge Rep. at 13-16.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert opinions of Plaintiffs' experts, Dr. Budge, and thus have failed to dispute her opinion that gender-confirming surgeries are safe, effective, and medically necessary treatments for gender dysphoria for many transgender people.

60. Failure to provide medically necessary treatments for gender dysphoria is medically harmful and unethical. Shumer Rep. at 16.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert opinions of Plaintiffs' expert, Dr. Shumer, and thus have failed to dispute his opinion that gender-confirming surgeries are safe, effective, and medically necessary treatments for gender dysphoria for many transgender people.

61. The World Professional Association of Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version* (2011) ("WPATH Standards of Care") are clinical guidelines for the treatment of gender dysphoria. SFOF ¶ 58; WPATH Standards of Care [Ex. 8 to Second May Decl.]. Under the WPATH Standards of Care, accepted treatment options for gender dysphoria include psychotherapy, hormone therapy, and various surgical procedures. SFOF ¶ 59; Schechter Rep. at 6-10; Shumer Rep. at 11-12; WPATH Standards of Care at 9-10.

RESPONSE: Do not dispute that this is contained in the WPATH guidelines, but assert that clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6,

Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants' response does not state a genuine issue of material fact because the parties agree to the contents of the WPATH Standards of Care and their remaining dispute is based on the inadmissible testimony of Dr. Ostrander. There is no dispute about the content of the WPATH Standards of Care. As the proposed fact does not discuss medical necessity *per se*, Defendants' aside about medical necessity is irrelevant here. In any event, the qualification is based solely on Dr. Ostrander's purported expert opinion, the documents she attached to her declaration, which are hearsay, and the studies cited in those documents, which are hearsay within hearsay. For the reasons further explained in the General Objection above and in Plaintiffs' accompany motion to strike, Dr. Ostrander's purported testimony is inadmissible and is not a valid basis to create a factual dispute.

62. The Endocrine Society's clinical practice guidelines, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline* (2017) (the "Endocrine Society Guidelines"), are guidelines for the treatment of gender dysphoria, specifically hormone treatments. DHS Dep. 27:6-28:1; Wylie C. Hembree, Endocrine Society Guidelines [Ex. 9 to Second May Decl.]); Shumer Rep. at 12.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

63. DHS's clinical officials in the Bureau of Benefits Management consider the WPATH Standards of Care and the Endocrine Society Guidelines to be appropriate standards for assessing the medical necessity of gender-confirming hormone treatments and surgical procedures. DHS Dep. 27:6-28:1. Dr. Sager, the BBM medical director, considers the WPATH Standards of Care and the Endocrine Society Guidelines to be generally accepted in the medical community based on her medical practice. DHS Dep. 28:14-16, 30:6-15, 33:8-34:3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding with the clarification that effective April 24, 2019, Dr. Sager is no longer employed by DHS.

REPLY: Plaintiffs do not dispute the State's clarification, but note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

Gender-Confirming Treatments Are Medically Necessary for Many Transgender People

Hormone Treatments

64. For many transgender people with gender dysphoria, hormone therapy is a medically necessary treatment for gender dysphoria. SFOF ¶ 61; DHS Dep. 19:22-20:1; *see also* Budge Rep. at 11-13. DHS admits that when hormones are used to treat gender dysphoria, they are not medically unnecessary. DHS Dep. 21:18-25.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

65. Hormone treatments, while effective, may be insufficient on their own to treat gender dysphoria adequately in many transgender people. Budge Rep. at 12-13; Schechter Rep. at 7; Shumer Rep. at 12, 14-16. Peer-reviewed research indicates that transgender individuals who have undergone both hormone therapy and gender confirming surgery have less gender dysphoria, depression, psychological distress, and suicidal ideation than individuals who had only undergone hormone therapy or received no gender-confirming care at all. Budge Rep. at 13.

RESPONSE: Dispute. Few studies compare outcomes in patients who received gender reassignment surgery with stand-alone hormone therapy, and the results of these studies were conflicting. (Ostrander Decl. Ex. B:10.) Also, clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay.

For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert witness opinions of Dr. Budge, Dr. Schechter, or Dr. Shumer, nor have they offered any other admissible evidence to rebut this fact.

Gender-Confirming Surgeries

66. Gender confirming surgical procedures as part of a medical transition are safe and effective treatments for gender dysphoria. Budge Rep. at 16-18; Schechter Rep. at 11-18.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). This is consistent with findings of the Centers for Medicare & Medicaid Services (CMS) in 2016, where it determined that it was not issuing a National Coverage Determination on gender reassignment surgery for Medicare beneficiaries with gender dysphoria because the clinical evidence is "inconclusive." (Dkt. 55-2:2.) CMS went on to encourage more "robust clinical studies that will fill the evidence gaps and help inform which patients are most likely to achieve improved health outcomes with gender reassignment surgery, which types of surgery are most appropriate, and what types of physician criteria and care setting(s) are needed to ensure that patients achieve improved health outcomes." (Dkt. 55-2:3.)

REPLY: Defendants fail to state a genuine dispute of material fact because they rely solely on inadmissible evidence. First, they rely on Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); the exhibits attached to that declaration, which are

inadmissible hearsay; and the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Likewise, the CMS document they cite is inadmissible hearsay, and the studies it references are inadmissible hearsay within hearsay. As Defendants did not purport to rely on the CMS document in enforcing the Challenged Exclusion and have not offered an expert witness who based their opinion on it, they cannot introduce this document or its contents in admissible form at trial. As Defendants have not offered any admissible evidence to rebut the expert opinions of Plaintiffs' experts, Dr. Budge and Dr. Schechter, and thus have failed to dispute those experts' shared opinion that gender-confirming surgeries are safe, effective, and medically necessary treatments for gender dysphoria for many transgender people, there is no disputed fact here.

67. Gender-confirming surgical procedures include a wide range of surgical procedures and do not refer to one particular surgery. DHS Dep. 25:23-26:4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

68. The American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, and other major medical organizations take the position that surgeries are an accepted and effective medical treatment for gender dysphoria. SFOF ¶ 60; *see also* Budge Rep. at 10-11; Shumer Rep. at 13; Hughto Rep. at 8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

69. Not all transgender people need surgery to alleviate their gender dysphoria; however, for many transgender people, surgery is the only medically effective treatment to alleviate symptoms of the condition. Schechter Rep. at 7; Shumer Rep. at 15-16; Budge Rep. at 13-16; Hughto Rep. at 9-10; WPATH Standards of Care at 54-55.

RESPONSE: Do not dispute that "not all transgender people need surgery to alleviate their gender dysphoria." Dispute the remainder of this proposed finding. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert witness opinions of Dr. Budge, Dr. Schechter, Dr. Shumer, Dr. Hughto, or the WPATH Standards of Care, nor have they offered any admissible evidence to rebut their shared expert opinion that "for many transgender people, surgery is the only medically effective treatment to alleviate symptoms of the condition." Accordingly, no material dispute of fact exists.

70. The WPATH Standards of Care explicitly state that "sex reassignment surgery is effective and medically necessary" for many transgender individuals. WPATH Standards of Care at 54; Shumer Rep. at 16.

RESPONSE: Do not dispute that this is what the WPATH guidelines state but dispute the accuracy of that statement. Clinical studies provide "very low" quality evidence regarding

whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert witness opinions of Dr. Shumer or the WPATH Standards of Care.

71. DHS's clinical staff in the Bureau of Benefits Management consider the WPATH Standards of Care and the Endocrine Society Guidelines to be appropriate standards for assessing the medical necessity of gender-confirming hormone treatments and surgical procedures. DHS Dep. 27:6-28:1. Dr. Sager, the BBM medical director, considers the WPATH Standards of Care and the Endocrine Society Guidelines to be generally accepted in the medical community based on her medical practice. DHS Dep. 28:14-16, 30:6-15, 33:8-34:3.

RESPONSE: Defendants OBJECT to this proposed finding on the grounds that it is unnecessary as it is a duplicate of PFOF ¶ 63. Subject to the objection, see Response to PFOF ¶ 63.

REPLY: Plaintiffs acknowledge that PFOF ¶ 71 is a duplicate of PFOF ¶ 63 and thus withdraw this proposed finding of fact.

72. The medical community considers surgical treatments for gender dysphoria to be reconstructive, not cosmetic, in nature, because, when performed in accordance with the

WPATH Standards of Care, they are clinically indicated to treat the underlying medical condition of gender dysphoria. Schechter Rep. at 10-11; DHS Dep. 28:5-13.

RESPONSE: Dispute. The WPATH acknowledges that not the entire medical community agrees that gender reassignment surgery is reconstructive, versus cosmetic. It notes:

> Unfortunately, in the field of plastic and reconstructive surgery (both in general and specifically for gender-related surgeries), there is no clear distinction between what is purely reconstructive and what is purely cosmetic. Most plastic surgery procedures actually are a mixture of both reconstructive and cosmetic components.
>
> While most professionals agree that genital surgery and mastectomy cannot be considered purely cosmetic, opinions diverge as to what degree other surgical procedures (e.g., breast augmentation, facial feminization surgery) can be considered purely reconstructive.

(Dkt. 166-8:65.) Defendants also dispute that surgical treatments for gender dysphoria are clinically indicated to treat gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants' response does not state a genuine issue of material fact because it misstates the proposed fact, is based on semantic and not substantive disputes, and relies on the inadmissible testimony of Dr. Ostrander.

First, Because Plaintiffs do not contend that the "entire" medical community takes this position, there is no genuine dispute—just a semantic difference. Dr. Schechter's opinion, which is unrebutted by the language from the WPATH Standards of Care quoted in Defendants' response or any other evidence submitted by Defendants, is that procedures that might be considered cosmetic for some purposes are considered reconstructive when used to treat a

clinical diagnosis such as gender dysphoria. Schechter Rep. at 10-11; DHS Dep. 28:5-13. Plaintiffs do not dispute that, in individual circumstances, a procedure may be cosmetic or reconstructive (or some combination) depending on its purpose.

Second, there is no genuine material dispute about whether gender-confirming surgeries can be clinically indicated, medically necessary treatments for gender dysphoria. Defendants have not offered any admissible evidence to rebut the expert witness opinions of Dr. Schechter, DHS's own Rule 30(b)(6) testimony acknowledging this fact cited above, or DHS's own recent clinical determinations that gender-confirming surgeries were medically necessary (for Cody Flack and a beneficiary under 21 who DHS does not consider subject to the Challenged Exclusion). Defendants' sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19.

73. The goals of transition-related medical interventions, including hormone treatments and surgeries, include prevention or elimination of the development of unwanted secondary sex characteristics of the assigned sex; promotion or reconstruction of the development of desired secondary sex characteristics of the sex associated with one's gender identity; reduced gender dysphoria and related symptoms; and the enhanced ability to "pass" as the sex associated with one's gender identity. Shumer Rep. at 14.

RESPONSE: Do not dispute that these are the goals of transition-related medical interventions, but assert that clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex.

B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert witness opinion of Dr. Shumer. Accordingly, no material dispute of fact exists.

74. Since transgender people who are visibly gender nonconforming experience more discrimination and worse health outcomes than those whose appearance matches their gender identity, gender-confirming medical treatments can also reduce the discrimination, mistreatment, and harassment that transgender people suffer for being visibly gender nonconforming. Hughto Rep. at 11-13. The experienced stigma for being transgender—which is heightened for transgender individuals unable to "pass" because of visibly gender-nonconforming features—frequently results in a higher risk of violence, mistreatment, chronic stress, and ensuing long-term psychological and physical harms. Hughto Rep. at 10-17.

RESPONSE: Defendants OBJECT to the use of the term "discrimination" to the extent it is a legal conclusion. Subject to that objection, for the purposes of summary judgment, defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine issue of material fact as Defendants do not dispute the substance of the proposed fact. Plaintiffs' use of the term "discrimination" in this context is a factual statement, not a legal conclusion, as it refers to transgender people's reported experiences with discrimination in various aspects of life, but whether the term is a factual or legal one is immaterial.

75. Transgender individuals who are unable to access or afford gender confirming procedures, which would increase gender conformity, are at greater risk of discrimination and other harms. Hughto Rep. at 11-13, 17.

RESPONSE: Defendants OBJECT to the use of the term "discrimination" to the extent is a legal conclusion. Subject to that objection, for the purposes of summary judgment, defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine issue of material fact as Defendants do not dispute the substance of the proposed fact. Plaintiffs' use of the term "discrimination" in this context is a factual statement, not a legal conclusion, as it refers to transgender people's reported experiences with discrimination in various aspects of life, but whether the term is a factual or legal one is immaterial.

76. Without access to gender-confirming care, the majority of individuals needing hormone therapy or gender confirmation surgery will experience severe psychological distress and some individuals will die by suicide if they are not able to obtain this care. Budge Rep. at 18-19; Hughto Rep. at 17.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be

excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert witness opinions of Dr. Budge or Dr. Hughto. Accordingly, no material dispute of fact exists.

77. Increased availability of gender-confirming care is associated with public health benefits, including improved psychological functioning and quality of life in transgender people, reductions in suicide and suicide attempts, lower levels of substance use, reductions in sexual assault and interpersonal violence, increased access to HIV prevention services, and reduced gender dysphoria, resulting in associated benefits to the general public in the form of reduced social, economic, and health-related costs. Hughto Rep. at 17-26.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). In addition, Dr. Hughto failed to provide a quantified savings amount associated with providing coverage for gender reassignment surgeries or empirical evidence necessary to calculate savings for the categories references above, making her cost savings bases wholly unreliable. (Dkt. 122 ¶¶ 6, 18–23.)

REPLY: Defendants fail to state a genuine dispute of material fact because their bases for disputing this fact are Dr. Ostrander's inadmissible testimony and because Dr. Hughto does not purport to offer an actuarial opinion on the potential cost savings associated with increased availability of gender-confirming care.

First, Dr. Ostrander's declaration contains no opinions in violation of Rule 26(a)(2)(B); the exhibits attached to that declaration are inadmissible hearsay; and the studies cited in those reports are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to

Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut the expert witness opinion of Dr. Hughto. Accordingly, no material dispute of fact exists.

