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STATE OF RHODE ISLAND

PROVIDENCE, Sc.

SUPERIOR COURT

RICHARD SOUTHWELL, et al.	)	
	)	
vs.	)	NO: PC-2021-05915
	)	
DANIEL J. MCKEE, et al.	)	

HEARD BEFORE THE HONORABLE  
MR. JUSTICE JEFFREY LANPHEAR

Volume 7

OCTOBER 19, 2021

APPEARANCES:

GREGORY PICCIRILLI, ESQUIRE  
FOR THE PLAINTIFFS

MICHAEL FIELD, ESQUIRE  
CHRISANNE WYRZYKOWSKI, ESQUIRE  
JON WHITNEY, ESQUIRE  
MORGAN GOULET, ESQUIRE  
FOR THE DEFENDANTS

Andrea Iacobellis, CSR  
Certified Shorthand Reporter

I N D E XWITNESSES

## DIRECT

## CROSS

DR. JAMES MCDONALD

4, 64

E X H I B I T SPLAINTIFFS'

## IDENTIFICATION

## FULL

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**C E R T I F I C A T I O N**

I, Andrea Iacobellis, CSR, hereby  
certify that the succeeding pages, 1 through 111  
inclusive, are a true and accurate transcript  
of my stenographic notes.

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ANDREA IACOBELLIS, CSR  
Court Reporter

11:34:59 1 **October 19, 2021**

11:35:27 2 **(Morning Session)**

11:35:27 3 **THE CLERK: PC-2021-05915, Richard Southwell**  
11:35:39 4 **vs. Daniel McKee.**

11:35:43 5 **THE COURT:** If I recall correctly, this is  
11:35:51 6 cross-examination of Dr. McDonald. Doctor, if you could  
11:35:55 7 come back up, please.

11:36:13 8 **THE CLERK:** Having been previously sworn in  
11:36:14 9 please state your full name for the record.

11:36:16 10 **THE WITNESS:** My name is Dr. Jim McDonald.

11:36:22 11 **THE CLERK:** Thank you.

11:36:22 12 **THE COURT:** When you're ready, Mr. Piccirilli.

11:36:26 13 **MR. PICCIRILLI:** Thank you, your Honor.

11:36:26 14 **CONTINUED CROSS-EXAMINATION BY MR. PICCIRILLI**

11:36:27 15 Q Good morning, Dr. McDonald.

11:36:28 16 A Good morning to you.

11:36:30 17 Q Doctor, since we were here last week, the Governor  
11:36:34 18 renewed his Executive Orders regarding 2186 and 2187 for  
11:36:42 19 the Declaration of Emergency in the mask mandate; is that  
11:36:45 20 correct?

11:36:45 21 A Yes.

11:36:54 22 **MR. PICCIRILLI:** I ask that that be marked as  
11:36:56 23 plaintiffs' exhibit next.

11:36:58 24 **THE CLERK:** Plaintiffs' Exhibit 42.

11:37:02 25 **MR. PICCIRILLI:** I assume there's no objection

11:37:03 1 to full.

11:37:04 2 THE CLERK: I'm sorry, Sheriff, could I mark  
11:37:07 3 that, please?

11:37:08 4 MR. PICCIRILLI: No objection to full, your  
11:37:11 5 Honor.

11:37:11 6 THE COURT: Without objection, 42 is full.

11:37:14 7 THE CLERK: Plaintiffs' 42 is full.

11:37:16 8 **(PLAINTIFFS' EXHIBIT 42 WAS MARKED FULL)**

11:37:16 9 Q Doctor, first off, do you recognize the order?

11:37:25 10 A I do.

11:37:25 11 Q Were you in any way a participant or responsible for  
11:37:35 12 recommending to the Governor that he extend the order?

11:37:37 13 A I did not have a specific conversation with the Governor  
11:37:37 14 about this.

11:37:37 15 Q I'm sorry?

11:37:41 16 A I did not have a specific conversation with the Governor  
11:37:44 17 about this.

11:37:44 18 Q Well, did you recommend that the orders be continued?

11:37:47 19 A I did to the team.

11:37:50 20 Q To the Covid response --

11:37:52 21 A Covid Leadership Team.

11:37:52 22 Q Leadership Team, I'm sorry.

11:37:53 23 A I did, yes.

11:37:54 24 Q And I think you testified earlier that Dr. Nicole  
11:37:57 25 Alexander Scott and Thomas McCarthy who would then pass

11:38:02 1 that recommendation along to the Governor; is that  
11:38:06 2 correct?

11:38:06 3 A Yes.

11:38:08 4 Q And were you the person in that team to recommend this be  
11:38:14 5 renewed or were other people in that team giving their  
11:38:18 6 opinions about it?

11:38:18 7 A Well, there's a lot of people in the team.

11:38:20 8 Q I know. We went through all the people. The question is  
11:38:26 9 was it based on your recommendation or were there other  
11:38:27 10 people in the team who also recommended it?

11:38:29 11 A Yes, there's other people on the team. There's also  
11:38:32 12 other people outside the team.

11:38:33 13 Q Okay. Well, within the team. Did you have a meeting of  
11:38:38 14 the team where you discussed whether or not to recommend  
11:38:42 15 the extension of the mask Executive Order?

11:38:45 16 A It was briefly mentioned during one of our leadership  
11:38:51 17 meetings last week.

11:38:52 18 Q It was briefly mentioned?

11:38:53 19 A Yes.

11:38:53 20 Q Did you give your opinion to the team in that meeting,  
11:38:56 21 that brief mention that you think it should be extended?

11:38:59 22 A Yes.

11:39:00 23 Q And you're saying -- how long was this discussion to  
11:39:04 24 extend it?

11:39:04 25 A It's a half hour meeting, which is one of many concepts

11:39:09 1 discussed. Nothing has really changed that would have  
11:39:12 2 warranted us to remove that recommendation so --

11:39:14 3 Q Doctor, please if I may.

11:39:18 4 MR. PICCIRILLI: And your Honor --

11:39:19 5 THE COURT: Go ahead.

11:39:20 6 MR. PICCIRILLI: Move to strike.

11:39:21 7 Q Just please respond to my answer, please.

11:39:23 8 A Okay.

11:39:24 9 Q My questions.

11:39:24 10 THE COURT: The answer stands but go ahead.

11:39:26 11 Q Again, Doctor, how long a discussion in this leadership  
11:39:31 12 team meeting did the discussion about extending the order  
11:39:35 13 take place?

11:39:36 14 A I don't remember.

11:39:36 15 Q A minute, five minutes?

11:39:37 16 A It wasn't long. I don't remember.

11:39:40 17 Q Okay. Did other people in this team have an opinion that  
11:39:46 18 they shared in this meeting about extending the order?

11:39:49 19 A I don't remember. It wasn't -- it really wasn't  
11:39:53 20 controversial so I don't remember any vigorous  
11:39:55 21 conversation about it.

11:39:56 22 Q And when you made your recommendation, what were you  
11:40:00 23 basing it upon?

11:40:00 24 A The same facts and circumstances as we discussed  
11:40:04 25 throughout the entire trial.

11:40:05 1 Q Well, I'm going to ask you to repeat them for me. What  
11:40:10 2 specifically did you rely upon to recommend extending the  
11:40:14 3 order?

11:40:14 4 A So Delta is the dominant strain of SARS-CoV-2 in Rhode  
11:40:20 5 Island, so that's one factor. Another factor is masks  
11:40:24 6 are an effective measure for source control, and masks  
11:40:28 7 are effective to some degree to protect people who wear  
11:40:32 8 them.

11:40:33 9 Another concept is we have vaccines for people 12  
11:40:36 10 and older, who we don't have vaccines for people who are  
11:40:41 11 under 12. We may have vaccines soon. We think maybe  
11:40:44 12 early next month, but we don't have vaccines now.

11:40:47 13 Other concepts are case prevalence, the number of  
11:40:52 14 people in the hospitals. Our hospitals are still  
11:40:54 15 dangerously overcrowded. We still have treatment  
11:40:57 16 available, that's another factor that weighs in.

11:41:01 17 Another factor that weighs in, keep reviewing data,  
11:41:05 18 keep looking for literature. I went through more  
11:41:09 19 literature over the weekend to see if there was any data  
11:41:12 20 to support your position, quite frankly, so I wasn't  
11:41:15 21 persuaded to go into a different direction.

11:41:18 22 Other things that factored in, there's a medical  
11:41:21 23 staff on the Department of Health. I don't make  
11:41:24 24 decisions by myself but I talk to other members of the  
11:41:27 25 medical staff, they're all in agreement. We still need



11:41:30 1 the mask mandate in place. We still need a State of  
11:41:33 2 Emergency in place.

11:41:33 3 So it's not like we're not looking for different  
11:41:36 4 opinions. Right now though the evidence is very  
11:41:37 5 persuasive that we still need to be in the same posture  
11:41:40 6 we're in right now.

11:41:41 7 Q Doctor, the very beginning of your testimony, on the very  
11:41:45 8 first day of this hearing on Direct Examination by the  
11:41:51 9 State's attorney, you indicated that there were three  
11:41:53 10 things you considered to qualify as a pandemic; Hospitals  
11:42:01 11 being overrun, no herd immunity and no treatment. Do  
11:42:05 12 you remember testifying to that?

11:42:06 13 A Yes.

11:42:07 14 Q Okay. So when you say things like masks are effective,  
11:42:12 15 can't vaccinate children over 12 -- under 12, the Delta  
11:42:17 16 is prevalent, reviewing data opinions of medical staff,  
11:42:23 17 all of those -- none of that has anything to do with  
11:42:25 18 those three factors; right?

11:42:26 19 A I don't agree.

11:42:27 20 Q Well, which one of those has to do with hospitals being  
11:42:31 21 overrun, no treatment and no herd immunity?

11:42:35 22 A I think they're all connected.

11:42:36 23 Q Okay. By the way, you also mentioned that other people  
11:42:46 24 advise the Governor about extending the Executive Order  
11:42:49 25 other than the medical team; is that right?

11:42:50 1 A I talked about the Covid Leadership Team. I'm sure the  
11:42:55 2 Governor has other people outside the Leadership Team. I  
11:42:57 3 just don't know who those people are.

11:42:57 4 Q So there are factors, other than medical reasons, of why  
11:43:00 5 he might have extended the Executive Order?

11:43:02 6 A I can't speak to things I don't know about.

11:43:05 7 Q Well, you mentioned it, Doctor, that's why I'm asking  
11:43:07 8 you. You said there were other people outside the Covid  
11:43:10 9 Leadership Team that were advising the Governor on the  
11:43:14 10 Executive Order; correct?

11:43:14 11 A I said I thought there might be. I don't know for sure.  
11:43:18 12 I don't know who the Governor listens to apart from the  
11:43:20 13 Covid Leadership Team. I'm sure he has other advisors.  
11:43:23 14 I'm just assuming he listens to people outside the  
11:43:26 15 Department of Health. I don't know that for sure.

11:43:27 16 Q Okay. So let me ask you this, Doctor, what is the metric  
11:43:36 17 that you're going to rely upon to end the mask mandate?

11:43:40 18 A So it's multi-factorial, and I think there's several  
11:43:44 19 things we are looking for. The data seems to be coming  
11:43:46 20 up with metrics now. Certain things that I'll be looking  
11:43:49 21 for are case prevalence.

11:43:51 22 Like right now we're at over 100 cases per seven  
11:43:54 23 days, you know, per 100,000. We're at 166 as of  
11:43:58 24 yesterday. You know, if we can get below 50 cases per  
11:44:02 25 100,000 per week, that would be really good. I think

11:44:05 1 seeing vaccines available for children 5 to 11 would also  
11:44:09 2 be something really good.

11:44:10 3 Our hospital metric is improving so that the  
11:44:12 4 hospitals aren't dangerously overcrowd would be helpful  
11:44:15 5 as well. Those are some of the things that would weigh  
11:44:18 6 into my, you know, thought process, and then we can  
11:44:20 7 certainly move to masking recommended and not then  
11:44:24 8 required.

11:44:24 9 Q Doctor, you keep leaving these things open-ended. You  
11:44:30 10 say those are some of the things that would influence  
11:44:34 11 your opinion as to when to end the mask mandates.

11:44:37 12 Besides case prevalence, vaccines for under 12 year olds  
11:44:43 13 and hospitalizations, what other metric are you going to  
11:44:48 14 rely on?

11:44:49 15 A You know, it's a pandemic. It's a new disease. It  
11:44:52 16 changes. I guess I have limited ability before this  
11:44:56 17 pandemic, not to be too convinced of anything, and not to  
11:44:59 18 back myself into a corner, but I don't know if there's  
11:45:03 19 going to be a new variant.

11:45:03 20 Right now the Delta variant is the dominant variant  
11:45:06 21 in the United States. I think it's going to stay that  
11:45:08 22 way but no one can answer for sure. I'm just being  
11:45:12 23 honest about limited cases that we may not know about in  
11:45:13 24 the future.

11:45:13 25 Q Doctor, there could be a variant like the Mo variant or

11:45:16 1 the Lambda variant, they're out there right now, that  
11:45:19 2 have no impact on hospitalizations or case prevalence.  
11:45:23 3 So a variant in and of itself is irrelevant, right,  
11:45:26 4 Doctor? It's only a variant that causes high cases and  
11:45:29 5 high hospitalizations?

11:45:31 6 A Yes. So I don't think Mo going to be a variant that's  
11:45:36 7 going to effect Rhode Island. It hasn't already so I  
11:45:38 8 think we are probably okay with that. Lambda hasn't been  
11:45:40 9 an issue either, but I don't know what future variants  
11:45:42 10 are going to come down the road. I just don't know.

11:45:45 11 Q Doctor, my question is the variant in and of itself is  
11:45:49 12 not the relevant factor to determine whether to continue  
11:45:55 13 the mask mandate. It's the variant impact on case  
11:45:58 14 prevalence or hospitalization that's relevant; isn't that  
11:46:01 15 true?

11:46:02 16 A As well as deaths.

11:46:03 17 Q As well as deaths.

11:46:05 18 A Yes, yes, of course. I agree.

11:46:07 19 Q So those three things, nothing else?

11:46:10 20 A Well, could be something else I haven't thought of here.

11:46:13 21 Q By the way, Doctor, let's talk about case prevalence.  
11:46:26 22 I'm old enough to remember way back at the beginning of  
11:46:29 23 this pandemic we used to talk about test positivity  
11:46:33 24 rates?

11:46:33 25 A Yes.

11:46:33 1 Q What is a test positivity rate?

11:46:36 2 A Of the tests you do, what was the percent of having the  
11:46:39 3 positive tests? In other words, indicating someone was  
11:46:41 4 infected with SARS-CoV-2. So if you have 1 percent of  
11:46:45 5 100, that's 1 percent test positivity rate.

11:46:48 6 Q And wasn't it at one point a very important metric, if  
11:46:53 7 not the most important metric, to determine things like  
11:46:57 8 when to allow businesses to open, when to allow people to  
11:47:00 9 go back to work, um, when to get re-masked; right?

11:47:05 10 A Early in the pandemic it had been more value than it does  
11:47:09 11 now.

11:47:10 12 Q My question was, Doctor, wasn't it one of the most  
11:47:15 13 important factors in determining your recommendation, the  
11:47:22 14 Department of Health's recommendation for things such  
11:47:26 15 masking, closing businesses, social distancing, all those  
11:47:31 16 types of recommendations?

11:47:32 17 A Yes, it was one factor we did rely on. Yes.

11:47:36 18 Q I can remember if you tried to travel from another state  
11:47:39 19 into Rhode Island, the one factor that determined whether  
11:47:42 20 you had to quarantine or not was the test positivity rate  
11:47:46 21 from the state you were coming from?

11:47:47 22 A Right.

11:47:48 23 Q If it was over ten you had to quarantine?

11:47:50 24 A You're right.

11:47:50 25 Q And if it was under ten you didn't have to quarantine?

11:47:53 1 A There were different metrics for different states, not  
11:47:56 2 all of them were 10 percent, some of them were 5 percent.  
11:47:56 3 Q Some were 5 percent.  
11:47:58 4 A Some states used rates -- well, one of the big problems  
11:48:01 5 we had Massachusetts use of certain numbers. So the  
11:48:03 6 states have their own approaches for this.  
11:48:05 7 Q So, Doctor, I had one of my experts, Richard Southwell,  
11:48:10 8 go through all of these charts that you gave us, right?  
11:48:13 9 A Yes.  
11:48:14 10 Q And he looked at test positivity rates?  
11:48:19 11 A Okay.  
11:48:19 12 Q And what he found was, with one exemption on August 16,  
11:48:26 13 the test positivity rate was never above 3.8 percent  
11:48:33 14 from June 30th to today.  
11:48:34 15 A Right. Yes.  
11:48:35 16 Q So below even the 5 percent --  
11:48:38 17 A Right.  
11:48:38 18 Q -- factor?  
11:48:39 19 A Yes.  
11:48:39 20 Q And under the CDC guidelines that is considered low, a  
11:48:45 21 low concern, the lowest concern?  
11:48:47 22 A Yes.  
11:48:48 23 Q If its under 5 percent; right?  
11:48:49 24 A Well, you're interpreting it wrong.  
11:48:53 25 Q How am I interpreting it wrong?

11:48:55 1 A Because different states do different volume tests.