Second, Defendants mischaracterize Dr. Hughto's purported expertise. She is a public health expert qualified to opine on the public health effects associated with excluding or covering gender-confirming care under Wisconsin Medicaid. She does not purport to quantify cost savings, but will testify as to the likelihood that some savings would result from covering this care. As the parties agree that, even under the cost impact analysis of Defendants' own actuarial expert, any cost impact would be immaterial from an actuarial perspective, there is no genuine material dispute here.

BACKGROUND OF THE CHALLENGED EXCLUSION

78. DHS has not provided any justification for the Challenged Exclusion, either at the time of its adoption in 1997 or at any time since. Despite labeling "transsexual surgery" and related "[d]rugs, including hormone therapy" to be "not medically necessary," DHS is unaware of any evidence suggesting this characterization was based on any review of the applicable scientific or medical literature at the time, or that DHS's predecessor agency, the Department of Family and Health Services ("DHFS"), considered any or all of the excluded procedures to be unsafe, or ineffective at treating gender dysphoria (or the previous diagnosis of gender identity disorder), or medically unnecessary in all instances. SFOF ¶¶ 70-73. Nor is it aware of any evidence to suggest the agency has ever considered the safety, efficacy, or medical necessity of gender-confirming treatments in its enforcement of the exclusion over the past 22 years. SFOF ¶¶ 74-78, 87-88.

RESPONSE: Dispute. Since the time the Challenged Exclusion was promulgated in 1995, DHS provided two justifications: (1) cost to the Medicaid program; and (2) medical efficacy. Specifically, DHS documented its motivation underlying the Challenged Exclusion as excluding services and products that were determined not to be medically necessary and, therefore, not medically efficacious. (Dkt. 21-13:2; 21-14:2–3) DHS also documented that the Challenged Exclusion would result in "decreased costs" for state government. (Dkt. 21-14:2.) DHS's expert witnesses, referenced in SFOF ¶¶ 75 and 77, support DHS's justifications for the

Challenged Exclusion of cost savings and medical. (Dkt. 74-1, 122; Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.)

REPLY: Defendants' response raises no genuine issue of material fact because (1) Defendants have already conceded that they do not consider gender-confirming treatments "experimental," (2) there is no evidence that Defendants were *motivated* by genuine concerns of cost or medical necessity when they promulgated the exclusion, (3) there is no genuine dispute that gender-confirming surgeries can be medically necessary; and (4) there is no dispute that the potential cost impact to Wisconsin Medicaid of covering gender-confirming surgeries, even by their own expert's estimate, is immaterial from an actuarial standpoint.

First, Defendants have admitted to this Court and stipulated that they have never considered gender-confirming treatments to be "experimental." Whether the definition of experimental arises from Wisconsin regulations or is used by its common meaning is immaterial.

Second, the record contradicts Defendants' assertion that cost savings *motivated* the Challenged Exclusion when it was promulgated. At best, the document cited by Defendants, ECF No. 21-14, is a form document for all regulatory changes that required the agency to check either that the proposed rule would "increase costs" or "decrease costs" to the state government. Of these two choices, the agency checked the latter, but in the narrative section below indicated that the exclusions contained in the proposed rule (of which the exclusion on gender-confirming care was just one) were collectively "expected to result in nominal savings for state government." ECF No. 21-14 at 2. In a transmittal form accompanying that document, the agency further explained that, "[a]ctually the program has hardly ever paid for any of these services or for those purposes, but questions about coverage continue to come up." ECF No. 21-14 at 3. There is

nothing in the record to suggest this was anything more than a pro forma statement in the regulatory materials, let alone a *motivating* factor for the Challenged Exclusion.

Likewise, Defendants have offered no admissible or credible evidence that a genuine determination that gender-confirming surgeries are unproven, unsafe, or ineffective *motivated* the State's promulgation of the Challenged Exclusion. Indeed, their own admissions contradict that assertion, as DHS admits it is not aware of any information that the "determination" that the excluded services were "medically unnecessary" was based "on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services," or that the agency determined the excluded services to be experimental, unsafe, or ineffective at treating gender dysphoria. SFOF ¶¶ 70-73. Defendants' contention in their response that the agency's characterization of the excluded services as "medically unnecessary" is synonymous with a reasoned finding or determination that they were "not medically efficacious" is unsupported by the record.

Third, there is no genuine dispute that gender-confirming surgeries can be medically necessary treatments for gender dysphoria. Moreover, the record evidence—including the testimony of DHS's medical director in a 30(b)(6) deposition of the agency—demonstrates that the position of Wisconsin Medicaid's medical directors is that gender-confirming surgeries can be medically necessary, and that the Challenged Exclusion conflicts with current medical practice and the generally accepted standards of care for treating gender dysphoria. DHS Dep. 62:24-64:22. In addition, Dr. Sager, DHS's former medical director, acting in her official capacity, determined gender-confirming surgeries were medically necessary in at least two individual circumstances. DHS Dep. 51:17-52:15; 58:18–59:15. The testimony of Defendants' expert witness, Dr. Ostrander, must be excluded for the reasons stated in the General Objection

above and Plaintiffs' accompanying motion to strike. Dr. Ostrander offers no opinion on the medical necessity, safety, or efficacy of gender-confirming surgeries at any point, let alone at the time the Challenged Exclusion was promulgated, nor does she take any position whatsoever on hormone treatments. Mot. to Strike Br. at 10, 11, 29.

Fourth, with respect to cost savings, there is no genuine dispute of a material fact. Even accepting Defendants' estimated cost savings associated with the Challenged Exclusion as true, there is no dispute that those savings (0.01 to 0.03 percent of the State's annual Medicaid spending) are actuarially immaterial.

79. The Challenged Exclusion was adopted as an amendment to the Medicaid regulations in 1996 and went into effect on February 1, 1997. *See* Wis. Dep't of Health & Fam. Servs., Clearinghouse Rule 96-154, 1 (Dec. 11, 1996) ("CR 96-154"); SFOF ¶ 10.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

80. The DHS regulations governing Wisconsin Medicaid do not define the term "transsexual surgery." SFOF ¶ 14. Indeed, DHS currently considers the term "transsexual surgery" to be "outdated" and inconsistent with modern medical terminology. DHS Dep. 20:2-14. Nevertheless, DHS currently interprets "transsexual surgery" to mean *any* surgical procedure intended to treat gender dysphoria, including chest surgeries, genital surgeries, and other surgical procedures to treat gender dysphoria. SFOF ¶ 64; DHS Dep. 20:2-21:7.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

81. At the time the policy was promulgated, DHFS labeled "transsexual surgery" and related "[d]rugs, including hormone therapy" as "not medically necessary," along with other services including "tattoo removal," "ear lobe repair," "services related to surrogate parenting," and "non-medical food." CR 96-154, at 1.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

82. DHS is not aware of information indicating that when the Challenged Exclusion was promulgated, DHFS's determination that the excluded services were "not medically

necessary" was based on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services conducted by or on behalf of DHFS. SFOF ¶ 70.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

83. DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or DHFS that any or all of the excluded services were experimental, unsafe, or ineffective at treating gender dysphoria (or, as the condition was known at the time, gender identity disorder). SFOF ¶¶ 71-73.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding with the following clarifications. First, Defendants do not dispute the proposed finding only to the extent the term "experimental" refers to the definition in Wis. Admin. Code § DHS 107.035. Second, clarify that the Challenged Exclusion was based, in part, on a determination that these services and products were medically unnecessary. Under Wis. Admin. Code § DHS 101.03(96m), DHS does not consider a procedure to be "medically necessary" if the procedure is "experimental in nature," does not have "proven medical value and usefulness," is not "generally accepted," is not "required" to "treat a recipient's illness," or "can[not] safely and effectively be provided." Wis. Admin. Code § DHS 101.03(96m)(a), (b)3., (b)5., (b)9. So while there is no record of what information DHS considered when making the determination that these services were medically unnecessary, it is undisputed that such a determination was made, along with a determination that the Challenged Exclusion would result in cost savings to the State. (Dkt. 21-13:2; 21-14:2–3)

REPLY: Defendants' response raises no genuine issue of material fact because (1) Defendants have already conceded that they do not consider gender-confirming treatments "experimental," and (2) there is no evidence that Defendants were *motivated* by genuine concerns of cost or medical necessity when they promulgated the exclusion.

First, Defendants have admitted to this Court and stipulated that they have never considered gender-confirming treatments to be "experimental." Whether the definition of experimental arises from Wisconsin regulations or is used by its common meaning is immaterial.

Second, the record contradicts Defendants' assertion that cost savings *motivated* the Challenged Exclusion when it was promulgated. At best, the document cited by Defendants, ECF No. 21-14, is a form document for all regulatory changes that required the agency to check either that the proposed rule would "increase costs" or "decrease costs" to the state government. Of these two choices, the agency checked the latter, but in the narrative section below indicated that the exclusions contained in the proposed rule (of which the exclusion on gender-confirming care was just one) were collectively "expected to result in nominal savings for state government." ECF No. 21-14 at 2. In a transmittal form accompanying that document, the agency further explained that, "[a]ctually the program has hardly ever paid for any of these services or for those purposes, but questions about coverage continue to come up." ECF No. 21-14 at 3. There is nothing in the record to suggest this was anything more than a pro forma statement in the regulatory materials, let alone a *motivating* factor for the Challenged Exclusion.

Likewise, Defendants have offered no admissible or credible evidence that a genuine determination that gender-confirming surgeries are unproven, unsafe, or ineffective *motivated* the State's promulgation of the Challenged Exclusion. Indeed, their own admissions contradict that assertion, as DHS admits it is not aware of any information that the "determination" that the excluded services were "medically unnecessary" was based "on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services," or that the agency determined the excluded services to be experimental, unsafe, or ineffective at treating gender dysphoria. SFOF ¶¶ 70-73. Defendants' contention in their response that the

agency's characterization of the excluded services as "medically unnecessary" is synonymous with a reasoned finding or determination that they were "not medically efficacious" is unsupported by the record.

84. Prior to the implementation of the Challenged Exclusion, DHFS predicted that exclusions added in the 1996 Amendments, including the Challenged Exclusion, would result in nominal cost savings to the State. DHFS, Fiscal Estimate: Medical Assistance: Medically Unnecessary Services 1 (Sept. 27, 1996) ("DHS Fiscal Est.") [ECF No. 21-14].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

85. DHS is not aware of information indicating that, between the Challenged Exclusion's implementation on February 1, 1997 and April 29, 2018 (the day before this lawsuit was filed), either DHS or DHFS undertook any study or review of any of the following:

a. the fiscal impact of enforcing, amending, or eliminating the Challenged Exclusion, SFOF ¶ 74;
b. the safety or efficacy of medical or surgical treatments for gender dysphoria, SFOF ¶ 76; or
c. the public health effects of enforcing, amending, or eliminating the Challenged Exclusion, SFOF ¶ 78.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

86. DHS is not aware of information indicating that it undertook any review or consideration of the applicability of the Challenged Exclusion to medical treatments for gender dysphoria following the publication of the WPATH Standards of Care in 2011. SFOF ¶ 87.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

87. DHS is not aware of information indicating that it undertook any review or consideration of the applicability of the Challenged Exclusion to medical treatments for the diagnosis of Gender Dysphoria in Adolescents and Adults announced in the DMS-5 in 2013. SFOF ¶ 88.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

88. DHS does not consider surgical treatments for gender dysphoria to be experimental. PI Op. at 26 n.22 (referencing party admission by Defendants' counsel at preliminary injunction hearing).

RESPONSE: Defendants OBJECT to this proposed fact on the grounds that the evidentiary material cited is not admissible evidence. Subject to that objection, Defendants do not dispute the proposed finding only to the extent the term "experimental" refers to the definition in Wis. Admin. Code § DHS 107.035.

REPLY: Defendants' response does not state a genuine material dispute because Defendants have already conceded this fact. Defendants, through counsel, admitted this fact to the Court at the preliminary injunction hearing. This admission is binding on Defendants and admissible. *See McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) ("The verbal admission by [] counsel at oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings."). Plaintiffs object to Defendants' attempt to qualify this admission by now claiming the definition of "experimental" in Wis. Admin. Code § DHS 107.035 is what they meant. Regardless, whether it is this definition of "experimental" or the common usage of the term, there is no material fact in dispute here.

89. From April 30, 2018 (the date this lawsuit was filed) to present, DHS has not undertaken any study or review of:

a. the fiscal impact to Wisconsin Medicaid, DHS, or the State of Wisconsin of enforcing, amending, or eliminating the Challenged Exclusion other than the reports of David Williams prepared and submitted to the Court in connection with this lawsuit, dated August 22, 2018 and November 16, 2018, SFOF ¶ 75; or
b. the safety or efficacy of medical or surgical treatments for gender dysphoria, other than the reports of Lawrence Mayer, Chester Schmidt, Daniel Sutphin, and Michelle Ostrander prepared for and/or submitted to the Court in connection with this lawsuit, SFOF ¶ 77.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

90. The only documents DHS has identified as being considered, reviewed, or relied on by DHS relating to the Challenged Exclusion are the WPATH Standards of Care, the Endocrine Society Guidelines, and coverage criteria from other state Medicaid agencies, including from Oregon, which were reviewed by Dr. Julie Sager, Wisconsin Medicaid's medical director, as recently as July 2018 when reviewing an HMO denial of a request for gender confirming surgery for an individual that was under 21 years of age. Defs.' Resp. to Interrogatory No. 10. In that instance, Dr. Sager determined that the requested surgery was medically necessary and recommended approval for coverage under Wisconsin Medicaid. DHS Dep. 58:8-60:4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding, with the clarification that effective April 24, 2019, Dr. Sager is no longer employed by DHS.

REPLY: Plaintiffs do not dispute the State's clarification, but note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

91. Even if DHS had considered the potential cost impact of ending the Challenged Exclusion prior to this lawsuit, which it did not, Defendants' estimated cost impact of covering gender-confirming surgeries (ranging from $300,000 to $1.2 million annually, or 0.008 percent to 0.03 percent of the State's $3.9 billion share of the $9.7 billion annual Wisconsin Medicaid budget), is immaterial from an actuarial perspective. Barrett & Corrough Rep. at 4-8.