11:48:58 2 Rhode Island has always been the state that does the most

11:49:00 3 testing per capita. Since we've always done the most

11:49:03 4 testing per capita, our test positivity rates always just

11:49:07 5 fall low. So it's not a useful metric for us. So it's

11:49:10 6 useful for us with the amount of testing but we've also

11:49:13 7 been the lowest testing per capita for the last 8, 9

11:49:16 8 months. So we don't follow it any more. It's not useful

11:49:19 9 for us.

11:49:19 10 Q So because you test more --

11:49:22 11 A Yes, we do.

11:49:23 12 Q -- and by testing more, you pick up more cases?

11:49:25 13 A Yes, we do.

11:49:27 14 Q Suddenly the percentage of cases is irrelevant?

11:49:30 15 A That's right.

11:49:31 16 Q Wouldn't it be more relevant?

11:49:33 17 A No.

11:49:34 18 Q Doctor, let me ask you this, of those cases that test

11:49:39 19 positive are they all symptomatic?

11:49:42 20 A No.

11:49:42 21 Q In fact, most of them are asymptomatic?

11:49:45 22 A I don't have the exact number.

11:49:46 23 Q Certainly most of them don't result in a hospitalization?

11:49:49 24 A That's true.

11:49:50 25 Q And even a significantly small percentage end up in

11:49:55 1 death; right?

11:49:55 2 A That's right.

11:49:56 3 Q So it's your testimony that suddenly, you're going to  
11:50:04 4 ignore the CDC guidelines with regard to test positivity  
11:50:08 5 because you just don't think that applies to Rhode  
11:50:11 6 Island?

11:50:11 7 A No, I think you're interpreting it incorrectly. When you  
11:50:14 8 look at the CDC guidance on this, they actually put two  
11:50:18 9 different metrics for the states to follow. Because the  
11:50:19 10 CDC recognizes some states don't do a lot of testing and  
11:50:22 11 some states do.

11:50:23 12 Rhode Island chose to follow the cases per 100,000  
11:50:27 13 per week because it gives a more accurate reflection of  
11:50:28 14 the amount of people who were infected in the state could  
11:50:31 15 transmit disease. So we have an idea of how much of the  
11:50:34 16 population is susceptible. That's the best approach in  
11:50:36 17 Rhode Island.

11:50:36 18 Q All right. On the first page of all of these Exhibits,  
11:50:41 19 Exhibit N, O, P, Q, and Y, these are the dashboard  
11:50:51 20 Exhibits?

11:50:51 21 A Yes.

11:50:51 22 Q On the very first page, at the very top or just below the  
11:50:57 23 very top, there's a chart that's called Estimated  
11:51:00 24 Prevalence of Infection --

11:51:01 25 A Yes.



11:51:03 1 Q -- correct? And I notice that again on June 30, the  
11:51:09 2 chart was going way down; right?

11:51:11 3 A Yes.

11:51:11 4 Q Okay. And you thought that was a go trend?

11:51:14 5 A I did.

11:51:16 6 Q Do you know what the model that was used to develop this  
11:51:21 7 projection?

11:51:21 8 A The statisticians and epidemiologists are the ones who  
11:51:23 9 propose the models. I don't know the variables. I don't  
11:51:26 10 know all the variables in the model.

11:51:26 11 Q Does the model change?

11:51:27 12 A It's updated to reflect current numbers but it doesn't  
11:51:32 13 change per se. They update based on anything that's new  
11:51:36 14 that happened.

11:51:37 15 For example, if there's a vaccine available, then  
11:51:39 16 the model would change. If the masking mitigation is in  
11:51:44 17 effect that would effect the model too. So they go by  
11:51:47 18 whatever variables are going on at the time.

11:51:49 19 Q Doctor, in your affidavit you wrote, Paragraph 28: The  
11:51:57 20 modeling team of statisticians and public health  
11:51:59 21 professionals at RIDOH came to similar conclusions of the  
11:52:05 22 Institute For Health Metrics and Evaluation, IHME Report  
11:52:11 23 that based upon statistical analysis, without continued  
11:52:15 24 and improved mitigation measures, the Delta variant will  
11:52:18 25 cause more than 200 additional deaths by the end of

11:52:21 1 December 2021; correct?

11:52:23 2 A Yes.

11:52:24 3 Q This IHME model, is that the model that you used or the  
11:52:31 4 modeling team uses at the Rhode Island Department of  
11:52:34 5 Health?

11:52:34 6 A No.

11:52:35 7 Q They use a different model?

11:52:36 8 A Yes, they use their own.

11:52:37 9 Q Have they always used their own?

11:52:41 10 A Yes.

11:52:41 11 Q So back in April of 2020, when the model was so grossly  
11:52:45 12 wrong about the number of hospitalizations, is it still  
11:52:47 13 that same model they're using?

11:52:49 14 A Its been updated.

11:52:50 15 Q You remember, Doctor, back in April of last year the  
11:52:53 16 model predicted 4,000 hospitalizations and there were  
11:52:57 17 like 300; right?

11:52:58 18 A I do remember that, you know, that was one of the things  
11:53:01 19 we used to understand the mitigation measures that made  
11:53:04 20 more sense. Governor Raimondo at the time and the  
11:53:07 21 Director and myself and a bunch of other people really  
11:53:09 22 had to look at the situation of what we had at the time,  
11:53:12 23 a new disease, a new pandemic, no way to prevent it, no  
11:53:16 24 way to treat it, and we were trying to look at what  
11:53:19 25 mitigation measures we could do --

11:53:21 1 Q Doctor, my question was the model that was used in April  
11:53:25 2 of 2020 was exceedingly grossly wrong; isn't that true?

11:53:30 3 A I don't know if it was wrong or if it actually prompted  
11:53:34 4 us to do the right mitigation measures and they were  
11:53:36 5 successful.

11:53:37 6 Q Did the modeling team ever tell you we got it really  
11:53:40 7 wrong and we're revamping this model because we got it  
11:53:44 8 really wrong?

11:53:44 9 A There's limitations to modeling, so it's updated. The  
11:53:47 10 team works on it and they disclose to us all because it's  
11:53:51 11 hard to predict 30 days in advance.

11:53:53 12 Q Doctor, now what I found interesting, Doctor, was after,  
11:54:09 13 so Exhibit N is June of 2021, June 29th. Then July 7th  
11:54:14 14 there's a model. July 14th, there's a model. July 21st,  
11:54:26 15 there's a model and then on July 27th it disappears. Do  
11:54:34 16 you see that?

11:54:34 17 A I do.

11:54:35 18 Q It says: Withheld pending update?

11:54:39 19 A Yes.

11:54:39 20 Q Okay. And then it disappears for awhile. August 5th, it  
11:54:46 21 looks like it got cut off, for some reason it stops. On  
11:54:52 22 July 2021, it's cut off; right?

11:54:56 23 A Yes.

11:54:57 24 Q Okay. And then on August 9th, the same thing, it's cut  
11:55:02 25 off; right?

11:55:03 1 A Yes.

11:55:03 2 Q And then on August 16th, right before the Executive  
11:55:08 3 Order, that's where the scary thing comes in, right? It  
11:55:11 4 starts going up; right?

11:55:12 5 A Yes.

11:55:13 6 Q August. So by the way this model, okay -- and then on  
11:55:24 7 August 18th, it looks like the same model, two days  
11:55:29 8 later; right?

11:55:30 9 A Yes.

11:55:30 10 Q August 24th, the same model?

11:55:37 11 A Yes.

11:55:37 12 Q August 26th, the same model; right?

11:55:42 13 A Yes.

11:55:43 14 Q Do you know if that model has been published at all since  
11:55:49 15 August 25th?

11:55:51 16 A It's on every dashboard. I think the dashboard is twice  
11:55:55 17 a week. It's on every dashboard.

11:55:57 18 Q On Exhibit Q it says: Prevalent model unavailable  
11:56:00 19 pending updates?

11:56:01 20 A Yup.

11:56:01 21 Q That's August 31st?

11:56:03 22 A Yes.

11:56:03 23 Q September 7th, missing?

11:56:09 24 A Right.

11:56:10 25 Q September 14th, missing?

11:56:15 1 A Okay.

11:56:16 2 Q September 21st, missing?

11:56:22 3 A Okay.

11:56:23 4 Q September 21, missing? September 28, missing, right?

11:56:32 5 A Yes.

11:56:33 6 Q October 3rd, missing.

11:56:38 7 A Okay.

11:56:38 8 Q October 7th, missing or October 5th, missing. And the

11:56:46 9 last date that you gave us, October 12, missing?

11:56:49 10 A Okay.

11:56:50 11 Q And yet somehow on October 15th or just before October

11:56:55 12 15th, you used a model to recommend to the Governor to

11:57:01 13 continue the Executive Order?

11:57:02 14 A It's one of many things that we use.

11:57:05 15 Q You certainly weren't using this to recommend extending

11:57:09 16 the Executive Order because it doesn't exist, Doctor?

11:57:12 17 A Well, it may not be on that dashboard, but I did data

11:57:17 18 updates with people throughout the week. I model data

11:57:20 19 throughout the week. I can't explain why it's not on the

11:57:23 20 dashboard.

11:57:23 21 Q Hold on, Doctor. Now you're testifying that there's

11:57:27 22 modeling data that you have that you chose not to put in

11:57:31 23 the Exhibits that you introduced to this Court; is that

11:57:34 24 what your testimony is?

11:57:35 25 A What I'm saying is I get much data throughout the week.

11:57:46 1 I get better reports. I'm not the one responsible for  
11:57:50 2 populating the dashboard, so it's likely I had seen  
11:57:54 3 models that whatever reason the person populated, the  
11:57:58 4 dashboard just didn't populate the dashboard.

11:58:01 5 So I can't explain why one person who works at the  
11:58:04 6 Department of Health, whose job is to populate the  
11:58:06 7 dashboard, didn't get the picture of piece of information  
11:58:09 8 there.

11:58:09 9 Q Okay. Let's talk about the NEDOC score. You spent a lot  
11:58:16 10 of time emphasizing how important the NEDOC score was to  
11:58:20 11 you in making your decisions; right?

11:58:22 12 A Yes.

11:58:22 13 Q So Exhibit N, June 30th dashboard, on Page 3 is a  
11:58:34 14 hospital list?

11:58:35 15 A Yes.

11:58:36 16 MS. WYRZYKOWSKI: Objection, your Honor. Can I  
11:58:37 17 be heard? If we're going to ask such questions of the  
11:58:41 18 Doctor, could he at least have a copy of the Exhibits  
11:58:44 19 before him?

11:58:44 20 MR. PICCIRILLI: Sure.

11:58:45 21 THE COURT: It's up to the cross-examiner  
11:58:47 22 whether to use it. I do want to point out for the record  
11:58:49 23 that those records, the Doctor hasn't had any of the  
11:58:52 24 dashboards in front of him, but for the moment we accept  
11:58:56 25 that he knows what they are.

11:58:57 1 Q MR. PICCIRILLI: Doctor, why don't I do this, why don't I  
11:59:02 2 have the sheriff, can you give him Exhibits, all the  
11:59:07 3 dashboards, N, O, P?

11:59:10 4 THE CLERK: One second, Counsel.

11:59:10 5 MR. PICCIRILLI: Sorry.

11:59:12 6 THE CLERK: N, O, P.

11:59:14 7 MR. PICCIRILLI: Q and Y.

11:59:38 8 THE CLERK: Q and Y. Handing the Sheriff N, O.  
11:59:40 9 P, Q and Y to hand the witness.

11:59:57 10 Q Doctor, look at Page 3 of Exhibit N, it says hospital  
12:00:01 11 beds and PPE.

12:00:08 12 A Yes, I got it.

12:00:09 13 Q And it says hospital data updated July 1?

12:00:13 14 A Yes.

12:00:13 15 Q 2021?

12:00:14 16 A Right.

12:00:15 17 Q And I notice MIR, that's Miriam Hospital?

12:00:21 18 A It is.

12:00:22 19 Q And it's red, right?

12:00:23 20 A Yes, it is.

12:00:24 21 Q And in fact, it's at 200. It's at the highest number?

12:00:27 22 A Right.

12:00:28 23 Q For dangerously overcrowded?

12:00:30 24 A Yes.

12:00:30 25 Q Okay. And the NEDOC score measures not hospitalizations

12:00:35 1 per se, but it measures the capacity of an emergency  
12:00:39 2 department; correct?

12:00:40 3 A It also includes the number of hospital beds, so it's  
12:00:44 4 more than that.

12:00:45 5 Q But, Doctor, the purpose of the NEDOC score is to  
12:00:49 6 determine overcrowding of emergency departments, not  
12:00:53 7 overcrowding of a hospital in general, correct?

12:00:55 8 A That is not true because emergency departments are often  
12:00:59 9 overcrowded because the hospital is overcrowded. If you  
12:01:02 10 can't move the patient from the emergency department to  
12:01:04 11 the in-patient ward or the intensive care unit because  
12:01:08 12 those beds are filled or there isn't staff to man those  
12:01:11 13 beds, that effects the emergency department. So they are  
12:01:13 14 related.

12:01:14 15 Q Doctor, it's the National Emergency Department  
12:01:18 16 Overcrowding Scale. It's not the national hospital  
12:01:21 17 overcrowding scale, correct?

12:01:23 18 A Yes.

12:01:24 19 Q You may measure the number of hospitalizations as one,  
12:01:29 20 I'm sorry. It may measure the number of hospital beds as  
12:01:33 21 one of the factors, but the purpose of the score is to  
12:01:38 22 determine emergency department overcrowding period.  
12:01:42 23 Nothing else.

12:01:44 24 A I don't agree with you. It's influenced by how many  
12:01:48 25 patients are in the hospital. Because, for example, it's



12:01:50 1 not appropriate for patients to be in the emergency  
12:01:54 2 department on ventilators. That's a concerning measure.

12:01:56 3 And so it's things like that that are influenced by  
12:01:59 4 the rest of hospital, it's connected. So I draw my  
12:02:01 5 inferences based on that. You can interpret it however  
12:02:04 6 you chose.

12:02:04 7 Q Well, I'm not the only one that interprets it that way.  
12:02:08 8 Doctor, I have studies. I have reports that have been  
12:02:11 9 put out by various groups that talk about whether or not  
12:02:16 10 the NEDOC scores are even valid. Are you aware of that?

12:02:22 11 A I don't know what studies you have, no.

12:02:40 12 MR. PICCIRILLI: I ask that this be marked as  
12:02:42 13 the next Plaintiffs' Exhibit.

12:02:44 14 THE CLERK: Plaintiffs' 42. I'm sorry, 43 for  
12:02:47 15 identification.

12:02:47 16 **(PLAINTIFFS' EXHIBIT 43 WAS MARKED FOR**  
12:02:57 17 **IDENTIFICATION)**

12:02:57 18 Q Doctor, my guess is you haven't seen this document  
12:03:02 19 before?

12:03:02 20 A No, I haven't seen it.

12:03:04 21 Q Okay. So you can't comment on the fact that this is a  
12:03:07 22 study, an observational study, to determine whether or  
12:03:12 23 not NEDOC is useful for detecting emergency room  
12:03:15 24 department overcrowding?

12:03:16 25 A I can't comment on this. I haven't read it before.

12:03:18 1 Q You've never -- have you ever looked at any literature to  
12:03:24 2 determine these NEDOCs are valid scores or not a valid  
12:03:30 3 score or what the purpose of a NEDOC score is. Have you  
12:03:33 4 ever done any research into what NEDOC is?

12:03:33 5 A I talked to subject matter experts in the State of Rhode  
12:03:38 6 Island in our state government. I've talked to state  
12:03:40 7 boards who used it. I talked to the emergency department  
12:03:43 8 physicians. So I understand how we use it and what it  
12:03:45 9 means to them. I got local guidance on this.

12:03:51 10 MR. PICCIRILLI: Can I ask this be marked as  
12:04:02 11 the next Plaintiffs' Exhibit.

12:04:04 12 THE CLERK: Plaintiffs' Exhibit 44 for I.D.

12:04:04 13 **(PLAINTIFFS' EXHIBIT 44 WAS MARKED FOR**  
12:04:07 14 **IDENTIFICATION)**

12:04:07 15 Q Doctor, this is an article from the American Journal of  
12:04:21 16 Emergency Medicine. Have you ever heard of that journal?

12:04:23 17 A Yes.

12:04:24 18 Q Okay. It's a reputable journal?

12:04:27 19 A Yes.

12:04:28 20 Q Okay.

12:04:28 21 MR. PICCIRILLI: So this study that was done in  
12:04:31 22 that journal, I'd ask that it be moved as a full exhibit.

12:04:35 23 MS. WYRZYKOWSKI: Objection, your Honor. Your  
12:04:37 24 Honor, the Doctor has already testified that he hasn't  
12:04:40 25 had an opportunity to review that exhibit, under the

12:04:42 1 hearsay rule, 803(18) it shouldn't be admitted in full  
12:04:45 2 because it hasn't been relied upon by the Doctor, and if  
12:04:48 3 the Doctor is providing testimony with respect to that  
12:04:51 4 exhibit, he needs to be given a full and fair opportunity  
12:04:52 5 to review that Exhibit so he can formulate a coherent  
12:04:55 6 opinion.

12:04:56 7 Opposing counsel is trying to get that in for the  
12:04:59 8 chief of the matter asserted therein, and therefore, the  
12:05:02 9 Doctor needs an opportunity to review that. It's not  
12:05:05 10 solely for impeachment purposes. He's trying to get it  
12:05:08 11 in full.

12:05:11 12 THE COURT: It stays for identification.

12:05:13 13 MR. PICCIRILLI: Thank you.