RESPONSE: Partial dispute. The Challenged Exclusion was based, in part, on a determination that it would result in "decreased costs" for the State. (Dkt. 21-14:2.) New benefits impose a cost paid by the State, either through an increased capitation rate that reflects the health plans' increased claims risk (for managed care enrollees) or through medical claims expenses paid directly by the state (for fee-for-service enrollees). (Dkt. 74:7.) For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine dispute of material fact because the parties agree that, even at the time of promulgation, any cost savings associated with the Challenged Exclusion and the other exclusions put into effect at the same time were expected to be "nominal." The record contradicts Defendants' assertion that cost savings *motivated* the

Challenged Exclusion when it was promulgated. At best, the limited historical record shows that the 1997 regulatory changes (adding several exclusions, of which "transsexual surgery" was just one) were expected to result in "nominal" cost savings. PFOF ¶ 84. There is nothing in the record to suggest this was anything more than a pro forma statement in the regulatory materials, let alone a motivating factor for the Challenged Exclusion. Plaintiffs do not dispute Defendants' position that the expected cost savings to the State of implementing the proposed rule were expected to be "nominal," so there is no genuine dispute here.

ENFORCEMENT OF THE CHALLENGED EXCLUSION

92. Pursuant to the Challenged Exclusion, Wisconsin Medicaid coverage for medical and surgical treatments for gender dysphoria has been denied by DHS and/or by one or more of the HMOs that offer Wisconsin Medicaid since the implementation of the exclusion on February 1, 1997, including since the preliminary injunction entered in this case on July 25, 2018. SFOF ¶ 89.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

93. Based on the Challenged Exclusion, from January 1, 2009 to present, DHS has denied Wisconsin Medicaid coverage to ten fee-for-service beneficiaries for the following gender-confirming surgical procedures: removal of testis; reduction of large breast; enlarge breast with implant; mastectomy (simple complete and subcutaneous); breast reconstruction; and repair brow defect. Defs.' Resp. to Interrogatory No. 5. Wisconsin Medicaid covers each of these procedures for other diagnoses. Email from K. Plunkett to J. Sager & L. Wiggins (Mar. 11, 2019) (attaching spreadsheet entitled Gender Reassignment Procedure Code List ("DHS Gender Reassignment Procedure Code List") (Mar. 11, 2019) (Bates range DHS000393-94) [Ex. 10 to the Second May Decl.]. Since 2014, HMOs that administer Wisconsin Medicaid have, based on the Challenged Exclusion denied numerous requests for gender-confirming surgical procedures, hormone treatments, and other medical treatments and services (e.g., office visits, psychotherapy) including chest reconstruction and genital reconstruction, as well as related

procedures such as anesthesia and office consultations, based on the Challenged Exclusion. Decl. of Abigail Moats ¶ 12 (Apr. 23, 2019) ("Moats Decl.").[3]

RESPONSE: Partial dispute. Wisconsin Medicaid covers each of these procedures for other diagnoses only when it is determined to be medically necessary. Wis. Admin. Code §§ 107.01(1), 107.02(2)(b). For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Plaintiffs do not dispute this clarification.

94. DHS has no published coverage guidelines for gender-confirming health care. DHS Dep. 17:10-20. Nor has DHS ever provided any formal guidance to Wisconsin Medicaid HMOs on what treatments and services are, or are not, covered by the Challenged Exclusion. SFOF ¶¶ 68-69. As a result, Wisconsin Medicaid HMOs have, under the Challenged Exclusion, denied coverage for a range of surgical treatments, hormone treatments, and other medical services for transgender beneficiaries. Moats Decl. ¶ 13.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the first and second sentences of this proposed finding. As the third sentence, Defendants OBJECT on the ground that it is purely conclusory and the cited evidentiary materials lack sufficient foundation. Plaintiffs' cite no admissible evidence from the Wisconsin Medicaid HMOs that the denials of coverage "for a range of surgical treatments" are because there are no published guidelines or formal guidance as to the Challenged Exclusion.

[3] DHS currently interprets the Challenged Exclusion to apply only to beneficiaries age 21 and above. SFOF ¶¶ 62–63. DHS considers requests for coverage by such beneficiaries under 21 that otherwise would be affected by the Challenged Exclusion under the Medicaid Act's Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) provisions. See 42 U.S.C. §§ 1396a(a)(10)(A); 1396d(a)(4)(b); Wis. Admin. Code § DHS 107.22; SFOF ¶ 65. DHS is aware of one beneficiary whose prior authorization request for surgery was denied by the person's managed care organization pursuant to the Challenged Exclusion. DHS Dep. 58:8–60:20. DHS determined, on appeal from the HMO's denial, that the requested procedure was medically necessary for that beneficiary, although it is unclear whether DHS and/or the HMO ever approved coverage following that determination. DHS Dep. 58:8–59:17.

REPLY: Defendants' response does not create a genuine issue of material fact because the undisputed record evidence proves the accuracy of the proposed fact. Despite Defendants' contention that Plaintiffs have not provided admissible evidence regarding denials of coverage from Wisconsin Medicaid HMOs, Plaintiffs have provided a summary of those denials, based on documents and written responses to third-party subpoenas from the HMOs that offer Wisconsin Medicaid plans, consistent with Federal Rule of Evidence 1006. To the extent that the State's dispute concerns whether those denials are because DHS has not provided guidelines regarding the Challenged Exclusion, such a dispute is immaterial. There is no dispute that DHS has never provided formal guidance on the scope of the exclusion to HMOs. SFOF ¶¶ 68-69. The undisputed, material fact is that the Wisconsin Medicaid HMOs deny coverage based on the Challenged Exclusion, which DHS promulgated and enforces. Moats Decl. ¶ 13; *see also, e.g.*, Vordermann Decl. [ECF No. 99] ¶¶ 9-11; Sherwin Decl. [ECF No. 95] ¶ 18.

95. DHS admits that hormone treatments are medically necessary treatments for gender dysphoria for many people. SFOF ¶ 61; DHS Dep. 19:22-20:1, 21:18-25.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

96. DHS's clinical staff in Wisconsin Medicaid's Bureau of Benefits Management ("BBM"), the office charged with making and reviewing medical necessity determinations for requested treatments, consider gender-confirming surgeries to be medically necessary treatments for gender dysphoria when clinically indicated under the WPATH Standards of Care, DHS Dep. 44:22-46:6, and that the Challenged Exclusion conflicts with current medical practice and the accepted standards of care for treating gender dysphoria, DHS Dep. 62:24-64:22. Accordingly, BBM's medical director has determined—in her clinical judgment and consistent with DHS's practice for making medical necessity determinations in the absence of internally published guidelines—that surgeries for transgender Medicaid beneficiaries (including Plaintiff Cody Flack) were medically necessary. DHS Dep. 51:17-52:15.

RESPONSE: Partial dispute. The cited evidentiary materials support that Dr. Sager determined that surgery for Cody Flack was medically necessary, but it does not support that Dr.

Sager ever made a determination that surgeries for any other Medicaid beneficiaries were medically necessary. (Dkt. 165, DHS Dep. 51:17–52:15.) For the purposes of summary judgment, and with the clarification that effective April 24, 2019, Dr. Sager is no longer employed by DHS, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine issue of material fact because their contention that the evidence "does not support that Dr. Sager ever made a determination that surgeries for any other Medicaid beneficiaries were medically necessary" is contradicted by the record. Apart from Mr. Flack, Dr. Sager made a determination regarding the medical necessity of gender-confirming surgery for at least one other individual, concluding that the requested surgery was medically necessary for that beneficiary. DHS Dep. 58:18–59:15. Plaintiffs do no dispute the remainder of Defendants' response, but note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

97. DHS's recent enforcement of the Challenged Exclusion has been motivated purely by political, not clinical, factors. DHS Dep. 32:19-33:7, 45:17-19, 50:5-23 & Ex. 3. DHS admits that, even with respect to the original denial of coverage for surgery for Named Plaintiff Cody Flack, the denial was not based on any review of his individual medical needs or any clinical considerations, SFOF ¶ 42; DHS Dep. 50:5-23, and that once the preliminary injunction in this case required it, the agency determined that the requested procedures were indeed medically necessary for Mr. Flack and approved them. DHS Dep. 50:24-51:20.

RESPONSE: Dispute. Since the time the Challenged Exclusion was promulgated in 1995, DHS provided two justifications: (1) cost to the Medicaid program; and (2) medical efficacy. Specifically, DHS documented its motivation underlying the Challenged Exclusion as excluding services and products that were determined not to be medically necessary and, therefore, not medically efficacious. (Dkt. 21-13:2; 21-14:2–3) DHS also documented that the Challenged Exclusion would result in "decreased costs" for state government. (Dkt. 21-14:2.) DHS's expert witnesses, referenced in SFOF ¶¶ 75 and 77, support the justifications DHS

offered for the Challenged Exclusion when it was first enacted. (Dkt. 74-1, 122; Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) Further, the Challenged Exclusion is part of the Wisconsin Administrative Code that DHS is required to apply, so its motivation in applying the Challenged Exclusion is to follow the law. (Dkt. 165, DHS Dep. 33:3–7.)

REPLY: Defendants' response raises no genuine issue of material fact because (1) Defendants have already conceded that they do not consider gender-confirming treatments "experimental," (2) there is no evidence that Defendants were *motivated* by genuine concerns of cost or medical necessity when they promulgated the exclusion, (3) there is no genuine dispute that gender-confirming surgeries can be medically necessary; and (4) there is no dispute that the potential cost impact to Wisconsin Medicaid of covering gender-confirming surgeries, even by their own expert's estimate, is immaterial from an actuarial standpoint. In addition, Defendants do not dispute that DHS determined Cody Flack's requested surgeries to be medically necessary for him and approved them accordingly.

First, Defendants have admitted to this Court and stipulated that they have never considered gender-confirming treatments to be "experimental." Whether the definition of experimental arises from Wisconsin regulations or is used by its common meaning is immaterial.

Second, the record contradicts Defendants' assertion that cost savings *motivated* the Challenged Exclusion when it was promulgated. At best, the document cited by Defendants, ECF No. 21-14, is a form document for all regulatory changes that required the agency to check either that the proposed rule would "increase costs" or "decrease costs" to the state government. Of these two choices, the agency checked the latter, but in the narrative section below indicated that the exclusions contained in the proposed rule (of which the exclusion on gender-confirming care was just one) were collectively "expected to result in nominal savings for state government."

ECF No. 21-14 at 2. In a transmittal form accompanying that document, the agency further explained that, "[a]ctually the program has hardly ever paid for any of these services or for those purposes, but questions about coverage continue to come up." ECF No. 21-14 at 3. There is nothing in the record to suggest this was anything more than a pro forma statement in the regulatory materials, let alone a *motivating* factor for the Challenged Exclusion.

Likewise, Defendants have offered no admissible or credible evidence that a genuine determination that gender-confirming surgeries are unproven, unsafe, or ineffective *motivated* the State's promulgation of the Challenged Exclusion. Indeed, their own admissions contradict that assertion, as DHS admits it is not aware of any information that the "determination" that the excluded services were "medically unnecessary" was based "on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services," or that the agency determined the excluded services to be experimental, unsafe, or ineffective at treating gender dysphoria. SFOF ¶¶ 70-73. Defendants' contention in their response that the agency's characterization of the excluded services as "medically unnecessary" is synonymous with a reasoned finding or determination that they were "not medically efficacious" is unsupported by the record.

Third, there is no genuine dispute that gender-confirming surgeries can be medically necessary treatments for gender dysphoria. Moreover, the record evidence—including the testimony of DHS's medical director in a 30(b)(6) deposition of the agency—demonstrates that the position of Wisconsin Medicaid's medical directors is that gender-confirming surgeries can be medically necessary, and that the Challenged Exclusion conflicts with current medical practice and the generally accepted standards of care for treating gender dysphoria. DHS Dep. 62:24-64:22. In addition, Dr. Sager, DHS's former medical director, acting in her official

capacity, determined gender-confirming surgeries were medically necessary in at least two individual circumstances. DHS Dep. 51:17-52:15; 58:18–59:15. The testimony of Defendants' expert witness, Dr. Ostrander, must be excluded for the reasons stated in the General Objection above and Plaintiffs' accompanying motion to strike. Dr. Ostrander offers no opinion on the medical necessity, safety, or efficacy of gender-confirming surgeries at any point, let alone at the time the Challenged Exclusion was promulgated, nor does she take any position whatsoever on hormone treatments. Mot. to Strike Br. at 10, 11, 29.

Fourth, with respect to cost savings, there is no genuine dispute of a material fact: even accepting Defendants' estimated cost savings associated with the Challenged Exclusion as true, there is no dispute that those savings (0.01 to 0.03 percent of the State's annual Medicaid spending) are actuarially immaterial.

Gender-Confirming Treatments and Services Subject to the Exclusion

Surgical Treatments

98. Surgical treatments for gender dysphoria that are categorically excluded from coverage by the Challenged Exclusion, regardless of whether prior authorization is required for the procedure, include penectomy, orchiectomy, vaginoplasty, feminizing genitoplasty, breast reconstruction, chondrolaryngoplasty, phalloplasty, metoidioplasty, masculinizing genitoplasty, mastectomy, reduction mammoplasty, hysterectomy, oophorectomy, salpingo-oophorectomy, intersex surgery (male to female), and intersex surgery (female to male). SFOF ¶ 79.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding, with the clarification that DHS only applies the Challenged Exclusion to these procedures for Wisconsin Medicaid beneficiaries age 21 and over. (SFOF ¶ 79.)

REPLY: Defendants' response does not state a genuine issue of material fact because there is no dispute that the Challenged Exclusion, on its face, applies to all Wisconsin Medicaid beneficiaries. Plaintiffs do not dispute Defendants' position that DHS does not currently *apply* the Challenged Exclusion to beneficiaries under age 21. However, undisputed record evidence

indicates that Wisconsin Medicaid HMOs have denied coverage for gender-confirming surgeries and hormone treatments unrelated to surgery to a number of beneficiaries, including beneficiaries under 21. *See, e.g.*, Decl. of Lexie Vordermann ¶¶ 9-11 [ECF No. 99] (denial of surgery to beneficiary under 21); Decl. of Abigail Moats ¶ 12 & Ex. 2 [ECF No. 167] (documenting HMO denials for surgeries, hormones, and other treatments based on the Challenged Exclusion from 2014 to present).