12:05:14 14 Q Doctor, the headline of this article is: The Inaccuracy  
12:05:19 15 of Determining Overcrowding Status By Using the National  
12:05:23 16 ED Overcrowding Study Tool, otherwise known as NEDOC,  
12:05:28 17 correct?

12:05:28 18 A Yes, you referenced the right title for review.

12:05:29 19 Q So if I told you in this report, what the researchers  
12:05:38 20 found was that NEDOCs was seriously overestimating the  
12:05:43 21 overcrowding of --

12:05:44 22 MS. WYRZYKOWSKI: Again, your Honor, objection.  
12:05:46 23 He's providing a summary --

12:05:48 24 MR. PICCIRILLI: Can I finish my question  
12:05:50 25 first?

12:05:50 1 THE COURT: He should be allowed to finish his  
12:05:52 2 question.

12:05:58 3 Q So again, Doctor, if I told you in this report that the  
12:06:04 4 researchers found that the NEDOC score was overestimating  
12:06:10 5 the overcrowding problem, and that they compared it to  
12:06:15 6 actual interviews of emergency department staff, who  
12:06:18 7 didn't think they had an overcrowding problem. Would  
12:06:21 8 that influence your opinion in any way as to the  
12:06:25 9 legitimacy of the NEDOC score?

12:06:27 10 MS. WYRZYKOWSKI: Objection, form. It's a  
12:06:29 11 compound question, and I rely on my prior objection that  
12:06:33 12 the Doctor has not read the study. He's a lay witness,  
12:06:36 13 and opposing counsel is trying to summarize a study that  
12:06:38 14 the Doctor has not read, and he is not an expertise in  
12:06:42 15 the field of medical science.

12:06:43 16 MR. PICCIRILLI: Hypothetical, your Honor.

12:06:45 17 THE COURT: Sustained.

12:06:48 18 Q Hypothetically speaking, Doctor, if this report said that  
12:06:53 19 the NEDOC score was overestimating overcrowding in  
12:06:59 20 emergency departments, would you want to consider that as  
12:07:03 21 part of your opinion as to whether the NEDOC score is a  
12:07:03 22 valid score?

12:07:09 23 MS. WYRZYKOWSKI: Objection, your Honor. Dr.  
12:07:11 24 McDonald is an expert witness in his field. He's trying  
12:07:13 25 to rely on a document that the Doctor has not read to

12:07:15 1 cause the Doctor to speculate. The Doctor is here to  
12:07:18 2 provide an expert opinion, not to provide speculation  
12:07:21 3 with respect to that.

12:09:29 4 THE COURT: Could I have the question read  
12:09:29 5 back.

12:09:29 6 (Record read)

12:09:30 7 THE COURT: Overruled. You may answer.

12:09:31 8 THE WITNESS: You know, I look at many studies.  
12:09:34 9 You know quite frankly, I don't what year this study was  
12:09:36 10 done but I look at many studies. I look at the weight,  
12:09:38 11 and I corroborated with what I know based on what is in  
12:09:41 12 front of me, local emergency room physicians and the  
12:09:45 13 chief medical officers and CEOs. I look at many studies.  
12:09:46 14 Q That's fair enough.

12:09:48 15 THE COURT: The Court is relying on Rule 703.

12:09:51 16 MR. PICCIRILLI: Thank you.

12:09:52 17 Q Now to get back to Exhibit N, Page 3, Miriam score of  
12:09:59 18 200. If you look at just the percentage of emergency  
12:10:05 19 department beds that are occupied, as opposed to  
12:10:10 20 available or operational beds, it looks like 36 beds were  
12:10:14 21 occupied and 73 -- out of 73 operational beds?

12:10:18 22 A Yes, that's right.

12:10:19 23 Q Less than half of the beds in the emergency department  
12:10:22 24 were occupied.

12:10:23 25 A Yes, you're right.

12:10:24 1 Q And yet somehow, Miriam Hospital's Emergency Department  
12:10:27 2 was considered dangerously overcrowded, even though half  
12:10:32 3 of their beds were vacant; right?

12:10:33 4 A Right, it was.

12:10:34 5 Q Okay. And the ICU beds with, which you said was an  
12:10:41 6 important factor too, yet again only half of ICU beds  
12:10:46 7 were occupied?

12:10:47 8 A Yes, you're right.

12:10:48 9 Q And the total non ICU beds 229 out of 259, about  
12:10:56 10 85 percent?

12:10:57 11 A Yes, yes.

12:10:59 12 Q So how did Miriam Hospital on June 30 be considered  
12:11:04 13 dangerously overcrowded when half of their emergency  
12:11:07 14 department beds are unoccupied and half of their ICU beds  
12:11:11 15 are unoccupied?

12:11:12 16 A So you're getting on more I think the critical part of  
12:11:16 17 the gross misunderstanding of the pandemic, just because  
12:11:18 18 there's a licensed bed in a hospital doesn't mean there's  
12:11:22 19 staff to take care of the person in the bed, and quite  
12:11:25 20 frankly, it's not on the metric here, that's used here.

12:11:28 21 In other words, one of things I keep hearing from  
12:11:31 22 doctors in emergency rooms, we don't have nurses. We  
12:11:33 23 can't get nurses. I hear this from the hospital  
12:11:37 24 executives as well. We can't get staff. We can't get  
12:11:40 25 the staff. So the staffing shortage has been a

12:11:41 1 significant factor.

12:11:42 2 Q The staffing shortage that's being exacerbated by the  
12:11:46 3 vaccine mandate that you put out, right?

12:11:49 4 MS. WYRZYKOWSKI: Objection, your Honor.

12:11:50 5 MR. PICCIRILLI: It's a fair question, your  
12:11:50 6 Honor.

12:11:50 7 MS. WYRZYKOWSKI: It's not a fair question if  
12:11:54 8 the population that's at issue is less than one percent.

12:11:57 9 THE COURT: I'll allow it. Overruled.

12:11:57 10 Q So it's --

12:11:57 11 THE COURT: Overruled.

12:12:00 12 Q I'm sorry. If you could read back the question, please?

12:12:00 13 I'm sorry. Go ahead. If you could --

12:12:11 14 A I have the question in my head.

12:12:11 15 Q If you don't need the question, go ahead.

12:12:14 16 A I can do it. So the vaccine mandate has moved us from  
12:12:18 17 77 percent of healthcare workers fully vaccinated, to  
12:12:22 18 95 percent of healthcare workers fully vaccinated. That  
12:12:25 19 5 percent shortage that we have now is it just in  
12:12:30 20 hospitals? And I don't know off the top of my head how  
12:12:33 21 many of that 5 percent are working remotely.

12:12:35 22 One of the exceptions in the regulation for people  
12:12:38 23 to be vaccinated is people working remotely. There's a  
12:12:41 24 lot of people who work full-time remotely, radiologists,  
12:12:45 25 pathologists. There's some other healthcare workers

12:12:48 1 working fully remotely, so I don't remember how much of  
12:12:49 2 that actually is -- so we had a shortage before the  
12:12:52 3 vaccine mandate and there's still a shortage now.

12:12:56 4 There's just a shortage with a lot of things in the  
12:12:58 5 United States right now, including staff.

12:12:59 6 Q Right. Doctor, if you look under the score definition  
12:13:05 7 that's on the upper left-hand part, there's seven  
12:13:08 8 factors?

12:13:09 9 A Yes.

12:13:09 10 Q Which of those seven factors says the amount of staff?

12:13:12 11 A There's none that refers to staff, but all metrics that  
12:13:17 12 infer the ability of a hospital to move patients through  
12:13:19 13 the emergency department.

12:13:20 14 Q Okay. So, Doctor, when you testified that you're  
12:13:35 15 concerned about the hospitalization overcrowding, you  
12:13:40 16 were really talking about the emergency department  
12:13:42 17 overcrowding, not the normal hospitalization beds,  
12:13:47 18 correct?

12:13:47 19 A It's both, because even though there's a bed in a  
12:13:50 20 hospital if there's not a staff member to take care of  
12:13:53 21 it, it's not a bed we can actually put somebody in, and  
12:13:56 22 that's why it's concerning and that's why 300 people in  
12:13:59 23 the hospital influence how this can be effective in the  
12:14:03 24 emergency department, and this is part of why I  
12:14:05 25 corroborate information with people I know in the



12:14:07 1 industry because I see this. Does this make sense?

12:14:09 2 Q All right. Well, if you will notice on the bottom of

12:14:13 3 this chart of ten or so hospitals, there's a total number

12:14:18 4 listed, correct?

12:14:19 5 A Yes.

12:14:19 6 Q And so total hospital beds 2257?

12:14:24 7 A Right.

12:14:24 8 Q Okay. Does that number appear consistently through all

12:14:30 9 of the Exhibits that you have in front of you?

12:14:32 10 A It's my understanding.

12:14:33 11 Q Okay. Lets look through them. Let's go to July 21,

12:14:42 12 which is Exhibit O. The little tab, July 21, and then

12:14:55 13 third page after that. See that?

12:15:09 14 A Yes, I'm there. I'm good, the July 21 piece.

12:15:13 15 Q A number appears there, right?

12:15:15 16 A Yes. It says 2,357. I mean it may change but it looks

12:15:21 17 like it's the same there.

12:15:22 18 Q Now, let's go ahead to Exhibit Q, which is September.

12:15:54 19 Okay. Now, September 2 on Page 3, there's no info. It

12:15:59 20 says pending update, right?

12:16:01 21 A That's what it says.

12:16:04 22 Q Now, let's go to September 19th. Again, the third page

12:16:10 23 in.

12:16:10 24 A I'm sorry, I don't have one for September 19.

12:16:12 25 Q I'm sorry, September 9?

12:16:14 1 A September 9?

12:16:15 2 Q Yes, 9/9 again would tell us pending review, correct, on  
12:16:20 3 page 3?

12:16:21 4 A That's what it says.

12:16:22 5 Q Let's go to September 16, third page in. What's the  
12:16:30 6 total?

12:16:30 7 A I don't see a total at the bottom.

12:16:35 8 Q Isn't it true that after September 16th the dashboard  
12:16:40 9 stopped reporting how many total beds there were?

12:16:42 10 A It may have. I didn't see that in detail, so I don't  
12:16:46 11 know.

12:16:46 12 Q And if I told you that, again, using my crack  
12:16:49 13 statistician, the plaintiff, he ended up calculating what  
12:16:53 14 the total number of beds is, and it's around 1,800. It's  
12:16:57 15 around 400 beds less than previously reported?

12:17:00 16 A Okay. That's your testimony, that's your testimony.

12:17:05 17 Q It's not my testimony, Doctor, it's the data. Are you  
12:17:09 18 aware that between July and September, 400 out of 2,200  
12:17:16 19 hospital beds in Rhode Island just disappear?

12:17:18 20 MS. WYRZYKOWSKI: Objection, your Honor, he's  
12:17:19 21 only referencing one date, which is the 19th. The Doctor  
12:17:22 22 should have an opportunity to go through all the Exhibits  
12:17:24 23 if he's going to ask broad questions covering two months?

12:17:27 24 MR. PICCIRILLI: I asked between July and  
12:17:29 25 September. I didn't ask about October. I can get there

12:17:32 1 but I'm asking between July and September.

12:17:34 2 MS. WYRZYKOWSKI: Same objection. You're still  
12:17:35 3 covering a two month time span. The Doctor should have  
12:17:37 4 an opportunity to review it in order to formulate an  
12:17:40 5 answer.

12:17:40 6 THE COURT: He's got them all in front of him.  
12:17:43 7 Doesn't he have all the data in front of him?

12:17:43 8 MR. PICCIRILLI: Yes, he does.

12:17:44 9 THE COURT: So of course he has time to answer  
12:17:46 10 a question.

12:17:56 11 THE WITNESS: I don't know who is responsible  
12:17:58 12 for putting this sum of all the numbers down there. I  
12:18:02 13 don't know who actually populates this dashboard by name.  
12:18:05 14 I know they work for us but I can't say that there's some  
12:18:08 15 reason why it doesn't appear there. I don't know the  
12:18:10 16 answer to your question, why there's 400 less beds. What  
12:18:14 17 I do know is we don't have the staff for the beds we  
12:18:17 18 have, that's what I know.

12:18:17 19 Q So, again, hypothetically speaking, Doctor, if you looked  
12:18:22 20 at this data and it showed that 400 hospital beds, nearly  
12:18:28 21 20 percent of hospital beds in Rhode Island, suddenly  
12:18:31 22 disappeared between July and September, would that  
12:18:33 23 influence your opinion about your recommendation  
12:18:39 24 regarding the emergency order and the masks?

12:18:42 25 A No, it wouldn't.

12:18:43 1 Q You wouldn't be curious as to where these 400 hospital  
12:18:48 2 beds went?

12:18:48 3 A You know there's usually a lot of requests for a lot of  
12:18:51 4 things, so I ask around the department and I can do that  
12:18:53 5 later on today if you'd like, but quite frankly when you  
12:18:56 6 look at the actual scores, what our various physicians  
12:19:00 7 who work in the emergency department and the hospital  
12:19:03 8 leadership, it's compelling to me that the hospital is  
12:19:05 9 stressed and overcrowded. I can even testify to my own  
12:19:08 10 experience by trying to go to a hospital, they're really  
12:19:10 11 overcrowded.

12:19:11 12 Q Well, that's not unique to emergency departments, Doctor.  
12:19:14 13 I can't tell you how many times I've been to an emergency  
12:19:16 14 room and its been overcrowded years ago. That's a  
12:19:21 15 persistent problem in this country. Emergency rooms are  
12:19:23 16 always overcrowded. Ask anybody in this room. So you  
12:19:27 17 want to use your personal experience about going to an  
12:19:29 18 emergency room and it's overcrowded and use that as a  
12:19:32 19 basis for an emergency order. Is that what your  
12:19:35 20 testimony is, Doctor?

12:19:36 21 MS. WYRZYKOWSKI: Objection, your Honor.  
12:19:36 22 That's not what he's saying. He is mischaracterizing the  
12:19:39 23 evidence and he's asked questions and not provided a  
12:19:42 24 factual basis regarding the emergency room.

12:19:44 25 THE COURT: Overruled. The Doctor can answer.

12:19:47 1 THE WITNESS: Yes. So obviously that's not  
12:19:48 2 what I said. What I said was I looked at the dashboard.  
12:19:52 3 What I said was I talked to the emergency department  
12:19:54 4 physicians in the State. What I said was I talked to  
12:19:55 5 chief medical officers, chief executive officers of the  
12:19:55 6 State.

12:19:58 7 I have a good feel of what goes on in the State, so  
12:20:02 8 yes, I'm very confident that hospitals are overcrowded  
12:20:05 9 and, no, I don't accept the premise that hospitals have  
12:20:08 10 always been overcrowded. We're in a pandemic. It's  
12:20:09 11 unlike anything this country has ever seen before. It's  
12:20:12 12 a very unique time in our history. So I'm very confident  
12:20:16 13 in saying when I hear doctors and nurses tell me that  
12:20:19 14 they're stressed, that they're overworked, that they're  
12:20:20 15 burnt out and that they can't get staff to work, that  
12:20:22 16 they're right and telling you the truth.

12:20:24 17 Q Doctor, you just testified earlier that you had a  
12:20:28 18 conference call with a bunch of hospital CEO's?

12:20:31 19 A Yes.

12:20:31 20 Q Right before the Executive Order was issued?

12:20:33 21 A Yes.

12:20:34 22 Q Okay. Was Care New England Hospital one of those  
12:20:37 23 hospitals CEO's or CFO's that you talked to?

12:20:40 24 A It was August 12th, and yes.

12:20:42 25 Q Okay. And Care New England runs what hospital in Rhode

12:20:46 1 Island?

12:20:46 2 A They run Butler. They run Kent. They run Women &  
12:20:52 3 Infants. Those are the main hospitals.

12:20:54 4 Q So, Doctor, when you had this conference call with -- she  
12:20:59 5 included the CEO from Care New England, did they tell you  
12:21:03 6 that on August 25th they were going to do a quarterly  
12:21:07 7 investment call with their investors, their bond holders  
12:21:10 8 at the hospital, in which they were going to present that  
12:21:13 9 they're desperate to bring patients back to return to  
12:21:17 10 pre Covid levels. That in fact they were being under  
12:21:20 11 utilized as a hospital and that they were hoping to bring  
12:21:27 12 patients back. Did he tell you that? Or she --

12:21:29 13 MS. WYRZYKOWSKI: Objection. Form.

12:21:30 14 Q -- whoever the CEO was?

12:21:32 15 A So it was Dr. James Fanale.

12:21:35 16 THE COURT: The objection is overruled.

12:21:36 17 THE WITNESS: And Dr. Harry Krishner (Phonetic)  
12:21:39 18 they did not mention about an August 25th investor call.

12:21:44 19 MR. PICCIRILLI: May I have this marked,  
12:21:45 20 please?

12:21:45 21 THE CLERK: Plaintiffs' 45 marked for  
12:21:47 22 identification.

12:21:47 23 **(PLAINTIFFS' EXHIBIT 45 WAS MARKED FOR**  
12:21:48 24 **IDENTIFICATION)**

12:21:48 25 Q Doctor, if I presented, well, first take a moment to look

12:22:04 1 at this document.

12:22:07 2 (Pause taken)

12:22:56 3 A Yes, how can I help you with this?

12:22:58 4 Q If you can go to the eleventh page in.

12:23:03 5 MS. WYRZYKOWSKI: Objection, your Honor. This  
12:23:04 6 is not a full Exhibit. He shouldn't read from it at this  
12:23:06 7 point.