99. All of these surgeries are recognized as safe and effective treatments for gender dysphoria in transgender people. Schechter Rep. at 11-17; WPATH Standards of Care at 55.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery is medically efficacious and a safe treatment for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). This is consistent with findings of the CMS in 2016, where it determined that it was not issuing a National Coverage Determination on gender reassignment surgery for Medicare beneficiaries with gender dysphoria because the clinical evidence is "inconclusive." (Dkt. 55-2:2.) CMS went on to encourage more "robust clinical studies that will fill the evidence gaps and help inform which patients are most likely to achieve improved health outcomes with gender reassignment surgery, which types of surgery are most appropriate, and what types of physician criteria and care setting(s) are needed to ensure that patients achieve improved health outcomes." (Dkt. 55-2:3.)

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay.

For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Likewise, the CMS document they cite is inadmissible hearsay, and the studies it references are inadmissible hearsay within hearsay. *See Cruz v. Zucker*, 195 F. Supp. 3d 554, 575 n.8 (S.D.N.Y. 2016), *reconsideration on other grounds granted*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016) ("This document is of little relevance to the present inquiry and the Court gives it little weight. The proposed decision memorandum is not a binding document and is primarily a literature review of studies that are inadmissible hearsay.") As Defendants did not purport to rely on the CMS document in enforcing the Challenged Exclusion and have not offered an expert witness who based their opinion on it, they cannot introduce this document or its contents in admissible form at trial. Defendants have not offered any admissible evidence to rebut the expert witness opinion of Dr. Schechter or the WPATH Standards of Care. Accordingly, no genuine dispute of material fact exists.

Hormone Treatments

100. Pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy that some hormone therapy treatments for gender dysphoria are excluded from coverage, regardless of whether prior authorization is otherwise required for the treatment, although DHS covers certain hormone treatments in practice because of the difficulty in enforcing the exclusion for drugs. SFOF ¶ 80; Defs.' Resps. to Interrogatory No. 12, 14; DHS Dep. 22:17-23:3.

RESPONSE: Partial dispute. While some forms of hormones may be excluded from coverage, Wisconsin Medicaid does not exclude coverage when the drug is requested or intended for the treatment of gender dysphoria. (Dkt. 166-1:17.) Only hormone therapy associated with transsexual surgery is excluded under the Challenged Exclusion. (Dkt. 166-1:22.) For the

purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine dispute of material fact because the material, undisputed fact is the Challenged Exclusion categorically excludes coverage for at least some hormone treatments to treat gender dysphoria, SFOF ¶¶ 11, 79, 80, even if different Wisconsin Medicaid HMOs' understanding of the scope of that exclusion varies in practice. Plaintiffs do not dispute Defendants' position that it is DHS's policy that only hormone treatments "associated with transsexual surgery" are excluded from Medicaid coverage under the Challenged Exclusion. However, undisputed record evidence indicates that Wisconsin Medicaid HMOs have denied coverage to beneficiaries for gender-confirming hormone treatments unrelated to transsexual surgery. *See* Decl. of Abigail Moats ¶ 12 & Ex. 2 [ECF No. 167] (documenting HMO denials for surgeries, hormones, and other treatments based on the Challenged Exclusion from 2014 to present).

101. Because managed care organizations offering Wisconsin Medicaid plans may use their own procedures for drug coverage, coverage for certain hormone treatments for transgender patients may be denied pursuant to the Challenged Exclusion. DHS Dep. 68:16-22.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

102. In fact, managed care organizations have denied coverage for hormone treatments on multiple occasions in recent years, including denials of testosterone, estradiol, and leuprolide. Moats Decl. ¶ 12.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

Wisconsin Medicaid Covers the Same Treatments for Other Conditions

103. Pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude from coverage certain medical services, treatments, and/or procedures when deemed medically necessary by a beneficiary's medical provider to treat gender dysphoria, but to cover the same procedures when they are deemed medically necessary by a beneficiary's medical provider to treat certain conditions other than gender dysphoria. SFOF ¶ 81; DHS Dep. 26:5-8, 68:23-70:4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

104. For example, Wisconsin Medicaid covers mastectomy, reduction mammoplasty, breast reconstruction, hysterectomy, oophorectomy, and salpingo-oophorectomy for Medicaid beneficiaries when medically necessary to treat conditions other than gender dysphoria, but pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude those services from coverage for beneficiaries 21 and over when they are deemed medically necessary by the beneficiary's medical provider to treat gender dysphoria. SFOF ¶¶ 82-83.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

105. In addition, Wisconsin Medicaid covers breast reconstruction, orchiectomy, penectomy, and vaginoplasty for Medicaid beneficiaries when medically necessary to treat conditions other than gender dysphoria, but pursuant to the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude those services from coverage for beneficiaries 21 and over when they are deemed medically necessary by the beneficiary's medical provider to treat gender dysphoria. SFOF ¶¶ 82, 84.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

106. All of these procedures are covered by Wisconsin Medicaid to treat conditions other than gender dysphoria. DHS Gender Reassignment Procedure Code List at 3-4, 7.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

Recent Enforcement of the Challenged Exclusion to Deny Coverage for Gender-Confirming Surgeries Has Not Been Motivated by Medical Considerations

DHS's Clinical Staff Consider the Challenged Exclusion to Conflict with Accepted Medical Practice and Applicable Standards of Care

107. It is the clinical opinion of Dr. Julie Sager, Wisconsin Medicaid's medical director in BBM, that ending the Challenged Exclusion would be consistent with medical practice and the medically accepted standards of care. DHS Dep. 62:24-64:22. Testifying for the agency, she assumes DHS's current position is the same. DHS Dep. 62:24-64:22. Both she and BBM's Chief Medical Officer, Dr. Lora Wiggins, consider gender-confirming surgeries to be medically necessary treatments for gender dysphoria. DHS Dep. 46:22-47:8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed findings in the first and second sentences, with the clarification that effective April 24, 2019, Dr. Sager is no longer employed by DHS. Dispute the third sentence, as the cited evidence does not support the proposed finding of fact; Dr. Sager testified that she and Dr. Wiggins "were in agreement that" surgical treatments for gender dysphoria were "medically reasonable," not that they were medically necessary.

REPLY: Defendants' response does not raise a genuine dispute of material fact because their disagreement is semantic, not substantive. The record evidence shows, and there can be no dispute that, Dr. Sager, in her official capacity as Wisconsin Medicaid's medical director, found on at least two specific occasions that gender confirming surgeries were medically necessary. DHS Dep. 51:17-20; 58:18-59:15. Plaintiffs also note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

108. Nevertheless, DHS has continued to vigorously enforce the Challenged Exclusion in recent years without regard to the clinical views of its medical staff. SFOF ¶¶ 79-84; DHS Dep. 46:14-47:8.

RESPONSE: Defendants OBJECT to the term "vigorously" as vague and ambiguous. Subject to that objection, for the purposes of summary judgment, Defendants do not dispute the proposed finding.

REPLY: Defendants' response does not state a genuine dispute of material fact, because with or without the descriptor "vigorously," there is no dispute that DHS has enforced the Challenged Exclusion in recent years without regard to the clinical views of its medical staff.

DHS Has Not Defined or Clarified the Scope of the Challenged Exclusion to Beneficiaries or the HMOs that Administer Medical Plans

109. Publicly, DHS states that "medical interventions such as hormones and surgery" for transgender people are not covered under Wisconsin Medicaid. SFOF ¶ 15. The agency's website contains the following statement:

> For people who need medical interventions such as hormones or surgery, these might be covered under private insurance plans. Currently, Wisconsin BadgerCare, BadgerCare Plus, Medicaid, and State of Wisconsin employee health insurance (ETF) do not cover gender reassignment surgery or drugs related to gender reassignment or hormone replacement. Please contact your health insurance company to learn more details about what services are covered by your insurance.

LGBT Health – Transgender Persons, Wis. Dep't of Health Servs., https://www.dhs.wisconsin.gov/lgbthealth/transgender.htm (last visited Apr. 23, 2019); SFOF ¶ 15.

RESPONSE: Dispute. The website no longer contains the quoted statement. For the purposes of summary judgment, Defendants do not dispute that the website previously contained the quoted statement.

REPLY: Defendants' response does not state a genuine dispute of material fact. Plaintiffs do not dispute that Defendants removed this statement from the DHS website at some point after the expanded preliminary injunction was entered by the Court on April 23, 2019, and at Plaintiffs' specific request. There is no dispute that, from at least December 13, 2017 until sometime following the Court's April 23, 2019 order, this statement appeared on DHS's website. *See also* ECF No. 21-15 (print-out of same webpage on May 21, 2018, indicating the page was "Last Revised: December 13, 2017.")

110. Although the HMOs that administer Wisconsin Medicaid are primarily responsible for enforcing the Challenged Exclusion for beneficiaries enrolled in their respective plans, including denying requests for prior authorization for treatments and services excluded by the Challenged Exclusion, DHS has never provided formal or specific guidance to the HMOs that administer Wisconsin Medicaid plans for 80 percent of the State's Medicaid beneficiaries on how to interpret the Challenged Exclusion. SFOF ¶¶ 67-69; DHS Dep. 15:12-16.

RESPONSE: Dispute, to the extent that the cited evidence does not state that DHS has never provided "specific guidance" to HMOs; rather, it says only that DHS has not provided "formal guidance" to HMOs. (SFOF ¶¶ 68–69.) For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' response states no genuine issue of material fact, because the State's dispute that the phrase "specific guidance" should be replaced with the phrase "formal guidance" is one of semantics, not of substance. The parties agree that DHS has never provided formal guidance to HMOs regarding the scope or interpretation of the Challenged Exclusion.

111. The agency has never provided formal guidance to HMOs on the agency's definition of the terms "transsexual surgery" and "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics" contained in the Challenged Exclusion, SFOF ¶ 68, nor has it provided formal guidance to those HMOs on what treatments and services are specifically excluded from coverage by the Challenged Exclusion. SFOF ¶ 69.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

112. The only written communication DHS has made to participating HMOs pertaining to the Challenged Exclusion was a letter, dated January 4, 2017, sent from former Wisconsin Medicaid Director Michael Heifetz, a political appointee, to contract administrators at the managed care organizations offering Wisconsin Medicaid plans. DHS Dep. 31:5-32:18 & Ex. 1. The letter stated that DHS would continue to enforce the Challenged Exclusion and "*will not reimburse* entities for procedures that fall outside the Department's regulations." DHS Dep. Ex. 1 (emphasis added). That letter stated that a federal court had issued a preliminary injunction against the portion of the U.S. Department of Health and Human Services ("HHS") final rule implementing Section 1557 of the Affordable Care Act ("Section 1557 Final Rule") prohibiting discrimination on the basis of gender identity. DHS Dep. Ex. 1. The letter, citing the Challenged Exclusion, stated that:

> The Department will continue to abide by its own regulations related to covered services under Medical Assistance/Medicaid ("MA"). Specifically, under the Department's MA regulations, transsexual surgery and medically unnecessary hormone therapy are not covered services. (*See* Wis. Admin. Code §§ DHS 107.03(23), (24); 107.10(4)(p)) . . . The Department will continue to make coverage decisions under its regulations, and will not reimburse entities for procedures that fall outside the Department's regulations.

DHS Dep. Ex. 1. The letter did not define "transsexual surgery" or "medically unnecessary hormone therapy." DHS Dep. Ex. 1. The Bureau of Benefits Management was not consulted on the letter. DHS Dep. 32:19-24. The letter was not based on clinical practice, but on DHS's legal position. DHS Dep. 33:3-7.

RESPONSE: Defendants OBJECT to the statement that Wis. Admin. Code § DHS 107.10(4)(p) is part of the "Challenged Exclusion." Plaintiffs did not include this law in their Amended Complaint. (Dkt. 1 ¶ 1.) The parties did not stipulate to this code provision as being part of "the Challenged Exclusion." (SFOF ¶10.) Dispute, to the extent that the evidence cited does not establish that the cited letter was the only written communication DHS had with HMOs "pertaining to the Challenged Exclusion"; rather, Dr. Sager testified that the cited letter was the only "guidance" sent to HMOs regarding "DHS's position on gender-confirming therapy." (DHS Dep. 32:10–14.) Subject to that objection and dispute, for the purposes of summary judgment, Defendants do not dispute the remainder of proposed finding.

REPLY: There is no dispute of a material fact here as Wis. Admin. Code § DHS 107.10(4)(p) merely repeats the exclusion contained in Wis. Admin. Code § DHS 107.03(23), and Plaintiffs, on May 23, 2019, filed a consent motion for leave to file a second amended complaint [ECF No. 189], to conform the definition of the Challenged Exclusion to contain all of the relevant provisions of the Wisconsin Medicaid regulations. Defendants' remaining dispute over the phrase "written communication" versus "guidance" is one of semantics, not of substance. In any event, Plaintiffs accept Defendants' characterization of the letter for purposes of summary judgment.

DHS's Enforcement of the Exclusion Since 2016 Has Been Motivated by Politics, Not Medicine

113. Prior to 2016, DHS sporadically covered chest surgeries to treat gender dysphoria based on a provision of the State's Medicaid regulations allowing coverage for procedures to treat a condition that significantly interferes with a person's personal or social adjustment, or employability. DHS Dep. 35:25-37:10 & Ex. 2. DHS did not consider these surgeries cosmetic when intended to treat gender dysphoria. DHS Dep. 35:25-37:14.

RESPONSE: Partial dispute. Dispute the second sentence, in that the administrative code provision cited as the basis for sometimes covering chest surgeries expressly provides that "cosmetic surgery" may be covered when "of questionable medical necessity but deemed advisable in order to correct conditions that may reasonably be assumed to significantly interfere with a recipient's personal or social adjustment or employability." Wis. Admin. Code § DHS 107.06(2)(c). Dr. Sager explained that this language formed "the basis by which . . . the Department found on occasion these procedures to be allowable." (DHS Dep. 37:15–24.). For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' response does not state a genuine dispute of material fact as the parties agree that DHS covered certain gender-confirming chest surgeries based on the cited regulation. The remainder of the State's dispute is purely semantic, not substantive.