12:23:07 8 MR. PICCIRILLI: I'm asking him a hypothetical.

12:23:10 9 MS. WYRZYKOWSKI: I'm sorry.

12:23:12 10 THE COURT: He's been asked to read it.

12:23:15 11 MS. WYRZYKOWSKI: And as a result, since it  
12:23:16 12 hasn't been moved in full it shouldn't be read from. The  
12:23:18 13 Doctor already said he's unaware of the phone call.

12:23:21 14 THE COURT: He's not reading it into the  
12:23:25 15 record.

12:23:28 16 Q The key utilization statistics, nine months ending  
12:23:32 17 June 30th. If I told you, Doctor, that between 2018 and  
12:23:44 18 2020, that the emergency room visits at Care New England  
12:23:52 19 hospitals went down from 70,000 to 58,000 visits, and  
12:23:57 20 that in 2021 it went down even further to 56,000 visits.  
12:24:02 21 Would that be important for you to know, as to whether or  
12:24:07 22 not the emergency department is being overwhelmed in  
12:24:11 23 Rhode Island, when hypothetically 20 percent fewer visits  
12:24:18 24 are happening during the Covid pandemic than were  
12:24:22 25 happening before?

12:24:22 1 A So I'm open to all information. I really like to look at  
12:24:27 2 everything. I know during the early part of the pandemic  
12:24:29 3 emergency departments were very uncrowded, like from  
12:24:31 4 April, May and June of 2020 there weren't a lot of people  
12:24:35 5 going anywhere, including emergency departments and  
12:24:37 6 doctor's offices. So I'm open to any information. So if  
12:24:40 7 there was any information -- and I actually do that, I'm  
12:24:43 8 actually always looking for different information. I'm  
12:24:45 9 not trying to push one particular point of view. I just  
12:24:48 10 try to keep my mind open to whatever is out there.

12:24:48 11 Q Well, good to know, Doctor. Good to know. So if you go  
12:24:51 12 to Page 14, where it says: Multi-pronged response. And  
12:24:59 13 again, if I told you that the CEO of Care New England was  
12:25:03 14 telling his investors on August 15th that they wanted to  
12:25:06 15 bring patients back to return to pre-Covid levels. Would  
12:25:09 16 that be important for you to know in making your  
12:25:12 17 determination as to whether to extend this emergency  
12:25:15 18 order?

12:25:15 19 MS. WYRZYKOWSKI: Objection. Hearsay,  
12:25:16 20 hypothetical. The Doctor can't authenticate this  
12:25:20 21 document.

12:25:20 22 MR. PICCIRILLI: It is a hypothetical. And I  
12:25:27 23 think the Doctor just testified that he welcomes this new  
12:25:31 24 information.

12:25:42 25 THE COURT: Doctor, is that information of the



12:25:44 1 type reasonably and customarily relied upon as an expert  
12:25:48 2 in your field in forming your opinion?

12:25:50 3 THE WITNESS: No, it wouldn't be something I  
12:25:52 4 would rely on.

12:25:54 5 Q BY MR. PICCIRILLI: Okay. Doctor, let me ask you this:  
12:25:57 6 The chief executive officer of a hospital tells you on  
12:26:01 7 August 12th that his hospital is severely overcrowded;  
12:26:04 8 correct?

12:26:04 9 A Yes.

12:26:05 10 Q Hypothetically, you find out after August 12th that the  
12:26:09 11 same CEO is telling investors that his hospital is  
12:26:13 12 uncrowded?

12:26:14 13 A I don't see that --

12:26:16 14 Q Doctor, hypothetically if that were true, would that be  
12:26:19 15 important for you to know?

12:26:20 16 A I was not on this call. If it was true I'd love to know,  
12:26:25 17 but I have no reason to doubt the honesty of Dr. Fanale.  
12:26:28 18 He's been someone that's been an honest person with me  
12:26:30 19 every time I've dealt with him.

12:26:30 20 Q So would you go back and ask him about this and say hey,  
12:26:34 21 Doctor, did you really tell investors on August 25th that  
12:26:38 22 you're under utilized? Will you do that for us, Doctor?

12:26:42 23 MS. WYRZYKOWSKI: Objection, your Honor.

12:26:43 24 THE COURT: Sustained.

12:26:44 25 Q BY MR. PICCIRILLI: I notice another change in the

12:27:10 1 hospitalization chart on the dashboards. Again, if you  
12:27:14 2 go back to Exhibit N on Page 3, hospital beds. The  
12:27:34 3 captions are total hospital operational beds, non ICU  
12:27:39 4 operational beds, non ICU occupied beds, ICU operational  
12:27:45 5 beds, ICU occupied beds, emergency department operational  
12:27:49 6 beds, emergency department occupied; correct?

12:27:53 7 A I see that, yes.

12:27:54 8 Q Okay. Now, I'm going to ask you to go to Exhibit Q and  
12:28:00 9 the date is, let's see here, again, September 16, the  
12:28:06 10 third page in. Do you notice something changing from  
12:28:18 11 that caption?

12:28:19 12 A I don't.

12:28:20 13 Q You see where it says ICU staffed capacity?

12:28:26 14 A Yes.

12:28:29 15 Q That doesn't appear in June's dashboard; right?

12:28:33 16 A It doesn't apparently.

12:28:34 17 Q So they suddenly added a category at some point in  
12:28:39 18 September, is that what happened to the dashboard?

12:28:41 19 A Yes. I'm not the one who constructed the dashboard so I  
12:28:44 20 assume that's what happened.

12:28:45 21 Q So before September staffing wasn't an issue but in  
12:28:52 22 September staffing became an issue?

12:28:54 23 A I wouldn't draw that inference.

12:28:56 24 Q Well, why else would you have it listed on your very  
12:29:00 25 important dashboard?

12:29:01 1 A Because doctors are all trying to figure out this  
12:29:03 2 pandemic. It's a new disease. It's a pandemic. The  
12:29:05 3 response, the whole pandemic response to the Department  
12:29:08 4 of Health has been constantly improving our response. So  
12:29:11 5 my guess is someone just decided to add a metric there  
12:29:14 6 that they thought would be helpful.

12:29:16 7 Q Okay. But adding that metric, could that have changed  
12:29:20 8 the way the score was calculated?

12:29:23 9 A No, it's not a variable in the seven elements that are  
12:29:32 10 listed in the upper left-hand corner.

12:29:34 11 Q Then why put it in the chart?

12:29:36 12 A Because I think people find it informative and it  
12:29:41 13 reflects what their staff capacity is.

12:29:42 14 Q So the fact of the matter is, Doctor, these charts, these  
12:29:46 15 hospital detail charts, going back from June until today,  
12:29:50 16 the metric that actually goes into them keeps changing;  
12:29:54 17 the total number of beds keep changing, the issue of  
12:29:57 18 whether they're staffed or not is changing.

12:30:00 19 And even the fact that in June you have NEDOC scores  
12:30:08 20 saying it's dangerously overcrowded if an emergency room  
12:30:12 21 is half occupied, this keeps changing through all of  
12:30:15 22 these documents?

12:30:16 23 A I'm sorry, is there a question?

12:30:20 24 Q Isn't it true it keeps changing?

12:30:23 25 A It appears they're updated. Yes, of course, they're

12:30:25 1 updated.

12:30:26 2 Q And yet somehow we're supposed to rely upon this  
12:30:31 3 inconsistency to determine whether or not hospitalization  
12:30:38 4 overcrowding is a problem in Rhode Island?

12:30:39 5 A Yes, I rely on this. It's one of the many things I  
12:30:42 6 looked at. Like I said, I talked to hospital leadership.  
12:30:45 7 I talked to emergency room physicians and nurses. I used  
12:30:48 8 a lot of things to help make recommendations. I don't  
12:30:48 9 just rely on one document.

12:30:51 10 But I think this document is reliable. I think it's  
12:30:53 11 persuasive and I think it's accurate and I know the  
12:30:56 12 healthcare providers who report it count on it.

12:30:58 13 Q Let's look at the 14 day projected hospitalizations.  
12:31:19 14 Again, if you go to Exhibit 10. Excuse me, just a  
12:31:42 15 moment. If you go to the second page of 10, it says  
12:32:36 16 hospitalizations and there's a chart there on top;  
12:32:41 17 correct?

12:32:41 18 A Yes.

12:32:41 19 Q And part of the chart includes projected Covid  
12:32:45 20 hospitalizations; correct?

12:32:46 21 A Yes.

12:32:47 22 Q Okay. Now, I want you to go to Exhibit Q, the second  
12:33:02 23 page. Exhibit Q, the second page, which would be  
12:33:11 24 hospitalization. It says Covid data through August 31st,  
12:33:16 25 projections updated August 19, correct?

12:33:19 1 A I have Exhibit Q and I'm on the second page, yes.

12:33:24 2 Q Do you see it says projections updated August 19th, in  
12:33:31 3 the box on the top?

12:33:32 4 A Yes, I do.

12:33:33 5 Q And then it says 14 day medium projected Covid  
12:33:38 6 hospitalizations occupancy. Covid hospitalization  
12:33:41 7 projections under development?

12:33:43 8 A Yes.

12:33:44 9 Q In fact after this date through Exhibit Q, which is  
12:33:50 10 September, and Exhibit Y, which is October, there is no  
12:33:57 11 more 14 day Covid hospitalization projections, isn't that  
12:34:01 12 true?

12:34:01 13 A Yes.

12:34:01 14 Q So you have data that you rely upon, Covid -- projected  
12:34:10 15 Covid hospitalizations, you would agree is an important  
12:34:13 16 metric, right, Doctor?

12:34:14 17 A Yes.

12:34:15 18 Q And yet you have no data after August, the end of August,  
12:34:20 19 as to what those projections are?

12:34:22 20 A Yes, they weren't updated.

12:34:25 21 Q Again, let's go back to Exhibit N, the first page.

12:34:44 22 A I have a lot of Exhibits. Do we need all of them? Can I  
12:34:48 23 clear up some of this?

12:34:50 24 Q You can put them in the stack to the side if you like,  
12:34:54 25 Doctor.

12:34:54 1 A I'm just curious, you need 42 and you need the --

12:34:58 2 THE COURT: Do you want to use just the  
12:35:01 3 dashboards for a few minutes?

12:35:01 4 MR. PICCIRILLI: That would be fine.

12:35:04 5 THE WITNESS: Just so I know what we're doing  
12:35:04 6 over here.

12:35:05 7 MR. PICCIRILLI: That's fine, Doctor. Thank  
12:35:07 8 you.

12:35:10 9 A So, I'm sorry, which Exhibit do you want me to pull out  
12:35:13 10 next?

12:35:13 11 Q Go back to N.

12:35:20 12 A I'm at Exhibit N.

12:35:22 13 Q On the first page it has three charts down, projected  
12:35:27 14 community immunity?

12:35:28 15 A Yes.

12:35:28 16 Q Okay. Again, go to Exhibit Q. The very first page of  
12:35:42 17 Exhibit Q is projected community -- community immunity  
12:35:48 18 model, last updated August 19, 2021; correct?

12:35:51 19 A Yes.

12:35:51 20 Q That disappeared from the rest of the dashboards for  
12:35:55 21 September and October; isn't that true?

12:35:57 22 A I don't have them all in front of me here.

12:36:03 23 Q Go through them.

12:36:03 24 A I can take your word for it, if it's not there it's not  
12:36:06 25 there.

12:36:06 1 Q It's not there for all of September and it's not there  
12:36:09 2 for October?

12:36:12 3 A Okay.

12:36:12 4 Q Where did that go?

12:36:14 5 A Like I said before, I'm not the one who populates the  
12:36:18 6 dashboard. I take the information I'm given. It's  
12:36:21 7 reasonable the people are waiting for more data to update  
12:36:25 8 it.

12:36:25 9 Q Doctor, when you testified on your direct examination,  
12:36:28 10 again, we can go back to Exhibit N. You testified about  
12:36:32 11 what was so important about projected community immunity.

12:36:36 12 You testified that you were hoping to see that  
12:36:41 13 number reach a certain percentage to determine whether or  
12:36:45 14 not the pandemic was over; isn't that right?

12:36:47 15 A Can you repeat what you were saying? I lost some of what  
12:36:51 16 you were saying.

12:36:51 17 Q Alright. You recall testifying about projected community  
12:36:54 18 immunity in your direct examination with the State's  
12:36:57 19 attorney?

12:36:57 20 A I do.

12:36:57 21 Q Okay. And you remember testifying that this was an  
12:37:01 22 important metric for you; correct?

12:37:02 23 A Yes.

12:37:03 24 Q And it was important because you wanted to see Rhode  
12:37:09 25 Island reach a certain immunity level?

12:37:11 1 A Yes.

12:37:11 2 Q And you testified that some of that immunity is by the  
12:37:15 3 vaccine and some of it is natural?

12:37:17 4 A Yes.

12:37:17 5 Q And in fact a number above it has the percentage of  
12:37:21 6 vaccinations?

12:37:22 7 A Yes.

12:37:22 8 Q But the number above it doesn't have natural immunity?

12:37:25 9 A That's right.

12:37:26 10 Q And you said there was a difference?

12:37:28 11 A Yes.

12:37:28 12 Q Okay. Again, this was important for you?

12:37:32 13 A It still is.

12:37:33 14 Q It still is. But the numbers don't exist any more. You  
12:37:37 15 don't have those projections as of August 19th from the  
12:37:40 16 date of the emergency order?

12:37:42 17 A Yes. So I wouldn't say the numbers don't exist any more.  
12:37:46 18 I just don't have the populated dashboard. I don't know  
12:37:48 19 why they weren't populated but they just weren't. But  
12:37:51 20 I've seen other modeling data that have projections.

12:37:55 21 Q Doctor, on your direct examination, beginning of the  
12:38:30 22 hearing, you were asked about pediatric deaths because of  
12:38:36 23 Covid in Rhode Island. Do you recall that?

12:38:37 24 A Yes.

12:38:38 25 Q And your testimony on that first day of hearing was that



12:38:42 1 there were three pediatric Covid deaths -- strike that.

12:38:47 2 Your testimony on the first day of hearing was that  
12:38:50 3 there were three pediatric deaths in Rhode Island because  
12:38:54 4 of Covid. Do you recall that testimony?

12:38:57 5 MS. WYRZYKOWSKI: Objection. That's an  
12:38:58 6 inaccurate summary. The Doctor clarified that it was  
12:39:01 7 based upon the CDC standard of Covid deaths.

12:39:05 8 MR. PICCIRILLI: He changed. He changed. I'm  
12:39:06 9 asking the first date he testified, you used the word  
12:39:09 10 because of Covid; right?

12:39:11 11 A I don't remember saying those words. I thought it was --  
12:39:15 12 my position has always been associated with or attributed  
12:39:18 13 to the CDC definition.

12:39:21 14 Q So the CDC's definition could include deaths, not because  
12:39:26 15 of Covid?

12:39:27 16 A The CDC's definition has been the same throughout the  
12:39:30 17 pandemic; any death that has a positive Covid test, could  
12:39:33 18 be used for the same definition.

12:39:35 19 Q Any death with a positive Covid test?

12:39:37 20 A Any death with a positive Covid test, yes.

12:39:40 21 Q So a 16 year old who gets shot in the head, is rushed to  
12:39:45 22 the hospital, is tested positive for Covid and then dies  
12:39:48 23 of the gunshot wound to the head, that's a Covid death?

12:39:51 24 A It meets the definition of the CDC.

12:39:54 25 Q So I think in your, the States' brief they indicate

12:40:01 1 there's over 600 Covid deaths in this country so far.

12:40:04 2 How many of those deaths were people who didn't die

12:40:08 3 because of Covid?

12:40:09 4 A I don't have that information.

12:40:10 5 Q It doesn't make you curious at all, Doctor?

12:40:13 6 A You know, we're going by the CDC's definition, of course

12:40:16 7 I'm curious, you know from what I can base and other

12:40:20 8 information I see, number of people being admitted to the

12:40:23 9 hospital, some of those ICU's, some from this disease.

12:40:27 10 It's my opinion that Covid is a major public health risk

12:40:31 11 to people in this country and in this State.

12:40:31 12 Q But it's also your testimony that number, 600,000 deaths

12:40:35 13 or more, is unverifiable because it could include

12:40:40 14 thousands of deaths not caused because of Covid?

12:40:42 15 A So you're speculating. I believe the current numbers are

12:40:46 16 over 700,000 people who have died that are attributed to

12:40:49 17 Covid. As long as we're using the same consistent

12:40:52 18 process it's a fair statement. I think at this point in

12:40:56 19 the pandemic it doesn't make sense to change definitions

12:40:58 20 now.

12:40:58 21 Q Now you just used another word, Doctor, "attributed to"

12:41:05 22 is attributed to because of? Or is attributed to you

12:41:06 23 just happen to have a positive test but you died of

12:41:10 24 something else?

12:41:10 25 A Like I said, we're using the same definition as the

12:41:13 1 Center for Disease Control and Prevention uses.

12:41:13 2 Q So does the Center for Disease Control use the phrase

12:41:16 3 attributed to?

12:41:17 4 A No, they don't.

12:41:18 5 Q Okay. So when you used that you misspoke just now?

12:41:21 6 A Yes, I did.

12:41:22 7 Q Okay. Again, I'm trying to be very precise with our

12:41:27 8 language here, Doctor.

12:41:27 9 A Yes, I understand.

12:41:28 10 Q So you can die with Covid or because of Covid?

12:41:30 11 A That's right.

12:41:31 12 Q Okay. And it's your testimony that a Covid death will be

12:41:36 13 recorded, even if you die with Covid but because of

12:41:40 14 something else?