114. After the Section 1557 Final Rule went into effect in 2016, BBM's clinical staff wrote to DHS management to share their position that the Challenged Exclusion conflicted with federal law and inquired, in writing, about whether gender-confirming surgeries should now be approved. DHS Dep. 39:6-41:6 & Ex. 2; Email from J. Sager to R. Currans-Henry, et al., Nov. 14, 2016 (Bates range DHS001008-1009) [Ex. 11 to Second May Decl.]. BBM never received a written response to this inquiry. DHS Dep. 41:7-8. However, mid-level DHS management, who were political appointees, notified the BBM medical directors that, under the instructions of DHS's "upper management" (also political appointees), they "were not to approve the surgeries, and . . . to remain mute and neither approve or deny, just leave them," offering no further explanation. DHS Dep. 41:9-18. They were told that they should let prior authorization requests for surgeries "sit and 'age out,'" which they understood to mean to neither approve nor deny within the prescribed timelines to render an action under state law. DHS Dep. 42:14-43:7 & Ex. 2. They had never received a similar direction for any other types of coverage determinations. DHS Dep. 43:8-10.

RESPONSE: Dispute the first clause of the first sentence. The Section 1557 Final Rule never went into effect. The federal district court for the Northern District of Texas entered a preliminary injunction one day before the rule's effective date. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). For purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' response does not state a genuine dispute over a material fact because whether the implementation date of the Section 1557 Final Rule was July 18, 2016 or December 31, 2016 is immaterial to Plaintiffs' claims. The Section 1557 Final Rule was issued May 18, 2016 and its effective date was July 18, 2016, "except to the extent that provisions of this rule require changes to health insurance or group health plan benefit design (including covered benefits, benefits limitations or restrictions, and cost-sharing mechanisms, such as coinsurance, copayments, and deductibles), such provisions, as they apply to health insurance or group health plan benefit design, have an applicability date of the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2017." 81 Fed. Reg. 31376–31473 (May 18, 2016) (codified at 45 C.F.R. § 92). It is unclear whether the rule "require[d] changes to health insurance or group health plan benefit design" for Wisconsin Medicaid, or that this later effective date applied to Wisconsin Medicaid at all. In any event, whether the effective date of the *rule* was July 18, 2016 or January 1, 2017 is immaterial to this case, as Section 1557's statutory protections have applied to DHS since the law's enactment in 2010, and Plaintiffs' Section 1557 claims are based on the statute and not the rule. There is no dispute that DHS's medical directors were instructed by DHS officials not to act on prior authorizations for gender dysphoria treatments in contravention of state administrative requirements.

115. At that time, BBM's clinical staff were given no written clarification from DHS's political appointees or executive management as to what procedures were subject to the Challenged Exclusion. DHS Dep. 32:10-16.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

116. BBM subsequently received no further direction from DHS management regarding the enforcement of the Challenged Exclusion. DHS Dep. 44:22-4512. According to Dr. Sager, "when we saw this black-and-white kind of in writing direction to the HMOs, I felt that we were quite vulnerable to continue the compassionate allowing of transgender surgeries. They were sporadic at that point, almost exclusively top procedures in the way them before given the Department really coming to a position that they pushed out to the HMOs" through Mr. Heifetz's letter. DHS Dep. 44:7-45:12; Email from J. Sager to L. Wiggins, Jan. 4, 2017 ("Jan. 2017 Email from J. Sager") (Bates range DHS001099-1100) [Ex. 12 to Second May Decl.].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

117. Contrary to their shared clinical opinion that gender-confirming surgeries were medically necessary and should be allowable under the current standard medical guidelines, including the WPATH Standards of Care and Endocrine Society Guidelines, Dr. Sager and Dr. Wiggins decided the best option would be to deny all requests for gender-confirming hormones and surgery moving forward to comply with the Department's directives to the HMOs. Jan. 2017 Email from J. Sager; DHS Dep. 44:22-46:6. This was not based on a clinical determination, but instead was motivated by "the increased number of requests for gender conforming [sic] surgeries since Medicare lifted its moratorium on the same in 2014, the increased political spotlight on the issue, the lack of clear direction or guidance from upper Medicaid management and the seemly [sic] clear stance of the state of WI not to cover such surgeries." Timeline of internal handling of Gender Conforming Surgical Requests within Wisconsin Mediciad [sic] Fee for service, J. Sager, July 8, 2018 (DHS Dep. Ex. 2); DHS Dep. 45:17-19. Indeed, Dr. Sager wrote at the time, "In my opinion, I think it is a more transparent and reasonable option to deny all these requests for gender-confirming treatment hormones and surgery, not that I believe this to be ethically or morally right, but in order to catalyze a better solution through the appropriate legislative or legal channels . . ." Jan. 2017 Email from J. Sager; DHS Dep. 44:22-46:6.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

118. Consistent with this assumption, internal DHS documents indicate that the Division of Medicaid Services wishes to eliminate one part of the Challenged Exclusion, Wis. Admin. Code § DHS 107.10(4)(p), which excludes hormone treatments from coverage, based on DHS's view that the provision conflicts with federal law and denies medically necessary care to

transgender people. An internal document entitled, "BIENNIAL RULE REVIEW: Division of Medicaid Services (DMS), Proposed Findings," and most recently circulated within DHS on February 14, 2019, contains the following statement:

> 107.10(4)(p) Conflicts with federal law. Section 1557 of the Affordable Care Act prohibits discrimination based on gender identity. There are an estimated 1.4 million adults in the US that identify as transgender. It is more acceptable today for a person to identify as a different sex than what they were born as. Major medical associations in the US have described transition-related surgeries as "medically necessary" for both the physical and mental health of transgender people. More and more insurance plans and Medicare are covering these surgeries. As these surgeries become more frequent, the rule has become outdated by not allowing coverage for these types of drugs. Section 1557 of the Affordable Care Act prohibits discrimination based on gender identity. Recommendation is to delete this rule or revise the rule to allow coverage of drugs for trans-sexual surgeries or alteration of sexual anatomy or characteristics.

Wis. Dep't of Health Servs., Biennial Rule Review Document (Jan. 2018) (Bates number DHS000520) [Ex. 13 to Second May Decl.].

RESPONSE: Defendants OBJECT to the statement that Wis. Admin. Code § DHS 107.10(4)(p) is part of the "Challenged Exclusion." Plaintiffs did not include this law in their Amended Complaint. (Dkt. 1 ¶ 1.) The parties did not stipulate to this code provision as being part of "the Challenged Exclusion." (SFOF ¶10.) Subject to this objection, Defendants dispute. The cited evidence does not support the proposed fact, in that it does not establish that "DHS's view [is] that the provision conflicts with federal law and denies medically necessary care to transgender people." Plaintiffs provide no evidence regarding the author of this document or whose view it represents, nor does the cited document state any view about the medical necessity of surgical treatments for gender dysphoria.

REPLY: There is no dispute of a material fact here as Plaintiffs have cured the issues raised in Defendants' objections, and Defendants' dispute about the contents of the cited document is based on a misreading of that document and Plaintiffs' proposed fact.

First, Wis. Admin. Code § DHS 107.10(4)(p) merely repeats the exclusion contained in Wis. Admin. Code § DHS 107.03(23), and Plaintiffs, on May 23, 2019, filed a consent motion for leave to file a second amended complaint [ECF No. 189], to conform the definition of the Challenged Exclusion to contain all of the relevant provisions of the Wisconsin Medicaid regulations.

Second, Plaintiffs object to and dispute Defendants' statement that "Plaintiffs provide no evidence regarding the author of this document or whose view it represents the quoted document." This document was produced by Defendants to Plaintiffs in this case, the top of the document indicates that it was prepared by DHS's Office of Legal Counsel, and the document is dated. The precise author of the document is irrelevant as it reflects the agency's position. In any event, Plaintiffs are now providing the Court a copy of the same document attached to two emails, each dated February 14, 2019, from DHS Policy Initiatives Advisor Emily K. Loman to DHS employees Marlia Mattke, Krista Willing, and Curtis Cunningham, containing a chain of other emails between those and other DHS employees (including Pamela Appleby, Susan Seibert, and Wisconsin Medicaid medical directors Lora Wiggins, Julie Sager, and Steve Tyska), that discusses the contents of the document and references various DHS employees' contributions to the document. See Third Declaration of Orly May Ex. 1. Plaintiffs will have the opportunity to call one or more of these current or former DHS employees at trial to authenticate this document, so this Court may consider the document for purposes of summary judgment.

Third, Defendants' "dispute" that "the cited document [does not] state any view about the medical necessity of surgical treatments for gender dysphoria" is irrelevant. The proposed fact does not discuss surgeries and makes clear that the internal discussions pertained to Wis. Admin.

Code § DHS 107.10(4)(p), which excludes coverage for hormones. There is no genuine dispute over the substance of the quoted language.

119. Earlier this year, in response to Dr. Sager's request for a formal discussion with DHS leadership about coverage for gender-confirming treatments, Dr. Sager was asked by DHS executive management to prepare a briefing document about what an appropriate policy would look like. DHS Dep.64:23-66:6. In preparation for such discussions, Dr. Sager requested and received a spreadsheet from BBM's medical coder, Kathleen Plunkett, identifying various gender-confirming procedures and Wisconsin Medicaid's coverage policies for those procedures, including coverage for the treatment of conditions other than gender dysphoria. DHS Dep. 65:12-66:6; Gender Reassignment Procedure Code List. That spreadsheet reveals that the large majority of procedures that are part of gender-confirming surgeries are covered for other conditions. DHS Dep. 65:12-66:6; Gender Reassignment Procedure Code List.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

120. Further discussions between BBM and DHS management about potential policy changes have not yet occurred. DHS Dep. 65:13-66:8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute that at the time of the DHS deposition, these discussions had not occurred yet.

EXPERIENCES OF THE NAMED PLAINTIFFS AND MEMBERS OF THE PROPOSED CLASS

Harm to All Members of the Proposed Class

121. The Challenged Exclusion contributes to and exacerbates the rampant discrimination and mistreatment transgender Wisconsin residents suffer, including pervasive health care discrimination and mistreatment by the police and others, as well as the high poverty rates in the transgender community. Hughto Rep. at 21-24; *see also* USTS Exec. Summ.; 2015 USTS-WI.

RESPONSE: Defendants OBJECT to the use of the term "discrimination" to the extent is a legal conclusion. Defendants further OBJECT that the cited USTS Executive Summary is inadmissible hearsay. Subject to these objections, Defendants dispute, in that there is inadequate evidence that surgical treatments can safely and effectively treat gender dysphoria, such that the

lack of coverage does not subject transgender Wisconsin residents to discrimination and mistreatment. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.)

REPLY: Defendants' response does not state a genuine issue of material fact because Plaintiffs' use of the word "discrimination" in this context is not a legal conclusion, and because Defendants have failed to offer any admissible evidence to rebut the expert witness opinion of Dr. Hughto.

First, Plaintiffs' use of the term "discrimination" in this context is a factual statement, not a legal conclusion, but whether the term is a factual or legal one is immaterial as Defendants do not dispute the substance of the proposed fact or to Dr. Hughto's expert opinions.

Second, Dr. Hughto cited and relied on the 2015 U.S. Transgender Survey, published by the National Center on Transgender Equality ("NCTE"), in forming her expert opinion. *See* Hughto Report at 12, 16, Ex. B at 4. To the extent that it helped form the basis for her opinion, as an expert in social epidemiology and public health with expertise in transgender health, she can testify about its contents. *See* Fed. R. Evid. 703. Moreover, this Court has already credited statistics from this document, *see* PI Op. & Order, July 25, 2018, at 33-34 [ECF No. 70], and several other courts have specifically cited to it. *See, e.g.*, *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1137 n.8 (D. Idaho 2018) (noting the statistics in the report are "reliable"); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) (citing the report to provide basic statistic on trans experiences); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018) (same). The Seventh Circuit has also cited statistics from a similar survey published by the National Center on Transgender Equality on students' experiences in schools. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). Because these statistics represent original survey results conducted by NCTE, a nationally

respected organization, and the results are not reasonably in dispute, the Court may take judicial notice of them under Fed. R. Evid. 201.

Third, Defendants' contention that "there is inadequate evidence that surgical treatments can safely and effectively treat gender dysphoria" is based solely on Dr. Ostrander's purported expert opinion and the documents she attached to her declaration. Dr. Ostrander offers *no opinion whatsoever* on the harm to transgender individuals unable to obtain gender-confirming care, so Plaintiffs object to Defendants' misleading attempt to use her purported opinion to create a factual dispute here. In any event, Dr. Ostrander's report and testimony must be excluded for the reasons explained in the General Objection above and Plaintiffs' accompanying motion to strike, incorporated herein.

122. The Challenged Exclusion prevents medical providers in Wisconsin from providing clinically appropriate, adequate treatments for gender dysphoria to their transgender patients by categorically denying coverage for necessary care to those patients. Decl. of Linda Wesp, MSN, RN, APNP, FNP-C, AAHIV-S ¶ 16 (Oct. 16, 2018) [ECF No. 94] ("Wesp Decl."); Decl. of Kathy Oriel, MD, MS ¶ 14 (Oct. 25, 2018) [ECF No. 109] ("Oriel Decl."); Supp. Decl. of Katherine Gast, MD, MS ¶¶ 3-4 (Feb. 22, 2019) ("Gast Supp. Decl."). For example, Dr. Gast, the UW Health surgeon who performs many gender-confirming surgeries on transgender patients, has seen 25 transgender patients on Wisconsin Medicaid seeking gender-confirming surgeries between April 30, 2018 and February 22, 2019. Gast Supp. Decl. ¶ 3. Dr. Gast submitted prior authorization requests for eight of those patients, all of which were denied. Gast Supp. Decl. ¶ 4. Her office did not submit prior authorization requests for the others because they knew they would be denied. Gast Supp. Decl. ¶ 4.

RESPONSE: Defendants dispute the first sentence of this proposed finding of fact. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). For the purposes of summary judgment, Defendants do not dispute the remainder of proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut this proposed fact.

123. All transgender Wisconsin Medicaid beneficiaries who need gender-confirming treatments for gender dysphoria, including the Named Plaintiffs and other members of the Proposed Class, will continue to suffer serious gender dysphoria and related harms because of the Challenged Exclusion. Decl. of Lexie Vordermann ¶¶ 7, 13 (Oct. 16, 2018) [ECF No. 99] ("Vordermann Decl."); Decl. of Tori Vancil ¶¶ 10-14 (Oct. 16, 2018) [ECF No. 97] ("Vancil Decl."); Decl. of Emma Grunenwald-Ries ¶¶ 14-16, 18 (Oct. 15, 2018) [ECF No. 98] ("Grunenwald-Ries Decl."); Wesp Decl. ¶¶ 13, 16; Oriel Decl. ¶¶ 6, 9-10, 13; Budge Rep. at 18-19; Hughto Rep. at 10-17.

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be

excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut Dr. Budge's expert opinion, the clinical opinions of the medical providers and Medicaid beneficiaries who submitted the declarations cited in this proposed fact, or any other admissible evidence to rebut this proposed fact. Accordingly, no genuine dispute of material fact exists here.

Enforcement of the Exclusion Against the Named Plaintiffs

Cody Flack

124. Cody Flack, a Wisconsin Medicaid beneficiary, is a transgender man with gender dysphoria who has been denied surgical treatments for gender dysphoria based on the Challenged Exclusion. SFOF ¶ 20-21; Decl. of Cody Flack ¶¶ 2-4 (May 16, 2018) [ECF No. 22] ("Flack Decl."). After the preliminary injunction in this case issued, DHS, for the first time, considered whether the chest reconstruction surgeries he sought were medically necessary, and, under generally accepted medical standards, determined that they were. DHS Dep. 50:24-52:15. DHS admits that the agency's previous denial of coverage to Mr. Flack for these surgeries was not based on a clinical determination, but a legal one. DHS Dep. 49:7-50:9. Having now obtained these surgeries, Mr. Flack's gender dysphoria has diminished significantly. Supp. Decl. of Cody Flack ¶ 4 (Oct. 16, 2018) [ECF No. 91] ("Flack Supp. Decl.").

RESPONSE: Dispute the second and third sentences, to the extent that the cited evidence shows only that Dr. Sager herself, not DHS, determined that Cody Flack's requested surgical treatments were medically necessary, and that Dr. Sager herself, not DHS, interpreted the cited letter as resting on a political rather than clinical determination. For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' response does not state a material factual dispute as it is based on a mischaracterization of the Rule 30(b)(6) testimony of DHS cited in the proposed fact. Plaintiffs object to Defendants' mischaracterization of the testimony to imply that Dr. Sager's determination regarding Cody Flack's requested treatments was made in her personal capacity. When she reviewed the medical necessity of Mr. Flack's requested surgeries in August 2018, Dr. Sager was the medical director for Wisconsin Medicaid, and made the medical necessity

determination *in her official capacity*, as she was required to do by the preliminary injunction in this case. DHS Dep. 50:24-52:15. Defendants' assertion that this was not a determination by DHS is false. Plaintiffs' further object to Defendants' misstatement of the proposed fact and Dr. Sager's 30(b)(6) testimony, where she testified that the basis for Mr. Flack's original denial was "legal." Neither she nor the PFOF used the word "political." Her testimony that the original denial of coverage for Mr. Flack's surgery was based on legal, not clinical, considerations was made in her capacity as DHS's 30(b)(6) representative and is binding on DHS. DHS Dep. 49:7-50:9.[4] It is also reflected in the September 25, 2017 letter sent by Dr. Sager, in her official capacity, to the administrative hearing officer in Mr. Flack's appeal. DHS Dep., Ex. 3. For these reasons, there is no genuine dispute of fact here.

125. Mr. Flack's gender is male. SFOF ¶ 19. While he was assigned female at birth and raised as a girl, he has known himself to be male since early childhood. Flack Decl. ¶ 4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

126. At age 18, Mr. Flack took steps to begin his gender transition. Flack Decl. ¶ 7. He began seeing a gender therapist, adopted a traditionally male name, and took other steps to outwardly present as the male he is. Flack Decl. ¶ 7. Due to a lack of support and resources, and fears that coming out as transgender might isolate him from his family and others, Mr. Flack felt unable to undergo a full transition for several more years—despite experiencing significant gender dysphoria. Flack Decl. ¶ 7.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

127. In 2012, after moving to Wisconsin and feeling more supported in his gender identity, Mr. Flack resumed his gender transition. Flack Decl. ¶ 8. He took steps to socially

[4] Plaintiffs acknowledge that Dr. Sager clarified that certain statements made during the 30(b)(6) deposition were her personal, professional clinical opinion and did not necessarily represent DHS's view. Plaintiffs' attorney asked her to qualify any testimony that reflected only her personal opinion. DHS Dep. 29:18-30:5. The portions of the deposition testimony cited above contained no such qualification and were clearly made in her capacity as DHS's representative.

transition to living and presenting as a man in all aspects of his life, including exclusively using his chosen traditionally male name, wearing traditionally men's clothing, and cutting his hair. Flack Decl. ¶ 8. He legally changed his name to Cody Jason Flack. SFOF ¶ 22. He also obtained a corrected Wisconsin state identification card listing his legally changed name and male sex. Flack Decl. ¶ 9.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

128. Mr. Flack has received care for his gender dysphoria from his psychotherapist and physicians. SFOF ¶¶ 23-24, 30. Since 2015, Mr. Flack has seen a psychotherapist, Daniel Bergman, who has treated him for gender dysphoria and other mental health conditions. SFOF ¶ 23. Since August 2016, Mr. Flack has been receiving hormone therapy (testosterone) under the supervision of Dr. Amy DeGueme, an endocrinologist. SFOF ¶ 24. As a result of the testosterone, he developed facial and body hair, a deeper voice, and a more masculine appearance. SFOF ¶ 25.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

129. In October 2016, Mr. Flack had a hysterectomy with bilateral salpingo-oophorectomy—the total removal of his uterus, cervix, fallopian tubes, and ovaries. SFOF ¶ 26. These surgeries were performed primarily to treat two serious medical conditions: dysmenorrhea, a condition characterized by pelvic or lower abdominal pain during menstruation, and premenstrual dysphoric disorder ("PMDD"), a severe form of premenstrual syndrome. SFOF ¶ 26. As Mr. Flack's hysterectomy with bilateral salpingo-oophorectomy was necessary to treat his PMDD and dysmenorrhea, Wisconsin Medicaid covered the procedure. SFOF ¶ 26.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

130. Mr. Flack's hysterectomy with bilateral salpingo-oophorectomy, which Wisconsin Medicaid covered to treat his PMDD and dysmenorrhea, helped significantly reduce his gender dysphoria by better aligning his body with his male identity. Flack Decl. ¶ 13; Decl. of Amy M. DeGueme, MD, ECNU ¶ 8 (May 14, 2018) [ECF No. 29] ("DeGueme Decl.").

RESPONSE: Dispute. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery is medically efficacious and safe treatment for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6,

Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants' response does not state a genuine issue of material fact because the purported dispute is irrelevant to the proposed fact and Defendants have no basis to dispute Mr. Flack's testimony or that of his treating endocrinologist, Dr. DeGueme. While Defendants' response disputes whether gender-confirming surgeries are medically necessary in general, the proposed fact only addresses the effects of past surgery on Mr. Flack. The dispute is irrelevant. Regardless, Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut Mr. Flack's testimony or the clinical opinion of Dr. DeGueme.

131. While the October 2016 surgeries and the hormone therapy helped reduce his gender dysphoria, Mr. Flack continued to experience severe gender dysphoria related to the presence of female-appearing breasts on his body. Flack Decl. ¶¶ 14-17; Decl. of Daniel P. Bergman, MS, LPC ¶ 9 (May 14, 2018) [ECF No. 28] ("Bergman Decl."). Because of his breasts, Mr. Flack was regularly mistaken as female and mistreated as a result. Flack Decl. ¶¶ 14-17. As his breasts cause people to mistake him as female, Mr. Flack avoided social situations whenever possible. Flack Decl. ¶ 29. Mr. Flack was ashamed of his breasts. Flack Decl. ¶ 29. Despite his efforts to present as the man he is, he considered the breasts an undesired visible marker of something he is not—female—and a source of significant distress. Flack Decl. ¶¶ 16-17.

RESPONSE: Dispute the first sentence, to the extent that clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from

gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' response does not state a genuine issue of material fact because the purported dispute is irrelevant to the proposed fact and Defendants have no basis to dispute Mr. Flack's testimony or that of his treating therapist, Daniel Bergman. While Defendants' response disputes whether gender-confirming surgeries are medically necessary in general, the proposed fact only addresses the effects of past surgery on Mr. Flack. The dispute is irrelevant. Regardless, Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Defendants have not offered any admissible evidence to rebut Mr. Flack's testimony or the clinical opinion of Mr. Bergman.

132. In an effort to conceal his breasts from public view, Mr. Flack engaged in a technique called "binding," which flattens or reduces the appearance of breasts. SFOF ¶ 27. Mr. Flack finds binding extremely painful and, because of his disabilities, difficult to do himself. SFOF ¶ 28. He has suffered respiratory distress, skin irritation, and sores as a result. SFOF ¶ 28.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

133. To treat his gender dysphoria associated with his breasts, and to avoid the distress, social anxiety, and physical pain and discomfort he suffered from trying to hide them from others, Mr. Flack's doctors recommended that he obtain surgery to remove them and create a

male-appearing chest. Bergman Decl. ¶¶ 9-10, 12, 14; DeGueme Decl. ¶ 9; Decl. of Clifford King, MD, PhD ¶¶ 4-5 (May 21, 2018) [ECF No. 30].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the remainder of proposed finding.

134. Mr. Flack sought to obtain chest reconstruction surgery; specifically, a double mastectomy and male chest reconstruction. SFOF ¶ 29.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

135. The applicable standards of care recognize the procedures Mr. Flack was seeking—double mastectomy and male chest reconstruction—as effective procedures in treating gender dysphoria in transgender men. Schechter Rep. at 9; Shumer Rep. at 15; WPATH Standards of Care at 57.

RESPONSE: Dispute, to the extent that WPATH are not the "applicable standards of care"; rather, they are merely clinical guidelines for the standards of care for treatment of transgender persons published by WPATH. (SFOF ¶ 58.) Do not dispute that this is what the WPATH guidelines state but dispute the accuracy of that statement. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m).

REPLY: Defendants' response does not create a genuine dispute of material fact because the purported dispute between the phrases "guidelines" and "standards of care" is semantic, and Defendants have otherwise failed to offer admissible testimony to rebut this fact.

First, the dispute between "guidelines" or "standards of care" is a semantic one, and not a material one. As Defendants have failed to offer any admissible evidence to rebut the opinions of

Plaintiffs' experts that the WPATH Standards of Care are generally accepted clinical guidelines for treating gender dysphoria, there is no material dispute here.

Second, Defendants fail to state a genuine dispute of material fact because their sole bases for disputing the "accuracy" of the WPATH Standards of Care are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19.

136. Mr. Flack consulted with Dr. Clifford King, a plastic surgeon, about obtaining a double mastectomy and male chest reconstruction. SFOF ¶ 30. Mr. Flack provided Dr. King with letters of support from four medical providers—his primary care doctor, therapist, endocrinologist, and the physician who performed his hysterectomy and oophorectomy. SFOF ¶ 31. In each of those letters, the provider stated that Mr. Flack has gender dysphoria and meets the criteria for surgery. SFOF ¶ 31. Dr. King determined that Mr. Flack was eligible for male chest reconstruction under the WPATH Standards of Care. SFOF ¶ 32. On July 18, 2017, Dr. King submitted a request for prior authorization to DHS for Wisconsin Medicaid coverage of the chest reconstruction surgery for Mr. Flack. SFOF ¶ 33.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

137. On August 2, 2017, DHS denied the prior authorization request made by Dr. King. SFOF ¶ 34. DHS's denial was based on the Challenged Exclusion. SFOF ¶ 35.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

138. In a letter from DHS to Dr. King, dated August 2, 2017, DHS stated that each surgical procedure sought by Mr. Flack—mastectomy simple complete and breast reconstruction—"is not a covered benefit." SFOF ¶ 36. The letter contained the following notation: "08/02/17: Per WI administrative code DHS 107.03(24) transsexual surgery is a non-covered service. BA." SFOF ¶ 36. The Parties stipulate that ECF No. 21-18 is a true and correct

copy of the full August 2, 2017 letter from DHS to Dr. King, and refer the Court to that document for a complete representation of its contents. SFOF ¶ 36.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

139. In a letter from DHS to Mr. Flack, dated August 2, 2017, DHS stated that Mr. Flack's prior authorization requests for mastectomy simple complete and breast reconstruction were denied because, for each, "THE SERVICE REQUESTED IS NOT A COVERED BENEFIT. THE REQUEST DOES NOT MEET ONE OR MORE OF THE CRITERIA FOUND IN WISCONSIN ADMINISTRATIVE CODE." SFOF ¶ 37. DHS cited "DHS 107.03 WISCONSIN ADMINISTRATIVE CODE" as "[t]he specific regulation(s) that support the reason for the denial/modification of your provider's request for services." SFOF ¶ 37. The Parties stipulate that ECF No. 21-19 is a true and correct copy of that letter, and refer the Court to that document for a complete representation of its contents. SFOF ¶ 37.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

140. DHS considered the surgical procedures Mr. Flack was seeking (double mastectomy and male chest reconstruction) to be excluded by Wis. Admin. Code § DHS 107.03(24). SFOF ¶ 38.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

141. Accordingly, DHS did not review Mr. Flack's prior authorization request for medical necessity prior to the August 2, 2017 denial. DHS Dep. 51:5-12.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

142. Mr. Flack administratively appealed DHS's decision. SFOF ¶ 39. An administrative law judge denied Mr. Flack's appeal of DHS's denial of the preauthorization request on November 21, 2017, and denied Mr. Flack's request for reconsideration on December 11, 2017. SFOF ¶ 40. The administrative law judge stated that he based his decision on the Challenged Exclusion. SFOF ¶ 41; Decision by Administrative Law Judge B. Schneider, at 1 (Nov. 21, 2017) [Ex. 20 to First May Decl.] [ECF No. 21-20].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

143. A September 25, 2017 letter from Julie Sager, MD, Medical Director, Bureau of Benefits Management, Division of Medicaid Services, Wisconsin Department of Health Services, submitted to the Division of Hearing and Appeals as part of Mr. Flack's administrative appeal of DHS's denial of prior authorization for the requested surgeries, stated the following:

> Mr. Flack is seeking the aforementioned services [a bilateral complete mastectomy (service code 19303) and breast reconstruction (nipple graft-service code 19350)] as part of gender confirmation surgery. The primary diagnosis listed with the prior authorization request is transsexualism (F64.0). Mr. Flack also carries a diagnosis of gender dysphoria which is an accepted medical indication for the surgical treatment requested.
>
> This request was denied by DMS as Wis. Admin. Code DHS 107.03(24) specifically lists 'transsexual surgery' as a non-covered service under medical assistance.
>
> The medical necessity of the services requested was not taken into account as reimbursement by Medicaid for this type of surgery is currently excluded by DHS regulations.
>
> Furthermore, please take notice of the attached federal court decision staying enforcement of Section 1557 of the Affordable Care Act regulations related to gender identity.