12:41:40 15 A Yes.

12:41:41 16 Q And in fact the three children who died in Rhode Island,

12:41:44 17 did not die because of a Covid death; right?

12:41:47 18 A They died with Covid.

12:41:49 19 Q Right. In fact your spokesman, is it Joseph Wendelken,

12:41:53 20 is he the spokesmen for the Department of Health?

12:41:55 21 A Yes, he's the Public Information Officer.

12:41:56 22 Q In fact, he on numerous occasions has had to correct the

12:42:02 23 public perception out there that these three deaths were

12:42:06 24 because of Covid?

12:42:06 25 A I've done the same thing myself.

12:42:08 1 Q Right. In fact, Doctor -- Mr. Wendelken sent an e-mail  
12:42:20 2 to a radio personality by the name of Matt Allen back in  
12:42:26 3 May saying we have had three COVID-19 associated  
12:42:30 4 pediatric deaths in Rhode Island. In one instance the  
12:42:33 5 child had a very significant underlying medical issue.  
12:42:36 6 The child was COVID-19 positive but it is not believed  
12:42:39 7 that COVID-19 contributed to the child's passing. Would  
12:42:43 8 you agree with that statement?

12:42:44 9 A Yes.

12:42:44 10 Q The second fatality was similar in a child who was  
12:42:48 11 COVID-19 positive, but it was not believed that COVID-19  
12:42:51 12 played a role in that child's passing either. Do you  
12:42:54 13 agree with that statement?

12:42:55 14 A Yes.

12:42:55 15 Q In the third instance the cause of death was considered  
12:43:00 16 undetermined. Do you agree with that statement?

12:43:01 17 A Yes.

12:43:01 18 Q Okay. So you wouldn't want to try to be misleading this  
12:43:07 19 Court or the public that three children in Rhode Island  
12:43:09 20 died because of Covid?

12:43:10 21 A I don't want to mislead the Court ever.

12:43:13 22 Q So if in the transcript it says you used the word because  
12:43:18 23 of, that was just a grave mistake on your part, right?

12:43:21 24 A I've already admitted if I said that I misspoke.

12:43:23 25 Q And in fact in the State's memo it goes on to emphasis

12:43:29 1 that children will die because of the Delta variant. Are  
12:43:34 2 you familiar with that?

12:43:34 3 MS. WYRZYKOWSKI: Objection, your Honor. The  
12:43:36 4 memo was written, it's argumentative. It's done by the  
12:43:39 5 State's attorney. It's not done by Dr. McDonald.

12:43:42 6 MR. PICCIRILLI: Well, I'm assuming he informs  
12:43:44 7 them.

12:43:45 8 THE COURT: Sustained.

12:43:45 9 Q Doctor, if someone were to say that children will die in  
12:43:53 10 Rhode Island because of the Delta variant, would you want  
12:43:56 11 to put that at ease and say that is not going to happen?

12:44:00 12 A I don't know what the future is in that regard. You know  
12:44:04 13 quite frankly, I'm very thankful we haven't had a  
12:44:08 14 pediatric death from Covid. I think that has lots to do  
12:44:11 15 with our public health response and our mitigation  
12:44:14 16 measures. Quite frankly, I think things like that are  
12:44:17 17 keeping the children safe in this State.

12:44:19 18 Q Well, children weren't wearing masks through the whole  
12:44:24 19 summer and they didn't die, right?

12:44:27 20 A Prevalence during the summer was very low and some  
12:44:30 21 children did wear masks but there was not a mandate over  
12:44:33 22 the summer.

12:44:34 23 MR. PICCIRILLI: Can I have the witness be  
12:44:35 24 shown Exhibit 15, please?

12:44:39 25 THE CLERK: Counsel, did you say Exhibit 15?

12:44:43 1 MR. PICCIRILLI: Yes, 1-5.

12:44:46 2 (Exhibit given to witness)

12:44:46 3 Q Do you have the Exhibit?

12:45:05 4 A You need these?

12:45:08 5 Q No.

12:45:11 6 A I've got your Exhibit, yes.

12:45:13 7 Q This was a chart that was prepared by Dr. Boston  
12:45:19 8 comparing Covid deaths and pediatric cases to flu deaths  
12:45:25 9 over the last ten years or so; correct?

12:45:28 10 A Yes, it's your Doctor's Exhibit.

12:45:31 11 Q You don't have any reason to doubt the numbers that are  
12:45:34 12 in here, do you, Doctor?

12:45:35 13 A No.

12:45:35 14 Q According to this chart during the H1N1 flu in 2009,  
12:45:43 15 2010, almost 1,300 deaths, pediatric deaths, were  
12:45:48 16 recorded, correct?

12:45:49 17 A Yes. It says 1,282 and I assume that's referring to the  
12:45:55 18 entire United States.

12:45:56 19 Q Correct. Some of the other seasonal flus, 2012 to 2013,  
12:46:03 20 1,161 deaths?

12:46:05 21 A Yes.

12:46:05 22 Q And on down the line there. In fact, the seasonal flu is  
12:46:14 23 exponentially much more deadly to children than COVID-19;  
12:46:17 24 isn't that right?

12:46:17 25 A I don't draw that conclusion.

12:46:19 1 Q You don't draw through that conclusion.

12:46:21 2 A No.

12:46:22 3 Q So 1,282 deaths in one year from the flu is similar to  
12:46:28 4 198 deaths in 2000?

12:46:32 5 A So it's very different responses. We have mitigation  
12:46:38 6 measures for the pandemic. We did not have this  
12:46:40 7 mitigation measure in place for the flu. It's really  
12:46:43 8 impossible to make comparisons.

12:46:46 9 The flu vaccine isn't as immunity effective as the  
12:46:49 10 Covid vaccine. People weren't wearing masks during flu.  
12:46:52 11 They aren't wearing masks now. We didn't shut down the  
12:46:56 12 economy ever for the flu. These two types of comparisons  
12:46:58 13 are just felicitous.

12:46:59 14 Q So would it be your opinion then, because the flu is so  
12:47:03 15 deadly for children, that children should be wearing  
12:47:06 16 masks for the rest of their lives while they're in  
12:47:09 17 school?

12:47:10 18 A We haven't made that evaluation. In Rhode Island we  
12:47:13 19 haven't had flu deaths. Last year there were no deaths  
12:47:16 20 in the entire state. That's something to learn from. I  
12:47:19 21 haven't seen pediatric deaths in a long time from the  
12:47:22 22 flu, so I haven't done the study and evaluation.

12:47:24 23 What I'm saying though is when you draw comparisons  
12:47:27 24 from flu to Covid, it's really impossible to make those  
12:47:30 25 comparisons because one mitigation measure, like masks in

12:47:33 1 and of itself is one mitigation measure.

12:47:35 2 But the whole country went through a great big  
12:47:39 3 response, Connecticut as well, so it's really impossible,  
12:47:41 4 in my opinion, to compare flu to Covid.

12:47:44 5 Q Doctor, I don't know about other people and what they're  
12:47:48 6 hearing, but it certainly sounds to me like masks are  
12:47:51 7 never going to go away for kids, because if it's this  
12:47:55 8 deadly, if the flu is this deadly, it's your opinion kids  
12:47:59 9 should be wearing masks so they don't get the flu.

12:48:02 10 MS. WYRZYKOWSKI: Objection. It's a  
12:48:03 11 mischaracterization.

12:48:05 12 THE COURT: Sustained. Okay. And with that  
12:48:08 13 why don't we take a break. I'll ask you all to be back  
12:48:12 14 here at five minutes to two.

12:48:13 15 MS. WYRZYKOWSKI: Excuse me, your Honor.

12:48:15 16 MR. FIELD: Can we just approach? I have a  
12:48:17 17 conflict at 2.

12:48:19 18 THE COURT: Of course. We are off the record.

12:48:19 19 (Bench discussion off the record).

12:49:33 20 MR. PICCIRILLI: I should have this marked.

12:49:36 21 THE CLERK: Plaintiffs' Exhibit 46 for  
12:49:39 22 identification.

12:49:39 23 **(PLAINTIFFS' EXHIBIT 46 WAS MARKED FOR**  
12:49:40 24 **IDENTIFICATION)**

12:49:40 25 Q Doctor, this is something which I attached actually to



12:49:47 1 the complaint, RIDE's guidance for health and safe  
12:49:53 2 opening of 2021-22 school year, correct?

12:49:56 3 A Yes.

12:49:57 4 Q This was prepared in conjunction with the Rhode Island  
12:50:01 5 Department of Education, the Rhode Island Department of  
12:50:03 6 Health and the Governor?

12:50:04 7 A Yes.

12:50:04 8 Q So you're aware of this, Doctor?

12:50:06 9 A Yes.

12:50:06 10 MR. PICCIRILLI: Okay. I move it as a full  
12:50:08 11 Exhibit.

12:50:10 12 THE COURT: Without objection, 46 is full.

12:50:12 13 MS. WYRZYKOWSKI: No objection. Thank you.

12:50:13 14 **(PLAINTIFFS' EXHIBIT 46 WAS MARKED FULL)**

12:50:13 15 Q And then if you go to the third page it has  
12:50:20 16 recommendations with regard to wearing masks; correct?

12:50:22 17 A Yes.

12:50:23 18 Q And as of the date of this document, which I believe was  
12:50:26 19 June 29th; is that correct?

12:50:27 20 A Yes.

12:50:28 21 Q Masks were not going to be mandated in schools, correct?

12:50:33 22 A That's correct.

12:50:34 23 Q Okay. Now, you said after that in July suddenly the  
12:50:44 24 Delta variant appeared and things changed, right?

12:50:47 25 A The Delta variant started around July 4th in Rhode

12:50:50 1

Island.

12:50:50 2

Q Doctor, I'm going to ask you, you're familiar with the school health regulations?

12:50:56 3

12:50:58 4

A Yes.

12:50:58 5

Q Okay. And you're familiar with how those regulations are enacted?

12:51:04 6

12:51:04 7

A Yes.

12:51:05 8

Q Okay. There's a normal procedure for enacting regulations such as those?

12:51:09 9

12:51:10 10

A Yes, they are. There is.

12:51:11 11

Q And in that normal procedure, well, let me ask you this, can you describe what the normal procedure is, not the emergency procedure, but the normal procedure for enacting a health regulation?

12:51:16 12

12:51:19 13

12:51:21 14

A Yes, I'll be happy to.

12:51:23 15

12:51:25 16

Q What's the process?

12:51:26 17

A So you start with an idea, anybody could have an idea and notify the Department of Health they have an idea. We're are open to everyone's idea and then it's an idea for consideration for regulation, people in the Department start drafting regulation. So you have to have something to react to. So a regulation is drafted and then it's presented often for what's called advance notice of rule making.

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So when we do advance notice of rule making, I was

12:51:53 1 in a meeting with this yesterday, for example, a  
12:51:55 2 community review can occur. We often look for like three  
12:51:58 3 weeks, we'll get written responses from people, but a lot  
12:52:01 4 of times we have an in-person or as the case was  
12:52:04 5 yesterday a Zoom, community review where everybody can  
12:52:07 6 just chat, we can dialogue with each other, and that can  
12:52:10 7 happen more than once. We do this as many times as we  
12:52:12 8 want. We usually do it once and give it our all. Then  
12:52:14 9 we get ready to go to the Office of Regulatory Reform, so  
12:52:18 10 Office of Regulatory Reform looks at what we have on the  
12:52:21 11 regulations. We often have to do a cross benefit  
12:52:25 12 analysis. So we do the cost benefit analysis.

12:52:27 13 Office of Regulatory Reform looks at the regulations  
12:52:29 14 and gee, does it conflict with other regulations in the  
12:52:32 15 State or does it conflict with any statute? Did the cost  
12:52:35 16 benefit analysis make sense? And then we will go out for  
12:52:39 17 public comment.

12:52:40 18 We go out for a public comment, we may have a public  
12:52:42 19 hearing, but we don't always. With public comment there  
12:52:45 20 will be a period of time, it's usually around 30 days,  
12:52:47 21 where we use people in the public to kind of help what  
12:52:50 22 their thoughts are.

12:52:50 23 And sometimes after the public comment we actually  
12:52:53 24 change our regulations. It comes from a logical outflow  
12:52:57 25 of public comment.

12:52:58 1 Q Doctor, if I can interrupt you there for a minute.

12:52:59 2 A Sure.

12:52:59 3 Q Under the statute, isn't it true you have to have a  
12:53:02 4 public comment if more than 25 people or a government  
12:53:05 5 agency or an association having not less than 25 members  
12:53:12 6 ask for a hearing?

12:53:12 7 A Yes.

12:53:12 8 Q So let's use?

12:53:14 9 A We almost always do it anyway.

12:53:16 10 Q Let's use that analysis with the school health  
12:53:20 11 regulations?

12:53:21 12 A Sure.

12:53:22 13 Q There are special rules for school health regulations,  
12:53:24 14 right? The Department of Education is involved as well  
12:53:26 15 as the Department of Health?

12:53:27 16 A Yes, we work with them as well.

12:53:28 17 Q And in the school health regulations you consult with the  
12:53:37 18 Department of Ed in drafting this?

12:53:39 19 A Yes, we do.

12:53:40 20 Q All right. Do you know the last time the Rhode Island  
12:53:44 21 School of Health regulations were amended?

12:53:46 22 A I don't know off the top of my head.

12:53:49 23 Q Have you been involved at all in a review of the school  
12:53:54 24 health regulations in Rhode Island?

12:53:55 25 A Yes.

12:53:56 1 Q When was that?

12:53:57 2 A That was before the pandemic we were involved -- I was  
12:54:00 3 involved in particular, because we were purposing  
12:54:03 4 regulations allowing the use of some students to use  
12:54:06 5 medical marijuana, to use medical marijuana in the  
12:54:09 6 schools.

12:54:09 7 So that occurred, I want to say 2018 maybe 2019, but  
12:54:13 8 I was involved with the meeting at that point as well.

12:54:16 9 Q But that never was enacted?

12:54:18 10 A Yes, it's a good example, we got a lot of public comment  
12:54:22 11 and decided that no, it really just wasn't a good idea.  
12:54:24 12 So that was an example, we got some input from the  
12:54:27 13 stakeholder, we took their idea, we went through the  
12:54:30 14 process and when it was all said and done, we decided  
12:54:34 15 this really isn't a good idea, so we decided not to do  
12:54:37 16 it.

12:54:37 17 Q My point is, Doctor, the last time that the school health  
12:54:40 18 regulations were amended was actually January of 2009,  
12:54:43 19 would that surprise you?

12:54:44 20 A Yes, that would surprise me.

12:54:48 21 MR. PICCIRILLI: Your Honor, for some reason I  
12:54:50 22 only have two copies of the school health regulations.  
12:54:55 23 They are attached to the complaint. I'll ask that this  
12:55:06 24 be marked.

12:55:06 25 THE CLERK: Plaintiffs' 47 for identification.

12:55:18 1 MR. PICCIRILLI: No objection that coming in?

12:55:19 2 MS. WYRZYKOWSKI: I don't have the document in  
12:55:20 3 front of me. I just want to look at it, please.

12:55:20 4 (Pause taken)

12:55:46 5 MS. WYRZYKOWSKI: Your Honor, I do object for  
12:55:48 6 one reason, the Department of Health regulations are  
12:55:50 7 actually updated in 2018. This is a 2009 copy.

12:55:54 8 MR. PICCIRILLI: I got that from the Department  
12:55:55 9 of Education website. Actually, it came from the  
12:55:58 10 Department of Health website. So if there's a more  
12:56:01 11 updated version that would surprise me. It's not on the  
12:56:05 12 website.

12:56:06 13 MS. WYRZYKOWSKI: I haven't been to the website  
12:56:08 14 recently looking for this document, so if the Court would  
12:56:11 15 give me an opportunity to go and check it but it's my  
12:56:12 16 understanding it was updated in 2018 not 2009. It was  
12:56:16 17 updated in 2009, but more versions have been done since  
12:56:19 18 then.

12:56:19 19 THE COURT: I have no idea why he's using 47.  
12:56:23 20 You may be using an older one for some reason.

12:56:26 21 MR. PICCIRILLI: It wasn't my intention, your  
12:56:28 22 Honor, to use an old one but why don't I ask you this  
12:56:31 23 question.

12:56:32 24 THE COURT: Another good reason to have lunch.

12:56:36 25 MR. PICCIRILLI: If your Honor wants to, we'll

12:56:38 1 take a break.

12:56:41 2 THE COURT: Okay. We need to take a longer  
12:56:43 3 break, so I'll ask you to be back at 2:30. We'll try and  
12:56:47 4 get going as soon as we can after that. Thank you all.

12:56:47 5 (Lunch break)

14:56:18 6 THE CLERK: Resuming the matter of  
14:56:23 7 **PC-2021-5915, Southwell vs. Daniel McKee.** I would just  
14:56:27 8 like to remind the witness that having been previously  
14:56:30 9 sworn in you are still under oath. If you could just  
14:56:32 10 state your name for the record, please.

14:56:33 11 THE WITNESS: Dr. James McDonald.

14:56:35 12 THE CLERK: Thank you.

14:56:36 13 MR. PICCIRILLI: Your Honor, before we begin, I  
14:56:38 14 think we have some agreement on what the current  
14:56:41 15 regulation is. The regulation I submitted is the one  
14:56:45 16 that's on the Rhode Island Department of Education  
14:56:48 17 website. Apparently, they haven't updated it. The  
14:56:51 18 Department of Health has one on their website that's also  
14:56:52 19 been updated. So we have the final Secretary of State  
14:56:55 20 version, which we will introduce by agreement. Thank  
14:56:58 21 you.

14:56:59 22 THE COURT: You want to mark that, remark that?

14:57:01 23 MR. PICCIRILLI: So if I can substitute this in  
14:57:04 24 for what was the last one?

14:57:10 25 THE CLERK: So we're going to replace Exhibit

14:57:12 1 47?

14:57:13 2 MR. PICCIRILLI: Yes.

14:57:14 3 THE CLERK: That is it, Counsel?

14:57:15 4 MR. PICCIRILLI: Yes.

14:57:16 5 THE COURT: By agreement, Exhibit 47 is marked  
14:57:19 6 for identification.

14:57:24 7 THE CLERK: For identification, your Honor.

14:57:25 8 MR. PICCIRILLI: Full.

14:57:28 9 THE COURT: Without objection, full.

14:57:30 10 THE CLERK: Plaintiffs' 47 is full.

14:57:30 11 **(PLAINTIFFS' EXHIBIT 47 WAS MARKED FULL)**

14:57:49 12 **CONTINUED CROSS-EXAMINATION BY MR. PICCIRILLI**

14:57:50 13 Q Doctor, before we broke I was trying to get into the  
14:57:54 14 school health regulations. I think we now have the  
14:57:57 15 actual current version, which we're moving along with. I  
14:58:03 16 like the old one, it used to have an index in the front  
14:58:07 17 of exactly what was in the regulation. Now there's no  
14:58:10 18 index. Now you have to scroll through the whole thing.

14:58:13 19 But you're familiar with the regulation, correct?

14:58:16 20 A I'm familiar with them.

14:58:17 21 Q And I believe you've testified you've actually been  
14:58:21 22 involved in reviewing them and possibly updating them?

14:58:27 23 A I was involved with a possible change that we were going  
14:58:31 24 to do in '18 or '19 about having the marijuana in schools  
14:58:34 25 and we never made the change. That was pretty much my



14:58:37 1 involvement.

14:58:37 2 Q Were you involved at all prior to that medical marijuana  
14:58:43 3 in 2018, were you involved at all in the amendments of  
14:58:46 4 these regulations prior to that?

14:58:48 5 A No.

14:58:48 6 Q Okay. So let me ask you this, Doctor, you testified that  
14:59:01 7 on June 29th the Department of Ed, the Department of  
14:59:07 8 Health and the Governor put out a guidance that said  
14:59:09 9 masks would not be mandated, is that correct?

14:59:10 10 A That's right.

14:59:11 11 Q And then early July it became concerning to you that the  
14:59:17 12 Delta variant was becoming prevalent in Rhode Island,  
14:59:20 13 correct?

14:59:20 14 A Yes.

14:59:21 15 Q And between early July and August 19th at some point you  
14:59:27 16 advised someone who advised the Governor that he should  
14:59:31 17 issue an executive emergency order, correct?

14:59:33 18 A Yes.

14:59:34 19 Q Why did you not convene a regulatory hearing under the  
14:59:44 20 Department of Health regulations guidelines some time in  
14:59:49 21 July to consider the issue of masking in schools?

14:59:53 22 A This is an emerging situation. Doing a regulation takes  
14:59:58 23 at least four months, so we just didn't have enough time.  
15:00:01 24 The case is accelerating quite rapidly.

15:00:04 25 You know I want to underscore Delta created a new

15:00:07 1 public health emergency, something I said at the  
15:00:09 2 beginning, and when Delta created a public health  
15:00:12 3 emergency we had to respond to it and that's why an  
15:00:13 4 executive order was something we asked for.

15:00:16 5 Q Doctor, forgive me on your statement, but you can issue a  
15:00:21 6 regulation in 30 days, can't you?

15:00:23 7 A No, you can't.

15:00:24 8 Q Do you have a notice of common period, 30 days.

15:00:25 9 A No, it takes much longer than that, a minimum time for  
15:00:30 10 regulation is 120 days.

15:00:31 11 Q 120 days?

15:00:32 12 A You can't do --

15:00:34 13 Q Well, why does it take 120 days?

15:00:36 14 A Because that's how long the regulatory process takes.

15:00:38 15 Q It takes -- why does it take 120 days? What's the first  
15:00:44 16 thing you would do?

15:00:45 17 A Well, first thing you have to do is draft the regulation,  
15:00:47 18 that takes time. Second thing you have to do is get it  
15:00:50 19 to the Office of Regulatory Reform and they have 30 days  
15:00:53 20 just themselves to look at it. Keep in mind that we have  
15:00:56 21 to do a cross venture analysis and that can take a very  
15:01:00 22 long period of time to do that as well, so it's at least  
15:01:03 23 that much time. Plus then we have to put it out for  
15:01:04 24 public comment, which takes at least 30 days.

15:01:06 25 So it's within, assuredly the least amount of time

15:01:11 1 you can do a regulation is 120 days, and I don't think  
15:01:13 2 regulations are done that quickly by the way. I have  
15:01:15 3 regulations I've been working on for over two years and  
15:01:18 4 still aren't done.

15:01:19 5 Q Well, you did the emergency rule pretty quick, didn't  
15:01:21 6 you?

15:01:21 7 A Well, during the entire pandemic we had a lot of  
15:01:26 8 extraordinary things and we've done emergency regulations  
15:01:29 9 and we've done executive orders, right. Those are  
15:01:33 10 extraordinary things that had to be done very rapidly.

15:01:36 11 Q Well, Doctor, masks were in school all last year from  
15:01:40 12 September of 2020 to June of 2021, correct?

15:01:45 13 A Yes.

15:01:45 14 Q And at no time during those eight to ten months did the  
15:01:52 15 Department of Health convene a normal regulatory hearing  
15:01:55 16 on the issue of masking in schools, correct?

15:01:57 17 A Yes.

15:01:58 18 Q It's a lot more than 120 days between September and June,  
15:02:01 19 right?

15:02:02 20 A Yes.

15:02:02 21 Q Why didn't you convene between September and June of last  
15:02:06 22 year?

15:02:06 23 A There was a lot of things going on with the pandemic. It  
15:02:10 24 wasn't an active question. I don't know why. You have  
15:02:13 25 to ask the Governor at the time. I don't remember why.

15:02:15 1 Q Doctor, you're the head of the Covid Response?

15:02:20 2 A I'm the medical director.

15:02:22 3 Q But what's your position with regard to Covid? I thought  
15:02:25 4 you were the head of the Covid Response Team?

15:02:28 5 A No, I'm the medical director for the Covid Leadership  
15:02:31 6 Team, the Executive Director of the Covid Leadership Team  
15:02:36 7 is Tom McCarthy, and the Director of Health and the one  
15:02:38 8 whose in charge of everything in the department,  
15:02:40 9 including Covid.

15:02:40 10 Q So it's your testimony that it's Dr. Alexander Scott's  
15:02:47 11 decision whether or not to convene a normal regulatory  
15:02:49 12 hearing over the last year regarding masking?

15:02:52 13 A It was never discussed. I don't remember it ever being  
15:02:54 14 discussed that we should do this at a regulation.

15:02:58 15 Q Well, you're familiar with the emergency rule statutes;  
15:03:03 16 correct?

15:03:04 17 A Yes.

15:03:04 18 Q It says you have to find imminent peril; correct?

15:03:09 19 A Yes.

15:03:09 20 Q Well, there was nothing imminent in July of 2021 that  
15:03:17 21 wasn't imminent in September of 2020, was there?

15:03:19 22 A I disagree. I think July put us in a new situation  
15:03:24 23 entirely.

15:03:24 24 Q Well, the reality is the same, it was going to be  
15:03:28 25 masking, mandatory masking in schools. That's the issue.

15:03:33 1 That's the regulation. You had from September of 2020  
15:03:38 2 until now to convene a regulatory hearing and you didn't?  
15:03:42 3 A You're right, we didn't.  
15:03:44 4 Q In fact, have you convened one now?  
15:03:47 5 A No, we did not.  
15:03:48 6 Q So since the emergency rule was enacted, back on  
15:03:52 7 September 23rd, you still haven't started the 120 day  
15:03:55 8 process?  
15:03:56 9 A No, we have not.  
15:03:59 10 Q You realize that the emergency rule is only good for 120  
15:04:02 11 days?  
15:04:02 12 A It's good for a varying amount of time but I don't how  
15:04:07 13 long this one is good for.  
15:04:07 14 Q The statute says the emergency rule may be effective for  
15:04:11 15 not longer than 120 days, renewable once for a period not  
15:04:15 16 exceeding 60 days.  
15:04:15 17 A Yes, but I don't know how long this particular regulation  
15:04:18 18 is good for.  
15:04:18 19 Q You don't know?  
15:04:20 20 A I was told it was 45 days but I'm not really involved in  
15:04:23 21 this process. This is for legal people helping me. I  
15:04:26 22 provide medical guidance for regulations. I don't  
15:04:29 23 remember the duration of how long it was good for. I  
15:04:31 24 have to verify that.  
15:04:32 25 Q The statute also requires that the agency publish the

15:04:48 1 emergency rule on its own website with reasons for the  
15:04:58 2 findings of that agency without prior notice of hearing,  
15:05:02 3 or on an abbreviated notice of hearing that it finds  
15:05:05 4 practical and promulgate the rule. You're familiar with  
15:05:09 5 that language in the statute?

15:05:11 6 A I wasn't until you just read it.

15:05:14 7 Q Okay. So it appears in the statute that the Department  
15:05:19 8 of Health could have still convened a hearing on the  
15:05:22 9 emergency rule and done it under an abbreviated notice of  
15:05:26 10 hearing period? You weren't aware of that?

15:05:29 11 A My medical guidance, I'm the Medical Director, there's  
15:05:33 12 other people who deal with the legal process of  
15:05:35 13 promulgating regulations. I'm not involved with that  
15:05:38 14 part.

15:05:38 15 Q So nobody ever asked you, Doctor, we're thinking about  
15:05:45 16 passing this emergency rule, what is your opinion about  
15:05:48 17 it?

15:05:48 18 A I'm asked to give medical guidance and I do, that's what  
15:05:52 19 I do. I'm not asked about when it should be published,  
15:05:57 20 what is the language around, you know, disclaimers or  
15:05:59 21 dates or things like that. That's for the regulation  
15:06:03 22 people to weigh in they do that work. I'm not involved  
15:06:04 23 with that part.

15:06:04 24 Q So you're saying the state lawyers decided to do this  
15:06:08 25 emergency rule not the Department of Health?

15:06:10 1 A No, I didn't say that at all. What I said was I provided  
15:06:13 2 a medical guidance. I gave my advice and the regulatory  
15:06:17 3 people process the regulations, put the right wording  
15:06:20 4 together and then work with how it's going to get posted  
15:06:22 5 and how it's going to get edited and who it was signed  
15:06:25 6 by. I provide medical guidance. I'm the Medical  
15:06:28 7 Director. I'm not one of the State attorneys or one of  
15:06:31 8 the State's regulatory staff.

15:06:32 9 Q Now you mentioned that if you pass a normal procedure  
15:06:39 10 regulation, you have to consider cost benefit analysis,  
15:06:43 11 correct?

15:06:43 12 A Yes, we do that.

15:06:45 13 Q We've spent, I don't know how many days here; six, seven  
15:06:49 14 days debating the science of masking. You cited MMWR  
15:06:55 15 reports.

15:06:55 16 Dr. Bostom has cited reports that prove masks don't  
15:06:59 17 work and may in fact be harmful. We have some  
15:07:02 18 disagreement potentially on that issue. Isn't the whole  
15:07:06 19 purpose of a regulatory proceeding is to have all of that  
15:07:12 20 information, science, opinion, data presented in a  
15:07:18 21 regulatory hearing so that the regulatory agency will  
15:07:22 22 balance cost benefit analysis of whether masks work,  
15:07:29 23 whether their harmful? Isn't that the whole point of the  
15:07:33 24 normal regulatory procedure?

15:07:34 25 MS. WYRZYKOWSKI: Objection, form. And

15:07:36 1 Dr. McDonald has also testified that he's not involved  
15:07:38 2 with that process, he just provides medical guidance and  
15:07:42 3 the rest is handled by the regulators and the state  
15:07:42 4 attorneys.

15:07:44 5 THE COURT: It does request a legal conclusion,  
15:07:47 6 since you've asked him what the intent of the  
15:07:49 7 Administrative Procedures Act is. Sustained.

15:07:57 8 MR. PICCIRILLI: Okay.

15:07:57 9 Q BY MR. PICCIRILLI: Is it true, Doctor, you've never  
15:08:02 10 conducted a cost benefit analysis to determine the  
15:08:08 11 appropriateness of mandatory masking in schools?

15:08:10 12 A I've never done one.

15:08:12 13 Q Okay. And is it true, Doctor, that you've never invited  
15:08:20 14 comment or considered alternate opinions, with regard to  
15:08:26 15 masking in schools, other than the one that you have,  
15:08:29 16 which is they should -- that masking should be in place  
15:08:34 17 in schools.

15:08:35 18 MS. WYRZYKOWSKI: Objection, form. The Doctor  
15:08:36 19 has also said he's done multiple opinions at various  
15:08:39 20 times to help formulate his guidance.

15:08:42 21 THE COURT: I understand. You don't have to  
15:08:42 22 give him the answer. He can handle it himself. The  
15:08:44 23 question was fair. Overruled.

15:08:47 24 THE WITNESS: Yes, I hold other opinions. In  
15:08:49 25 fact, myself and the entire medical staff have looked at



15:08:52 1 every article you can find to talk about this issue to  
15:08:55 2 see if there was an issue with masking. There was an  
15:08:57 3 article that came out June 30th in JAMA by Dr. Walick  
15:09:03 4 (Phonetic) from the University of Poland about Germany  
15:09:05 5 and it said masks were harmful for kids. We look at it  
15:09:10 6 closely. We had discussions about it. We've tracked it  
15:09:12 7 14 days later, because the author tried his methodology.

15:09:16 8 So we do look for other opinions. I mean even  
15:09:19 9 yesterday I was looking for articles that would be  
15:09:21 10 contrary to my opinion, because I wanted to keep an open  
15:09:24 11 mind about this. I just didn't find it. I found an  
15:09:27 12 article from China that actually said masks reduce  
15:09:32 13 anxiety, as people who wear masks had less anxiety. They  
15:09:35 14 exercised more, cause less anxiety.

15:09:38 15 So we are constantly looking for different opinions.  
15:09:40 16 We're not closed minded nor am I working in a vacuum by  
15:09:45 17 myself.

15:09:45 18 Q Doctor, Dr. Andrew Bostom testified that there were  
15:09:50 19 13 studies, randomized control trial studies prior to the  
15:09:55 20 pandemic, ten years prior to the pandemic, that proved  
15:09:58 21 masking doesn't work to stop the spread of a virus? Did  
15:10:03 22 you consider any of those studies in your analysis?

15:10:06 23 A I wasn't familiar with those studies beforehand. No, I'm  
15:10:10 24 not aware of them.

15:10:10 25 Q Have you gone back and looked at them to see if they're

15:10:14 1 relevant to your opinion now?

15:10:15 2 A I looked at some of the studies he proposed, and I can't  
15:10:18 3 remember all that I looked at but I looked at some.

15:10:20 4 Q By the way, isn't it also true in a normal regulatory  
15:10:24 5 process, that if the regulatory agency decides to rely on  
15:10:29 6 certain evidence and discard other evidence, they have to  
15:10:33 7 explain that in writing why they do that, right?

15:10:36 8 MS. WYRZYKOWSKI: Objection, your Honor. The  
15:10:37 9 Doctor already testified what goes in that process.

15:10:40 10 MR. PICCIRILLI: If he knows.

15:10:42 11 THE COURT: If you know you can answer.

15:10:44 12 THE WITNESS: When we do the regular regulatory  
15:10:47 13 process we respond to every comment. I'm not the one who  
15:10:54 14 responds to every comment, someone else does, but I know  
15:10:57 15 they respond to every comment.

15:10:58 16 Q And, again, I think you testified earlier that, when I  
15:11:18 17 asked you whether you consider other states or even other  
15:11:22 18 countries experiences with masking. For example, how  
15:11:27 19 throughout the southern states right now hospitalizations  
15:11:30 20 are plummeting, in some cases by 85 percent, and they  
15:11:34 21 have no masking. And your testimony was, well, I only  
15:11:38 22 look at Rhode Island. Do you remember that?

15:11:39 23 A I didn't say I only looked at Rhode Island. You're  
15:11:43 24 mischaracterizing what I said. I said I am aware what  
15:11:46 25 goes in other states but I follow Rhode Island most

15:11:46 1 closely and that's what I use.

15:11:49 2 I work with the Department of Health. I have data  
15:11:52 3 about what goes on in our schools. I know specific facts  
15:11:55 4 about what goes on in our schools because I work at the  
15:11:59 5 Department of Health. I know 65 percent of the people in  
15:12:02 6 K-12 who have a positive test have no symptoms or are  
15:12:08 7 infectious. I know our own data.

15:12:10 8 Q Doctor, so your answer is you do not look at data or  
15:12:18 9 information coming from other states or other countries.  
15:12:21 10 You only look at Rhode Island data?

15:12:22 11 A No, I didn't say that. I do look at it but I look at  
15:12:26 12 Rhode Island data most closely because that's the data I  
15:12:28 13 live with. But if I see studies from other countries, of  
15:12:32 14 course I look at studies from other countries. I don't  
15:12:32 15 see every study out there, but I see studies from other  
15:12:35 16 states. I look at that too. I'm open to both points of  
15:12:35 17 view.