SFOF ¶ 42; DHS Dep. Ex. 3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding, with the clarification that effective April 24, 2019, Dr. Sager is no longer employed by DHS.

REPLY: Plaintiffs do not dispute the State's clarification, but note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

144. This letter was drafted primarily by DHS's Office of Legal Counsel. DHS Dep. 49:19-22. Dr. Sager, against her wishes, was directed to sign it. Because it did not reflect a clinical determination, she initially refused to sign it because, as she explained, "I wanted the political appointees to sign it because it was a -- felt to me like it was a nonclinical adjudication, and I felt disingenuous signing something that was outside of my clinical jurisdiction." DHS Dep. 50:5-23. Nevertheless, she ultimately signed the letter. DHS Dep. Ex. 3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

145. After being denied coverage for surgery, Mr. Flack's gender dysphoria worsened considerably. Flack Decl. ¶¶ 27-28; Bergman Decl. ¶ 11. Without the means to pay for surgery, he felt hopeless and experienced profound depression and distress because of the denial and his inability to complete his gender transition. Flack Decl. ¶¶ 27-31. He even contemplated suicide and the possibility of performing chest surgery himself, but did not act on those thoughts. Flack Decl. ¶ 28.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

146. Following the preliminary injunction entered in this case on July 25, 2018, DHS reviewed Mr. Flack's prior authorization request for medical necessity for the first time. DHS Dep. 51:5-16.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

147. Dr. Sager, in her role as the medical director of BBM, determined, following a review of Mr. Flack's medical records, that the surgeries he was seeking were medically necessary to treat his gender dysphoria. DHS Dep. 51:17-20. Dr. Sager reviewed the request using the same protocol as requests for other treatments without published coverage guidelines, including consideration of other payers' standards, standards in the medical community, and cost effectiveness. Using the WPATH Standards of Care and the Endocrine Society Guidelines as indicia of what is consistent with the prevailing standards of care and accepted in the medical community, Dr. Sager determined that Mr. Flack's requested surgeries met the definition of medically necessary services. DHS Dep. 51:21-52:15.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

148. Dr. Sager would apply that same type of review to other prior authorization requests and denials, including for gender-confirming surgeries if the Challenged Exclusion were not in place. DHS Dep. 52:16-20; 71:11-17.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding, with the clarification that effective April 24, 2019, Dr. Sager is no longer employed by DHS.

REPLY: Plaintiffs do not dispute the State's clarification, but note that Dr. Sager was the medical director of BBM at DHS from 2016 to 2019. DHS Dep. 6:19-24; 35:15-18.

149. On September 25, 2018, Dr. Clifford King performed the double mastectomy and male chest reconstruction on Mr. Flack. Flack Supp. Decl. ¶ 3.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

150. Immediately after the surgeries, Mr. Flack felt a sense of relief that his outward appearance would now match his male gender and that he would no longer be misgendered because of his chest. Flack Supp. Decl. ¶ 4. He began looking forward to attending public events he previously avoided and to going out in public without extra clothing to hide his chest. Flack Supp. Decl. ¶ 4. He began to feel like "a different person" and "more upbeat and hopeful about [his] life in general." Flack Supp. Decl. ¶ 4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

151. Mr. Flack is considering obtaining a phalloplasty as a gender dysphoria treatment in furtherance of his gender transition. Flack Supp. Decl. ¶ 4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

Sara Ann Makenzie

152. Sara Ann Makenzie is a transgender woman enrolled in Wisconsin Medicaid. SFOF ¶¶ 43-44; Decl. of Sara Ann Makenzie ¶¶ 2-3 (May 21, 2018) [ECF No. 23] ("Makenzie Decl."). Because of the Challenged Exclusion, she was unable to obtain Wisconsin Medicaid coverage for chest and genital reconstruction surgeries needed to treat her gender dysphoria. Makenzie Decl. ¶¶ 18-21. She was compelled to pay out of pocket for a chest surgery that helped alleviate her gender dysphoria, but was unable to afford or obtain genital surgery until the preliminary injunction in this case issued last year. Makenzie Decl. ¶¶ 18-20. After the injunction, Ms. Makenzie's Medicaid HMO reviewed her prior authorization request for genital reconstruction surgery, determined it was medically necessary for her, and approved coverage for the treatment. DHS Dep. 53:15-54:25.

RESPONSE: Partial dispute. Dispute the second sentence, to the extent that a dispute exists over whether chest and genital reconstruction surgeries were needed to treat her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Makenzie.

153. Ms. Makenzie's gender identity is female. SFOF ¶ 45. While she was assigned male at birth and raised as a boy, she has understood herself to be female since childhood and has experienced gender dysphoria for most of her life. Makenzie Decl. ¶¶ 5-7. She has lived consistently as a woman since at least 2012. Makenzie Decl. ¶¶ 3, 8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

154. Ms. Makenzie has been diagnosed with gender dysphoria, and began seeking medical treatments and therapy for gender dysphoria in approximately 2012. SFOF ¶¶ 46, 48.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

155. Since 2013, Ms. Makenzie has been on hormone therapy to treat gender dysphoria. SFOF ¶ 49. Hormone therapy has helped diminish Ms. Makenzie's symptoms of gender dysphoria. Makenzie Decl. ¶¶ 13-16; Decl. of Trisha E. Schimek, MD ¶ 5 (May 21, 2018) [ECF No. 31]; Decl. of Beth E. Potter, MD ¶ 6 (May 23, 2018) [ECF No. 33].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

156. In 2017, Ms. Makenzie sought to obtain chest reconstruction surgery, in the form of breast augmentation, because her lack of a developed chest was exposing her to frequent misgendering. Makenzie Decl. ¶ 18. When Ms. Makenzie contacted DHS to inquire whether Wisconsin Medicaid would cover the chest reconstruction, DHS advised her that the procedure was not a covered benefit. Makenzie Decl. ¶ 19. After learning that chest reconstruction would not be covered by Wisconsin Medicaid, Ms. Makenzie obtained a personal loan from her bank of approximately $5,000 to pay out-of-pocket for the procedure. Makenzie Decl. ¶ 20. Dr. Venkat Rao, a plastic surgeon at UW Health in Madison, performed the surgery in August 2016. Makenzie Decl. ¶ 21.

RESPONSE: Defendants OBJECT to the statement that "Ms. Makenzie contacted DHS to inquire whether Wisconsin Medicaid would cover the chest reconstruction, DHS advised her that the procedure was not a covered benefit" on the grounds that it is vague, ambiguous, and lacks sufficient foundation to enable Defendants to adequately respond. For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' objection is meritless, so it does not give rise to a genuine dispute of material fact. There is nothing vague or ambiguous about Ms. Makenzie's testimony that she contacted DHS to inquire whether Wisconsin Medicaid would cover her chest reconstruction and learned during that call that it would not be covered. Ms. Makenzie can testify about this fact at trial. As Defendants have failed to provide any evidence to dispute Ms. Makenzie's testimony, no genuine dispute exists.

157. The chest reconstruction procedure has been an effective treatment for Ms. Makenzie's gender dysphoria, and she has experienced fewer instances of being mistaken as male or of being mistreated for having masculine features. Makenzie Decl. ¶ 22. However, Ms. Makenzie continued to experience profound distress at the sight of her male-appearing genitalia, which negatively impacts her social life, sexuality, and occupational functioning. Makenzie Decl. ¶¶ 23-24.

RESPONSE: Partial dispute. Dispute the first sentence, to the extent that a dispute exists over whether chest and genital reconstruction surgeries were needed to treat her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Makenzie. Defendants have not offered any admissible evidence to rebut Ms. Makenzie's testimony about the effect of this surgery on her. Accordingly, no genuine dispute of material fact exists here.

158. Ms. Makenzie's medical providers recommended that she obtain genital reconstruction in the form of a bilateral orchiectomy and vaginoplasty, which would create female-appearing external genitalia. SFOF ¶ 51. In 2014, Ms. Makenzie consulted with her

primary care physician, Dr. Trisha Schimek, about obtaining genital reconstruction surgery. Dr. Schimek told Ms. Makenzie that Wisconsin Medicaid would not cover the surgery. SFOF ¶ 50.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

159. In February 2018, on the referral of her primary care doctor, Dr. Beth Potter, Ms. Makenzie consulted with Dr. Katherine Gast, a plastic surgeon, about obtaining genital reconstruction surgery. SFOF ¶ 52. Dr. Gast informed Ms. Makenzie that Wisconsin Medicaid would not cover this procedure. SFOF ¶ 53.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the finding.

160. The applicable standards of care recognize the procedures Ms. Makenzie was seeking—bilateral orchiectomy and vaginoplasty—as effective procedures in treating gender dysphoria in transgender women. Schechter Rep. at 9; Shumer Rep. at 15; WPATH Standards of Care at 57.

RESPONSE: Dispute, to the extent that WPATH are not the "applicable standards of care"; rather, they are merely clinical guidelines for the standards of care for treatment of transgender persons published by WPATH. (SFOF ¶ 58.) Do not dispute that this is what the WPATH guidelines state but dispute the accuracy of that statement. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery is medically efficacious and safe treatment for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants' response does not create a genuine dispute of material fact because the purported dispute between the phrases "guidelines" and "standards of care" is semantic, and Defendants have otherwise failed to offer admissible testimony to rebut this fact.

First, the dispute between "guidelines" or "standards of care" is a semantic one, and not a material one. As Defendants have failed to offer any admissible evidence to rebut the opinions of Plaintiffs' experts that the WPATH Standards of Care are generally accepted clinical guidelines for treating gender dysphoria, there is no material dispute here.

Second, Defendants fail to state a genuine dispute of material fact because their sole bases for disputing the "accuracy" of the WPATH Standards of Care are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19.

161. DHS considers the surgical procedures Ms. Makenzie was seeking (bilateral orchiectomy and vaginoplasty) to be excluded by the Challenged Exclusion. SFOF ¶ 54.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

162. Without coverage from Wisconsin Medicaid, Ms. Makenzie lacked the means to pay for genital reconstruction surgery. Makenzie Decl. ¶ 33.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

163. Learning that Wisconsin Medicaid would not cover her procedure caused Ms. Makenzie extreme distress, including thoughts of suicide and removing her genitals herself. Makenzie Decl. ¶ 33. Her inability to obtain this necessary care exacerbated her gender dysphoria and caused significant emotional distress, particularly related to her genitalia. Makenzie Decl. ¶¶ 23, 33-34. She also engaged in self-harm. Makenzie Decl. ¶ 34. She was constantly afraid that someone would be able to see her genitals through her clothing. Makenzie Decl. ¶ 23. To minimize the chance that someone would notice her genitals through her clothing, she wore multiple pairs of underwear and engaged in a practice called "tucking" to hide her

genitals, which she found very painful and uncomfortable. Makenzie Decl. ¶ 23. Despite these efforts to conceal her genitals, she was constantly worried that someone might notice them—and then mistreat or attack her once they realized she is transgender. Makenzie Decl. ¶ 24.

RESPONSE: Partial dispute. Dispute the second sentence, to the extent that it implies that the surgical treatments Ms. Makenzie sought were medically necessary to treat her gender dysphoria and her inability to undergo the treatments exacerbated her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Makenzie. Defendants have not offered any evidence to rebut Ms. Makenzie's testimony about her inability to obtain surgery.

164. Following the preliminary injunction entered by the Court on July 25, 2018, Ms. Makenzie's Medicaid HMO, Care Wisconsin, reviewed her prior authorization requests for Wisconsin Medicaid coverage for her genital reconstruction surgery and related procedures. Second Supp. Decl. of Sara Makenzie ¶ 2 (Oct. 18, 2018) [ECF No. 92]. Care Wisconsin, in

consultation with DHS, determined that the requested surgeries were medically necessary for Ms. Makenzie. DHS Dep. 53:15-54:25.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

Marie Kelly

165. Marie Kelly is a transgender woman with gender dysphoria who has been unable to obtain surgical treatments for gender dysphoria because of the Challenged Exclusion. Decl. of Marie Kelly ¶¶ 3, 19-21 (Oct. 15, 2018) [ECF No. 93] ("Kelly Decl.").

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

166. Ms. Kelly was assigned male at birth, but she has a female gender identity and has known herself to be female for nearly all of her life. Kelly Decl. ¶¶ 3, 6. Ms. Kelly has lived fully in accordance with her female gender identity since 2010. Kelly Decl. ¶¶ 3, 9.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

167. Ms. Kelly has a diagnosis of gender dysphoria. Kelly Decl. ¶ 4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

168. Ms. Kelly was continuously enrolled in Wisconsin Medicaid from 2014 to February 28, 2019, and she expects to be re-enrolled in the near future. Kelly Decl. ¶ 5; Supp. Decl. of Marie Kelly ¶¶ 2-6 (Apr. 22, 2019) ("Kelly Supp. Decl.").[5]

[5] Ms. Kelly, who works as a temporary administrative assistant through a staffing agency, has a variable monthly income that has consistently been under the Wisconsin Medicaid income limits for many years. However, she was placed by her staffing agency in a temporary position in January 2019 that caused her unexpectedly to exceed the monthly income limits for Wisconsin Medicaid, resulting in temporary ineligibility for Medicaid coverage. Kelly Supp. Decl. ¶¶ 2–4. She is no longer at that job placement and has significantly fewer hours of work. She expects her monthly income in April will again fall below the Wisconsin Medicaid income limits, which would make her income-eligible for Medicaid again, and she intends to re-enroll as soon as possible. Kelly Supp. Decl. ¶¶ 5–6. If she is income-eligible for Medicaid based on her April income, the effective date of her re-enrollment would be retroactive to April 1, 2019. In addition, in March 2019, she

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

REPLY: As of May 1, 2019, Ms. Kelly is again enrolled in Wisconsin Medicaid. Second Supp. Decl. Marie Kelly at ¶ 3 [ECF No. 187].