15:12:38 18 What we've done is made a recommendation. I made a  
15:12:41 19 recommendation, to me what was a persuasive argument. I  
15:12:44 20 think the Center for Disease Control and Prevention and  
15:12:48 21 Science Brief on May 7th was compelling and persuasive.  
15:12:50 22 It was a really thoughtful and pure article with 65  
15:12:53 23 different articles. I thought it was very persuasive.

15:12:56 24 Q The CDC Science Brief on May 7th was very persuasive. On  
15:13:03 25 May 7 the CDC was still saying that if you were fully

15:13:06 1 vaccinated you didn't have to wear a mask. You didn't  
15:13:09 2 have to worry about being around anyone who didn't wear a  
15:13:12 3 mask that you couldn't catch Covid.

15:13:15 4 And then something happened in Provincetown where  
15:13:18 5 there was a breakthrough and the CDC had to admit they  
15:13:22 6 were wrong and changed what their recommendation was,  
15:13:25 7 correct?

15:13:25 8 A No, you're incorrectly summarizing what happened. The  
15:13:29 9 Delta variant became the dominant strain in Rhode Island  
15:13:33 10 after July 4th. The Delta variant wasn't present before  
15:13:36 11 May. What the CDC study in Barnstable County was in  
15:13:39 12 Provincetown is you kind of have almost no cases in  
15:13:43 13 Provincetown, then you had this massive outbreak of  
15:13:46 14 unvaccinated individuals, and what they did was they had  
15:13:46 15 new information.

15:13:51 16 If you have new information it updates the  
15:13:53 17 guidelines, that's what I saw, where they had new  
15:13:56 18 information so they updated their guidelines.

15:13:57 19 Q So they were wrong in May and they were proven wrong in  
15:14:02 20 what happened in Provincetown, that vaccines worked to  
15:14:06 21 prevent you from catching Covid?

15:14:08 22 A No, they weren't wrong in May. They were right based on  
15:14:11 23 the facts at the time. Like I said several times now,  
15:14:15 24 Delta variant wasn't in Rhode Island, wasn't in  
15:14:18 25 Massachusetts, really wasn't in the United States before

15:14:21 1 May. It really became an issue after July 4th.

15:14:24 2 So the pandemic changed. The pandemic became very  
15:14:28 3 severe. That's why it was to me important to have a new  
15:14:30 4 State of Emergency and to have a new, a new approach  
15:14:34 5 here, because the pandemic was getting worse.

15:14:36 6 And I'm representing the Department of Health. My  
15:14:40 7 job is to protect the public. That's what I'm trying to  
15:14:43 8 do, protect the public.

15:14:44 9 Q In my complaint, which you testified you reviewed my  
15:14:48 10 complaint?

15:14:48 11 A I did.

15:14:49 12 Q In my complaint I cite a statement from the CDC website  
15:14:54 13 as of September 11th of this year, discussing the  
15:14:57 14 variants of Covid, SARS-Cov-2. Do you recall that?

15:15:01 15 A If you would just -- I don't remember your complaint in  
15:15:04 16 details, so you may have to repeat the phrase you're  
15:15:07 17 going to talk about.

15:15:08 18 Q This is where the CDC mentions that there were three  
15:15:12 19 categories of variant classification, a few classes;  
15:15:18 20 variants of interest, variants of concern, variants of  
15:15:21 21 high consequence?

15:15:21 22 A Yes.

15:15:22 23 Q You're familiar with that?

15:15:23 24 A I am very familiar with that.

15:15:24 25 Q And then they talk about the fact that there were four

15:15:28 1 strains that were currently classified as variants of  
15:15:33 2 concern in the United States?

15:15:34 3 A Yes.

15:15:34 4 Q Okay. Do you know what those four are?

15:15:36 5 A Yes.

15:15:36 6 Q What are they?

15:15:38 7 A There's the Alpha, the Beta, the Gamma and the Delta.

15:15:41 8 Q And to date as of September 11th, no bearing by  
15:15:47 9 consequence has been identified, correct?

15:15:48 10 A Yes, thankfully.

15:15:50 11 Q So Delta is no more of a high consequence than Alpha,  
15:15:55 12 Beta or Gamma, according to the CDC own's website?

15:15:58 13 A You're interpreting it wrong, because if there's volumes  
15:16:00 14 of cases that made it a public health emergency in Rhode  
15:16:05 15 Island. Keep in mind prior to July 4th, Rhode Island had  
15:16:07 16 survived the Alpha variant, as well as the Beta and the  
15:16:10 17 Gamma. We were doing well. What happened, which was  
15:16:13 18 new, was the Delta variant made it to Rhode Island and we  
15:16:17 19 became the dominant strain.

15:16:18 20 Q But that's true all over, right? The Delta is the  
15:16:21 21 dominant strain all over the country right now?

15:16:23 22 A It is.

15:16:24 23 Q And that's why the CDC says, you know, the vaccines don't  
15:16:28 24 really work so well with regard to Delta, so you still  
15:16:30 25 have to wear a mask even if you're vaccinated, right?

15:16:33 1 A The vaccines don't have the same effect against Delta as  
15:16:37 2 they had with these other strains.

15:16:38 3 Q So in fact, I think even your counsel has conceded that  
15:16:42 4 the purpose of the vaccine isn't to prevent you from  
15:16:45 5 getting the virus. It isn't to prevent you from giving  
15:16:48 6 the virus, it's only intent is to lessen the severity if  
15:16:51 7 you do get it, right? You would agree with that?

15:16:53 8 A Well, I think you're mischaracterizing it. In other  
15:16:56 9 words, the vaccine is very effective at preventing you  
15:16:59 10 from dying. It's also very effective at preventing  
15:17:02 11 people from being hospitalized but it's not as effective  
15:17:05 12 as preventing cases. But obviously it prevents people  
15:17:07 13 from getting Covid and that's why I think you're  
15:17:09 14 mischaracterizing.

15:17:10 15 Q It prevents people from getting Covid?

15:17:12 16 A Yes, it does.

15:17:13 17 Q Then why if you're vaccinated, why are you still wearing  
15:17:16 18 a mask?

15:17:16 19 A Because it doesn't prevent everybody from getting Covid.

15:17:19 20 Q And we just don't know which one it works for and which  
15:17:26 21 ones it doesn't?

15:17:26 22 A I don't know which people it is very effective for and  
15:17:30 23 which people it's not. That's not known.

15:17:31 24 Q By the way, Doctor, does natural immunity protect you  
15:17:37 25 from getting Covid or giving Covid to someone else?

15:17:40 1 A For some people it does.

15:17:42 2 Q So just like the vaccine?

15:17:45 3 A So natural immunity is still being studied. I don't know  
15:17:49 4 how long that immunity lasts and I don't know how often  
15:17:52 5 people in that community transmit disease to one person  
15:17:55 6 to the other.

15:17:55 7 Q Well, that's true of the vaccine too. We don't know how  
15:17:59 8 long the vaccine lasts. They're talking about a third  
15:18:01 9 booster shot, right?

15:18:01 10 A Booster shots have already been approved.

15:18:04 11 THE COURT: What are we doing with vaccines?

15:18:04 12 MR. PICCIRILLI: I'm sorry, Judge?

15:18:06 13 THE COURT: We're going onto the future with  
15:18:08 14 the vaccines. We have enough problems with masks.

15:18:12 15 MR. PICCIRILLI: Fair enough.

15:18:12 16 Q Well, the vaccine is one of the factors that we take into  
15:18:18 17 account in whether or not you're going to drop this mask  
15:18:22 18 mandate, right?

15:18:22 19 A It is a factor. We'd love to be able to offer it to  
15:18:26 20 children sooner than later.

15:18:27 21 Q Does the State of Rhode Island test for natural immunity?

15:18:34 22 A The State does not do tests for natural immunity.

15:18:37 23 Q So you're mandating people to get vaccines, or you're  
15:18:41 24 certainly encouraging them to get vaccines, but you're  
15:18:44 25 not testing to see whether they already have natural



15:18:47 1

immunity?

15:18:48 2

A That's correct.

15:18:48 3

Q Well, wouldn't that be something important to do to

15:18:52 4

determine whether -- how many people in the State already

15:18:54 5

have natural immunity?

15:18:55 6

A No, it's not important to do.

15:18:57 7

Q Well, isn't it on your --

15:19:02 8

A It's on our dashboard.

15:19:04 9

Q It's under Projected Community Immunity?

15:19:06 10

A So we don't know how long natural immunity lasts. So the

15:19:10 11

working definition of the model is that it lasts for 90

15:19:13 12

days, because that's the assumption the Center for

15:19:15 13

Disease Control and Prevention uses.

15:19:17 14

Q I'm going to show you N and O, please. So you're saying

15:19:25 15

because the Center For Disease Control uses natural

15:19:30 16

immunity, that's why it's in the model?

15:19:33 17

A They come up with a definition that they're pretty

15:19:36 18

confident that natural immunity is definitely working for

15:19:38 19

90 days, so that's the assumption they made. That's the

15:19:41 20

assumption they use.

15:19:42 21

Q If you go to -- again, I apologize having to go reread

15:19:46 22

this. If you go to Exhibit N, the first page, estimate d

15:19:50 23

prevalence of infection. It says CDC Community

15:19:53 24

Transmission; correct, on the right in blue?

15:20:00 25

A I see it, yes.

15:20:01 1 Q If you go to Exhibit O, July 28th, what three letters are  
15:20:17 2 missing before community transmission from that model?

15:20:21 3 A CDC.

15:20:22 4 Q So you stopped following CDC guidelines on July 28,  
15:20:26 5 correct?

15:20:27 6 MS. WYRZYKOWSKI: Objection, your Honor. He's  
15:20:28 7 already testified he's not the person who does the  
15:20:30 8 information. He's the person who reviews the  
15:20:33 9 information. So somebody else in the Department would  
15:20:35 10 have made a determination with respect to that.

15:20:37 11 THE COURT: And he would be stopped from using  
15:20:38 12 CDC information, so the question was fair.

15:20:41 13 THE WITNESS: Actually, if you look, I'm sorry,  
15:20:43 14 Judge, can I just opine on this?

15:20:43 15 THE COURT: Sure.

15:20:45 16 THE WITNESS: I just want to answer that if you  
15:20:46 17 don't mind. It says community transmission then there's  
15:20:51 18 a little symbol.

15:20:51 19 Q Right.

15:20:51 20 A And it says --

15:20:51 21 THE REPORTER: I'm sorry.

15:20:56 22 MR. PICCIRILLI: You got to read that a little  
15:20:58 23 bit slower. But go ahead read what it says.

15:21:00 24 A It says pre-transmission levels are inspired by the CDC  
15:21:04 25 level of community transmissions metrics. The CDC uses

15:21:08 1 both case rates and location test strips and positives to  
15:21:14 2 determine the level of a transmission.

15:21:16 3 Here, the community transmission level is based only  
15:21:19 4 on case rates and does not factor a percent positive.

15:21:22 5 Q Right, that little asterisk. You go back to  
15:21:27 6 Exhibit N, on June 30th there is no asterisk with that  
15:21:32 7 disclaimer is there?

15:21:33 8 A Yes, you're right. There is no asterisk.

15:21:35 9 Q So sometime between June 30th and July 28th, the Rhode  
15:21:39 10 Island Department of Health decided to stop following the  
15:21:41 11 CDC guidance, stopped considering test positivity or the  
15:21:50 12 NAAT positivity, and instead it says it's inspired by the  
15:21:55 13 CDC levels. And only case rates and not percent positive  
15:22:01 14 is being used. The State of Rhode Island changed their  
15:22:05 15 metric between June 30 and July 28 and stopped following  
15:22:10 16 the CDC, isn't that correct?

15:22:11 17 A No, you're wrong.

15:22:13 18 Q I'm reading what it says here, Doctor, tell me why I'm  
15:22:16 19 wrong?

15:22:16 20 A I think it's obvious why you're wrong.

15:22:19 21 Q It's obvious, tell me?

15:22:21 22 A Look, we go by case rates. It says right above there in  
15:22:26 23 blue, less than 10, low transmission. Greater than 10,  
15:22:30 24 moderate. Greater than 50, substantial. Greater than  
15:22:35 25 100, high transmission.

15:22:36 1           These are the Center For Disease Control and  
15:22:38 2           Prevention thresholds for the definition of low,  
15:22:41 3           moderate, substantial.

15:22:43 4 Q       Doctor, where are you reading from?

15:22:45 5 A       I beg your pardon?

15:22:46 6 Q       Where are you reading from?

15:22:47 7 A       Right above where it says community transmission.

15:22:50 8 Q       Oh, the colored version?

15:22:53 9 A       Yes, it's right there. There's no subject views.

15:22:58 10       There's no one trying to hide anything. They're just  
15:23:02 11       trying to explain it. That's all it says though.

15:23:05 12 Q       But, Doctor, the language is different on July 28th than  
15:23:09 13       it is on June 30th. June 30th doesn't say it does not  
15:23:13 14       consider the test positivity rate. It doesn't say that  
15:23:16 15       on June 30th.

15:23:17 16 A       You're right, it doesn't.

15:23:18 17 Q       So on June 30th it was considering the test positivity,  
15:23:22 18       right? And than on July 28th it stops?

15:23:24 19 A       No, you're wrong.

15:23:24 20 Q       Well, that's what the document says, Doctor?

15:23:26 21 A       We weren't considering test positivity rates. I can  
15:23:30 22       assure you, I work at the Department of Health. I look  
15:23:33 23       at this data. I can tell you no one talks about the case  
15:23:37 24       of positive rates.

15:23:37 25 Q       Then why did the CDC letters disappear? Why all of a

15:23:43 1 sudden after it's removed July 28? If it was the same as  
15:23:45 2 it was on June 30th, why did you do that?

15:23:47 3 A I don't know why. People make things, in other words  
15:23:51 4 people who work for us edit things. I don't think anyone  
15:23:55 5 meant anything by it, other than to provide clarity. I  
15:23:58 6 think they're providing clarity, that's all.

15:23:58 7 Q By the way, Doctor, you testified that the number of  
15:24:02 8 cases, community transmission based on number of cases is  
15:24:06 9 the most important metric, and you testified that Rhode  
15:24:09 10 Island does a lot more testing now than it did before,  
15:24:12 11 right?

15:24:12 12 A I said Rhode Island does more testing per capita than  
15:24:15 13 most other states, if not every state.

15:24:16 14 Q But the testing in and of itself doesn't prove whether  
15:24:20 15 someone is symptomatic or in the hospital or even going  
15:24:24 16 to die, right?

15:24:24 17 A Right.

15:24:25 18 Q So the fact that you're doing more testing, of course  
15:24:28 19 you're going to come up with more cases but they're going  
15:24:31 20 to be -- all those cases could be people who are  
15:24:33 21 perfectly fine, right?

15:24:35 22 A We do case findings. This is a core public health  
15:24:41 23 function because you isolate those that are positive that  
15:24:45 24 the quarantine doesn't expose. It's imperative that we  
15:24:48 25 do the core public health function and case findings.

15:24:51 1           So what we're doing is testing as many people as  
15:24:55 2 possible so we can isolate those who have the positive  
15:24:57 3 tests so they don't spread it to others and quarantine  
15:25:01 4 those who are exposed so they don't spread it to others  
15:25:04 5 because they're asymptomatic. So, yes, we're definitely  
15:25:06 6 doing that.

15:25:07 7 Q But this model doesn't just count positive tests, does  
15:25:12 8 it?

15:25:12 9 A It counts negative tests too.

15:25:17 10 Q Doctor, let's go back to June 30th. Read, what's next to  
15:25:24 11 the asterisk under Estimated Prevalence of Infection. It  
15:25:28 12 says estimated prevalence to consider is community  
15:25:31 13 transmission of COVID-19 of asymptomatic, unreported and  
15:25:36 14 those not protected by regular testing for Covid.

15:25:40 15 A It's right there.

15:25:41 16 Q So this model assumes people have positive tests without  
15:25:46 17 any evidence that they do?

15:25:48 18 A Do you have a question?

15:25:52 19 Q Is that right?

15:25:53 20 A Yes. There's assumptions made in every model, and  
15:25:55 21 there's assumptions made in this model.

15:25:58 22 Q So it's not just about reading the data of people who  
15:26:01 23 have actually tested positive, it's making assumptions  
15:26:03 24 that people are positive, even without that evidence,  
15:26:06 25 correct?

15:26:07 1 A I've testified multiple times, this model is built on  
15:26:10 2 assumptions.

15:26:11 3 Q Is this model published anywhere? Can somebody like  
15:26:27 4 Dr. Bostom go on the website and review the model and see  
15:26:30 5 what it's based on?

15:26:31 6 A I don't know.

15:26:47 7 THE COURT: Sheriff, will you be kind enough to  
15:26:50 8 get a pair of glasses off my desk, please.

15:27:05 9 MR. PICCIRILLI: Your Honor, can I have just a  
15:27:07 10 minute.

15:27:07 11 (Pause taken)

15:27:38 12 Q Again, Doctor, we started this earlier today talking  
15:27:43 13 about what's the offer? What's the metric to end this,  
15:27:47 14 right?

15:27:47 15 A Yes, you did ask that earlier.

15:27:50 16 Q In fact, I think the Governor right now is giving a press  
15:27:53 17 conference talking about that he's meeting with his team  
15:27:56 18 to determine what the exit strategy is. Did you know  
15:27:59 19 that?