169. To further her gender transition and treat her gender dysphoria, Ms. Kelly has taken feminizing hormone treatments under the supervision of her primary care providers since 2011. Kelly Decl. ¶ 12.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

170. Although the hormone treatments have helped reduce Ms. Kelly's gender dysphoria, she still experiences exacerbated symptoms of gender dysphoria and daily anxiety related to her male-appearing genitalia, male-appearing chest, and facial hair. Kelly Decl. ¶¶ 12, 14-17.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

171. Ms. Kelly's medical providers have determined that female genital reconstruction, female chest reconstruction, and electrolysis for facial hair removal are medically necessary treatments for her gender dysphoria. Kelly Decl. ¶ 18; Wesp Decl. ¶ 14.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

172. Ms. Kelly has sought Wisconsin Medicaid coverage for gender-confirming surgical treatments, including female genital reconstruction (orchiectomy and vaginoplasty), female chest reconstruction, and electrolysis for facial hair removal, to further her gender transition and treat her daily symptoms of gender dysphoria and related anxiety and distress. Kelly Decl. ¶ 18.

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applied for disability-based Medicaid. Kelly Supp. Decl. ¶¶ 5–6. If approved, a process that may take several months, her coverage would be retroactive to March 1, 2019, which would mean she had no actual lapse in coverage. Kelly Supp. Decl. ¶¶ 7–8.

RESPONSE: Partial dispute. Dispute to the extent that it implies that the treatments Ms. Kelly sought were medically necessary to treat her gender dysphoria and her inability to undergo the treatments exacerbated her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Kelly. Defendants have not offered any admissible evidence to rebut Ms. Kelly's testimony about her efforts to seek Wisconsin Medicaid coverage for gender-confirming care.

173. Ms. Kelly has inquired with her Wisconsin Medicaid managed care organizations several times over the years, including as recently as August 2018, about whether Wisconsin Medicaid would cover gender-confirming procedures. Kelly Decl. ¶¶ 19-20. She was told each time she inquired that these procedures are not covered because of the Challenged Exclusion. Kelly Decl. ¶¶ 19-20. Because she could not afford to pay for gender-confirming procedures herself, she was unable to obtain those or any gender-confirming surgeries and suffered ongoing gender dysphoria as a result. Kelly Decl. ¶¶ 20-21.

RESPONSE: Partial dispute. Dispute the third sentence, to the extent that it implies that the services Ms. Kelly sought were medically necessary to treat her gender dysphoria and her inability to undergo the treatments exacerbated her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Kelly. Defendants have not offered any admissible evidence to rebut Ms. Kelly's testimony about her efforts to seek Wisconsin Medicaid coverage for gender-confirming care.

Courtney Sherwin

174. Courtney Sherwin is a transgender woman who has been on Wisconsin Medicaid for about two years. Decl. of Courtney Sherwin ¶¶ 3-4 (Oct. 18, 2018) [ECF No. 95] ("Sherwin Decl."). Ms. Sherwin has been enrolled in Wisconsin Medicaid through several third-party HMOs. Sherwin Decl. ¶¶ 17, 22. Her current HMO, Quartz, has denied her coverage for several gender-confirming surgical treatments for gender dysphoria deemed medically necessary by her doctors based on the Challenged Exclusion. Supp. Decl. of Courtney Sherwin ¶¶ 2-3, 5-8 (Jan.

25, 2018) [ECF No. 132] ("Sherwin Supp. Decl."). Ms. Sherwin suffers severe gender dysphoria because of the male-appearing parts of her body and her male-sounding voice, and has experienced significant depression, anxiety, and suicidality resulting from her inability to obtain gender-confirming surgeries. Sherwin Decl. ¶¶ 30, 33; Sherwin Supp. Decl. ¶ 9.

RESPONSE: Dispute the final sentence, to the extent that it implies that the services Ms. Sherwin sought were medically necessary to treat her gender dysphoria and her inability to undergo the treatments exacerbated her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Sherwin. Defendants have not offered any admissible evidence to rebut Ms. Sherwin's testimony about her efforts to seek Wisconsin Medicaid coverage for gender-confirming care.

175. Ms. Sherwin's gender identity is female. Sherwin Decl. ¶¶ 3, 6. She was assigned male at birth and raised as a boy, but has known herself to be female since around age 10. Sherwin Decl. ¶¶ 3, 6.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

176. Ms. Sherwin has been diagnosed with gender dysphoria. Sherwin Decl. ¶ 5.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

177. Ms. Sherwin came out as transgender in late 2017 and began her gender transition in early 2018, at which time she began living full-time as a woman. Sherwin Decl. ¶ 6. Before coming out as transgender, Ms. Sherwin suffered significant gender dysphoria (including anxiety, depression, stress, and suicidal ideation) resulting from the incongruence resulting from her identity as a woman and being perceived as a man by others. Sherwin Decl. ¶ 8.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

178. After coming out as transgender and starting her gender transition, Ms. Sherwin began wearing traditionally women's clothing, began using the name Courtney instead of her traditionally male birth name, and started a medical transition to further her transition and treat her gender dysphoria. Sherwin Decl. ¶ 9.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

179. Since March 2018, Ms. Sherwin has taken feminizing hormone treatments under the care of her primary care doctor. Sherwin Decl. ¶ 11. Ms. Sherwin has been denied Wisconsin Medicaid coverage for certain hormone treatments for gender dysphoria prescribed by her doctors because of the Challenged Exclusion, and has had to pay out-of-pocket for the hormone treatments for which she was denied coverage. Sherwin Decl. ¶¶ 11-13.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

180. While the hormone treatments have reduced Ms. Sherwin's gender dysphoria, she continues to experience significant dysphoria related to her masculine voice and her male-appearing chest, genitals, and facial hair. Sherwin Decl. ¶¶ 10, 12, 19, 21, 23. Indeed, Ms. Sherwin has been harassed when others discover her transgender status as soon as they hear her voice. Sherwin Decl. ¶ 24.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

181. Ms. Sherwin's medical providers have determined that gender-confirming surgeries, including genital reconstruction (orchiectomy, penectomy, and vaginoplasty) and chest reconstruction (breast augmentation), are medically necessary treatments for her gender dysphoria. Sherwin Decl. ¶¶ 16-17, 22, 26-27. Ms. Sherwin's doctors have determined that her need for an orchiectomy, a gender-confirming surgery that would stop her body's natural production of testosterone, is particularly urgent as it is medically necessary for her because of her gender dysphoria, and to prevent the adverse and dangerous side effects she experiences from one of her hormone treatments, the testosterone blocker spironolactone. Sherwin Decl. ¶¶ 14-17.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

182. Notwithstanding Ms. Sherwin's doctors' recommendations that she obtain these surgeries, her Wisconsin Medicaid HMO, Quartz, has denied her coverage for these surgeries based on the Challenged Exclusion. Sherwin Supp. Decl. ¶¶ 2-3, 5-8; Exs. A and B to Sherwin Supp. Decl. (Nov. 22, 2018 and Jan. 22, 2019) [ECF Nos. 132-1, 132-2].

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

183. Because Ms. Sherwin cannot afford these treatments herself, she is experiencing significant gender dysphoria and consequences of that dysphoria, including severe social anxiety, adverse physical health symptoms, and other distress. Sherwin Decl. ¶¶ 19-21, 23-25, 30-31, 33.

RESPONSE: Dispute, to the extent that it implies that the surgical treatments Ms. Sherwin seeks are medically necessary to treat her gender dysphoria and her inability to undergo the treatments caused or exacerbated her gender dysphoria. Clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) For the purposes of summary judgment, Defendants do not dispute the remainder of the proposed finding.

REPLY: Defendants fail to state a genuine dispute of material fact because their sole bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Sherwin. Defendants have not offered any admissible evidence to rebut Ms. Sherwin's testimony about her efforts to seek Wisconsin Medicaid coverage for gender-confirming care.

Enforcement of the Exclusion Against Other Members of the Proposed Class

184. In addition to the Named Plaintiffs, other transgender Wisconsin Medicaid beneficiaries with gender dysphoria are being denied coverage for gender-confirming surgeries pursuant to the Challenged Exclusion. *See, e.g.*, Grunenwald-Ries Decl. ¶ 18; Supp. Decl. of Grunenwald-Ries ¶¶ 3-5 (Feb. 21, 2019) ("Grunenwald-Ries Supp. Decl."); Vordermann Decl. ¶¶ 9-12, 14; Vancil Decl. ¶ 14; Wesp Decl. ¶¶ 13, 16; Oriel Decl. ¶¶ 13, 14; Gast Supp. Decl. ¶¶ 3-4.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

185. For example, Emma Grunenwald-Ries, a transgender Wisconsin Medicaid beneficiary, is seeking genital reconstruction, chest reconstruction, and facial feminization surgery to treat her gender dysphoria, on the recommendation of her primary care doctor. Grunenwald-Ries Supp. Decl. ¶ 2. Dr. Katherine Gast, a surgeon at UW Health who performs gender-confirming surgeries, agreed to perform the first of those procedures, genital reconstruction, but will not submit a prior authorization request since she knows it will be denied based on the Challenged Exclusion. Grunenwald-Ries Supp. Decl. ¶ 5. Ms. Grunenwald-Ries experiences significant gender dysphoria related to her genitalia, chest, and voice, experiences daily anxiety, stress, and worry about her inability to obtain this medically necessary care, and finds it upsetting that the Challenged Exclusion is the only barrier to her completing her medical transition. Grunenwald-Ries Supp. Decl. ¶¶ 5- 6.

RESPONSE: Defendants OBJECT to the statement that Dr. Gast "knows" that prior authorization requests for procedures for her patient, Emma Grunenwald-Ries, "will be denied based on the Challenged Exclusion" on the ground that it is hearsay and an incorrect view of the current state of the law. This Court has issued a preliminary injunction against enforcement of the Challenged Exclusion. Subject to that objection, Defendants partially dispute. Dispute that Ms. Grunenwald-Ries's requested services are "medically necessary," as clinical studies provide "very low" quality evidence regarding whether gender reassignment surgery and related hormone therapy are medically efficacious and safe treatments for transgender persons suffering from gender dysphoria. (Ostrander Decl. Ex. B:9–10, Ex. C:5–6, Ex. D:5–6, Ex. E:1.) So these services are not "medically necessary," as that term is defined in Wis. Admin. Code § DHS 101.03(96m). For the purposes of summary judgment, Defendants do not dispute the remainder of this proposed finding.

REPLY: Defendants' response does not state a genuine issue of material fact because there can be no dispute that, at the time Ms. Grunenwald-Ries consulted with Dr. Gast, the surgeries she sought were subject to the Challenged Exclusion, and their remaining objection is based on the inadmissible testimony of Dr. Ostrander.

First, Plaintiffs object to Defendants' response as misleading, as the preliminary injunction entered by the Court came more than two months after Ms. Grunenwald-Ries's consultation with Dr. Gast, as indicated by the date on her declaration: February 21, 2019. Dr. Gast's advice to Ms. Grunenwald-Ries was not, at the time it was made, "incorrect as a matter of law." Furthermore, Ms. Grunenwald-Ries is not offering Dr. Gast's statement for the truth of the matter, but merely for her own understanding as to why a prior authorization for a surgery her doctors deemed medically necessary was not being submitted, and as such, it is not hearsay.

Grunenwald-Ries Supp. Decl. ¶ 5. In any event, Dr. Gast's own declaration corroborates the truth of Ms. Grunenwald-Ries's statement. Gast. Decl. ¶ 4 [ECF No. 164]. Dr. Gast, who leads UW Health's Transformations Clinic, is well-situated as a provider to testify to her understanding of the availability of Wisconsin Medicaid coverage for her patients based on her actual knowledge. Plaintiffs may call both Ms. Grunenwald-Ries and Dr. Gast as witnesses at trial to testify on these subjects.

Second, Defendants' only other bases for disputing this fact are: 1) Dr. Ostrander's declaration, which contains no opinions in violation of Rule 26(a)(2)(B); 2) the exhibits attached to that declaration, which are inadmissible hearsay; and 3) the studies cited in those reports, which are inadmissible hearsay within hearsay. For the reasons stated in the General Objection above and in Plaintiffs' accompanying motion to strike, Dr. Ostrander's testimony is inadmissible, unreliable, and irrelevant, and must be excluded. *See* General Objection; Mot. to Strike Br. 1, 2, 18, 19. Dr. Ostrander is not a clinician and does not purport to offer testimony on the medical necessity of gender-confirming care to any individual, including Ms. Grunenwald-Ries. Defendants have not offered any admissible evidence to rebut Ms. Grunenwald-Ries's testimony about her efforts to seek Wisconsin Medicaid coverage for gender-confirming care.

186. As another example, Lexie Vordermann, another transgender Wisconsin Medicaid beneficiary who is 19, was denied coverage for an orchiectomy by her Medicaid HMO, Quartz, in early 2018 based on the Challenged Exclusion. Vordermann Decl. ¶ 9. She appealed that decision but it was denied. Vordermann Decl. ¶ 10. A second prior authorization request submitted by her doctor was also denied by Quartz, by letter dated September 2018, which also cited the Challenged Exclusion. Vordermann Decl. ¶ 11. As a beneficiary under 21, it is DHS's position that the Challenged Exclusion does not apply to Ms. Vordermann, DHS Dep. 56:5-57:8, but Quartz's denials nevertheless cited the Challenged Exclusion as the sole basis for the denials. Vordermann Decl. ¶¶ 9-11.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

187. There are hundreds, or even thousands, of transgender Wisconsin Medicaid beneficiaries who may be denied gender-confirming treatments at some point in their lives if the Challenged Exclusion remains in place. Hughto Rep. at 18-19.

RESPONSE: For the purposes of summary judgment, Defendants do not dispute the proposed finding.

Dated: June 4, 2019

Respectfully submitted,

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