15:27:59 20 A Yes, I did know that.

15:28:01 21 Q And, again just to be clear, there have been no pediatric  
15:28:09 22 deaths because of Delta in Rhode Island, correct?

15:28:12 23 A Yes, thankfully.

15:28:13 24 Q In fact, over the last seven days there have been no  
15:28:18 25 pediatric hospitalizations because of Covid in Rhode

15:28:21 1 Island, isn't that true?

15:28:22 2 A I haven't looked at the data this week. I don't know.

15:28:25 3 Q You don't know how many kids are in the hospital right  
15:28:28 4 now with Covid?

15:28:28 5 A I don't know how many kids are in the hospital at this  
15:28:30 6 very moment right now, no.

15:28:31 7 Q When is the last date that you remember how many kids  
15:28:33 8 were in the hospital?

15:28:34 9 A Couple weeks ago.

15:28:35 10 Q And how many kids were in the hospital?

15:28:37 11 A I don't remember off the top of my head.

15:28:38 12 Q Less than five?

15:28:39 13 A Yes.

15:28:39 14 Q So kids aren't getting sick. They're not dying from  
15:28:49 15 Covid and yet the metric that you're using to determine  
15:28:52 16 whether or not these poor kids have to keep wearing the  
15:28:56 17 stupid masks is totally unrelated to that. It's based  
15:29:00 18 upon what happens to other people, not them, right?

15:29:03 19 MS. WYRZYKOWSKI: Objection, compound.

15:29:05 20 Objection, argumentative with reference to masking.

15:29:09 21 THE COURT: Overruled.

15:29:13 22 THE WITNESS: So you know children are wearing  
15:29:15 23 a public health counter measure with the masks. I don't  
15:29:19 24 know that it's fair to characterize it as a stupid mask.  
15:29:23 25 We looked at a lot of different methods and what we're



15:29:27 1 looking at through the metrics is the off-ramp, which I  
15:29:29 2 perhaps more than anyone else in the State would love to  
15:29:32 3 see us get to as soon as possible, are things like case  
15:29:37 4 counts in everyone. Hospitalization numbers for  
15:29:40 5 everyone, whether a hospital can handle the capacity they  
15:29:45 6 have that will be influenced by whether we get vaccines  
15:29:47 7 to kids, which might be as early as the first week of  
15:29:51 8 November, which is simply just two or three weeks away,  
15:29:52 9 and whether we still have no new variants coming in the  
15:29:56 10 state.

15:29:57 11 The pandemic had proved many things. One thing its  
15:29:58 12 proven is it's very unpredictable. So we're basing it on  
15:30:01 13 the best evidence we have. I make the best  
15:30:03 14 recommendation every day, the best advice I can.

15:30:06 15 Q So the answer is yes, kids in schools are being made to  
15:30:11 16 wear masks that would benefit other people. It has no  
15:30:16 17 benefit to them?

15:30:17 18 A No, that's incorrect.

15:30:18 19 Q They don't get sick. They don't go to the hospital.  
15:30:21 20 They don't die because of Covid. Is that true?

15:30:23 21 A Yes, that's true.

15:30:26 22 Q So the only reason the kids are wearing masks in schools  
15:30:30 23 is so that someone who is older, who has comorbidities,  
15:30:35 24 who may be more at risk, so they don't go to the hospital  
15:30:40 25 or die, right?

15:30:40 1 A That's not the only reason.

15:30:42 2 Q That's not the only reason kids in schools are wearing  
15:30:46 3 masks?

15:30:46 4 A No, it's not the only reason.

15:31:01 5 MR. PICCIRILLI: Doctor, I have nothing  
15:31:03 6 further.

15:31:04 7 THE COURT: Doctor, I have a few questions  
15:31:08 8 before we go another round here. First thing, you talked  
15:31:11 9 about your occupation. I got confused at the beginning.  
15:31:15 10 Did you say you were the Medical Director of the  
15:31:18 11 Department of Health? I understand you're the Medical  
15:31:20 12 Director of the team but what is your position with the  
15:31:22 13 Department of Health?

15:31:23 14 THE WITNESS: I have many titles. I'm one of  
15:31:25 15 the medical directors of the Rhode Island Department of  
15:31:27 16 Health. There's other medical directors of the  
15:31:29 17 Department of Health.

15:31:30 18 I'm also the Medical Director of the Covid Unit but  
15:31:32 19 I have other roles as well. Medical Director for the  
15:31:36 20 Drug Overdose and Prevention team. Medical Director for  
15:31:38 21 the regulatory side of the House. Medical Director for  
15:31:45 22 Health Policy matters and communications. I have a lot  
15:31:45 23 of people who work with me so I can handle all these  
15:31:48 24 diverse tasks. So there's a lot of people who help me be  
15:31:52 25 me.

15:31:54 1 THE COURT: Is there a chief medical director  
15:31:56 2 of the Department?

15:31:57 3 THE WITNESS: There is the Director of Health,  
15:31:58 4 which is Dr. Alexander Scott, and there's a medical  
15:32:01 5 director. There's a delegated authority document that  
15:32:05 6 the Director assigns that lists an order of priority. If  
15:32:08 7 she is incapable of carrying out her duties who is the  
15:32:11 8 next medical director in line? It is my name, followed  
15:32:14 9 by Dr. Bandy, followed by Dr. Fine.

15:32:18 10 THE COURT: Thank you. You indicated at one  
15:32:21 11 point that you relied on actually two different parts of  
15:32:27 12 the data dashboard. The amount of hospitalizations and  
15:32:35 13 the other one was the amount effecting students. Do you  
15:32:43 14 rely on the information, all of the information on the  
15:32:46 15 dashboard?

15:32:47 16 THE WITNESS: I look at all the information on  
15:32:49 17 the entire dashboard but I don't rely on all of the same.  
15:32:52 18 It's a 22 page dashboard, some of the pages are really  
15:32:55 19 more relevant for the Department of Business Regulation,  
15:32:58 20 but I care about other things as well so I don't look at  
15:33:01 21 them every day.

15:33:02 22 THE COURT: So at the same time the chart  
15:33:03 23 you're looking at, the DBR is also looking at in trying  
15:33:07 24 to implement their procedures?

15:33:08 25 THE WITNESS: This status bar has been around

15:33:10 1 since the beginning of the pandemic, when we had the lock  
15:33:13 2 down of our economy, things like how many people were on  
15:33:18 3 food stamps, our employment rate was much more important  
15:33:21 4 than they are now. How far people are moving. Things  
15:33:24 5 like that were much more important than they are now. So  
15:33:28 6 DBR was looking at things like that. I don't know if DB  
15:33:32 7 is still looking at data. I don't interact with them  
15:33:34 8 daily any more.

15:33:36 9 THE COURT: Okay. So you indicated earlier  
15:33:38 10 today that the model for hospital impact has changed.  
15:33:43 11 But you're not sure how, is that correct?

15:33:47 12 THE WITNESS: I need more clarity, in other  
15:33:47 13 words?

15:33:51 14 THE COURT: Well, you remember Mr. Piccirilli  
15:33:53 15 talking to you about hospital beds and PPE. How some of  
15:33:59 16 the factors are different now.

15:34:02 17 THE WITNESS: Well, the variables are the same.  
15:34:03 18 In other words, those seven variables haven't changed  
15:34:06 19 throughout the entire pandemic. They're the seven  
15:34:09 20 variables that are measured.

15:34:10 21 THE COURT: And now there's another column  
15:34:12 22 added, correct?

15:34:13 23 THE WITNESS: Yes, apparently another column  
15:34:15 24 was added about staffing.

15:34:17 25 THE COURT: And we can assume that that's not

15:34:18 1 -- that doesn't factor into the NEDOC score because  
15:34:21 2 that's not one of the factors in the NEDOC score,  
15:34:24 3 correct?

15:34:24 4 THE WITNESS: I think you're right in that  
15:34:25 5 assumption. I think that, you know, part of what you see  
15:34:28 6 though when you look at some of the variables it has to  
15:34:31 7 do with a lot of things about where a patient is in the  
15:34:33 8 emergency department, and one of the things is waiting  
15:34:36 9 times for the longest patient or waiting times for the  
15:34:38 10 longest waiting room patient. These are affected by  
15:34:41 11 staff, number of people on a ventilator --

15:34:46 12 THE COURT: I'm just trying to find out whether  
15:34:48 13 or not you're actually calculating the official NEDOC  
15:34:51 14 score or whether or not the Department of Health is ever  
15:34:54 15 using something else on the dashboards.

15:34:55 16 THE WITNESS: No, we don't calculate this  
15:34:57 17 number. The NEDOC score provided to us, we don't  
15:35:00 18 calculate the number. It's a national metric, it's given  
15:35:03 19 to us.

15:35:04 20 THE COURT: Isn't it a metric of the first six  
15:35:07 21 columns put together?

15:35:08 22 THE WITNESS: No.

15:35:09 23 THE COURT: No?

15:35:10 24 THE WITNESS: It's a measure of the seven  
15:35:12 25 metrics. It's a formula that's used. It's a national

15:35:14 1 metric. It's not for Rhode Island Department of Health  
15:35:18 2 method that we created. It's a national metric that  
15:35:20 3 everybody used across the country. We used it early in  
15:35:23 4 the pandemic so we can follow our hospital capacity and  
15:35:26 5 we still use it.

15:35:27 6 THE COURT: And you're not sure why the actual  
15:35:29 7 column was added?

15:35:30 8 THE WITNESS: I don't know.

15:35:38 9 THE COURT: Mr. Piccirilli talked about the  
15:35:43 10 business meeting of Care New England. Did you know that  
15:35:47 11 the hospitals were trying to get patients back to the  
15:35:52 12 hospitals, their own patients?

15:35:54 13 THE WITNESS: I have no idea what that meeting  
15:35:57 14 is about. All I can say is --

15:35:58 15 THE COURT: No, I'm not asking about the  
15:35:59 16 meeting.

15:35:59 17 THE WITNESS: I don't know anything about it.

15:36:00 18 THE COURT: I'm just asking whether or not the  
15:36:02 19 doctors have expressed to you a desire to, I'm sorry, the  
15:36:04 20 hospital had expressed to you a desire to bring in their  
15:36:09 21 own patients, the private pay, outpatient, whatever it is  
15:36:15 22 they want to do?

15:36:16 23 THE WITNESS: The message I continually hear  
15:36:18 24 from the emergency room physicians I talk to is they're  
15:36:20 25 continually overwhelmed and they're still overwhelmed.

15:36:23 1 That's the message I heard yesterday and the message I  
15:36:26 2 heard today. In other words, I don't hear anything  
15:36:27 3 coming from emergency rooms or hospitals but they're  
15:36:29 4 getting overwhelmed.

15:36:30 5 THE COURT: Surely you know there is a lot more  
15:36:32 6 to a hospital than the emergency room?

15:36:34 7 THE WITNESS: This is me talking to the chief  
15:36:35 8 medical officer, chief executive officer and I'm very  
15:36:38 9 aware that there's a lot going on.

15:36:40 10 THE COURT: When you're talking to those  
15:36:41 11 people, do they express a desire to you to bring in  
15:36:41 12 public patients?

15:36:43 13 THE WITNESS: I haven't heard that from anyone  
15:36:44 14 yet.

15:36:45 15 THE COURT: Such as routine or elective  
15:36:47 16 surgery?

15:36:48 17 THE WITNESS: I haven't heard that. I'm sure  
15:36:50 18 they want to do that because they want to get out of the  
15:36:53 19 pandemic at some point but what I hear consistently is  
15:36:56 20 that the hospital is overwhelmed.

15:36:58 21 THE COURT: Okay. So in July and August of  
15:37:10 22 2021, there's no more future hospitalization projections  
15:37:14 23 in the dashboard, correct?

15:37:18 24 THE WITNESS: Yes, I don't why that's the case.

15:37:20 25 THE COURT: Isn't that odd?

15:37:21 1 THE WITNESS: No, because I saw the projection  
15:37:25 2 from other presentations I was at, so I was seeing this  
15:37:28 3 modeling data, you know, at least twice a week, so I  
15:37:32 4 don't why it wasn't on the dashboard. But I was seeing  
15:37:34 5 it twice a week so I know it's being done. I don't know  
15:37:37 6 why it's on the dashboard because I'm not the person who  
15:37:40 7 populates the dashboard.

15:37:41 8 THE COURT: But before it was a topic, front  
15:37:44 9 and center, correct, patients?

15:37:45 10 THE WITNESS: Yes, that's fair.

15:37:46 11 THE COURT: And it's an important factor not  
15:37:49 12 only for you but for Mr. McCarthy, for everyone else who  
15:37:54 13 is on the Covid response team.

15:37:56 14 THE WITNESS: So we see the data every week. I  
15:37:59 15 see the data at least twice a week. I don't know why  
15:37:59 16 it's not on the dashboard.

15:38:01 17 THE COURT: I thought that you referred to the  
15:38:03 18 dashboard, you did use the word guide that you have every  
15:38:08 19 week. You expressed great importance to it.

15:38:11 20 THE WITNESS: I get it twice a week. It's an  
15:38:13 21 isolated summary of what's going on in the pandemic.  
15:38:16 22 Most of the data I see is actually coming from other  
15:38:19 23 sources but it's nice to have everything in the dashboard  
15:38:21 24 twice a week. I get to look at the whole thing.

15:38:24 25 THE COURT: Okay. Well, the projected



15:38:31 1 hospitalization, isn't that a significant factor for you  
15:38:36 2 to consider?

15:38:37 3 THE WITNESS: Yes, the projected  
15:38:39 4 hospitalizations is something I looked at.

15:38:41 5 THE COURT: And considered?

15:38:42 6 THE WITNESS: Yes.

15:38:52 7 THE COURT: You reference several studies to  
15:38:55 8 justify your opinion that masks are not clearly  
15:38:59 9 associated with children's physical ailments; is that  
15:38:59 10 correct.

15:39:04 11 THE WITNESS: Yes.

15:39:05 12 THE COURT: Okay. All of these seem to be  
15:39:08 13 recent, during the pandemic as you put it, and not long  
15:39:12 14 term even though there are studies for children, correct?

15:39:12 15 THE WITNESS: Right.

15:39:19 16 THE COURT: And that's because it's difficult  
15:39:21 17 to measure this long term because we haven't been wearing  
15:39:26 18 masks.

15:39:26 19 THE WITNESS: Right. I'm amazed that we  
15:39:29 20 actually have as many studies that we have.

15:39:32 21 THE COURT: But of all the studies, we went  
15:39:34 22 through a number of different studies with Dr. Boston's  
15:39:37 23 attorney concerning the physical effects. Have you  
15:39:39 24 looked at any studies for the emotional effect and mental  
15:39:45 25 health capacity in children?

15:39:46 1 THE WITNESS: Yes.

15:39:47 2 THE COURT: And what are those?

15:39:49 3 THE WITNESS: Well, I haven't found many. I  
15:39:50 4 found one yesterday in particular that I was looking at  
15:39:54 5 to make sure I'm not missing something, and I found a  
15:39:58 6 study from China published in JAMA Pediatrics in January  
15:40:01 7 of 2021. It went on to explain that anxiety and  
15:40:07 8 depression was much less common in children who wore  
15:40:09 9 masks and a half hour exercise per day.

15:40:14 10 THE COURT: But in all respect, that was a  
15:40:15 11 study you looked at yesterday in the past couple of days,  
15:40:18 12 and was not the basis for any of the decisions or  
15:40:18 13 regulations.

15:40:20 14 THE WITNESS: That's right.

15:40:21 15 THE COURT: Did you look at the emotional needs  
15:40:24 16 or mental health needs of children or consider that when  
15:40:29 17 advising on a mask mandate?

15:40:31 18 THE WITNESS: We considered it. We just  
15:40:34 19 haven't seen studies that said it was a problem, so it  
15:40:37 20 definitely was considered. The pandemic is emotional  
15:40:40 21 stress on kids period. One of the things I've seen in my  
15:40:43 22 private practice is a lot of kids stressed out about the  
15:40:45 23 pandemic. They were stressed about not being in school.  
15:40:48 24 They're stressed about just all the insecurities in our  
15:40:52 25 culture. I really didn't haven't a lot of patients

15:40:54 1 complaining about wearing masks though. I just didn't  
15:40:57 2 see that.

15:40:57 3 THE COURT: You didn't have all those --

15:40:58 4 THE WITNESS: I didn't have a lot of patients  
15:41:00 5 complaining about wearing masks. I just didn't have my  
15:41:04 6 patients complaining about masks. They seem to be  
15:41:05 7 wearing the masks okay. They survived them. This is  
15:41:08 8 from my own experience. But I didn't see studies that  
15:41:09 9 showed about the children having adverse affects from  
15:41:11 10 wearing masks or emotional trauma about wearing the mask.

15:41:15 11 THE COURT: We're wearing masks for a year and  
15:41:17 12 a half, for a child in third grade or junior high school  
15:41:22 13 that would have a bigger impact than it would for someone  
15:41:26 14 like me, wouldn't you agree?

15:41:28 15 THE WITNESS: You know, as a pediatrician I  
15:41:29 16 notice that children adapt to things. They're very  
15:41:32 17 resilient. Kids generally get used to things and I think  
15:41:34 18 the kids aren't nearly as upset about this as how adults  
15:41:38 19 do. And quite frankly, most children respond to changes  
15:41:41 20 in the world. The kids I've seen during the pandemic  
15:41:43 21 demonstrate a lot of resilience. Most of them are  
15:41:46 22 exceedingly happy to be back in school, which is  
15:41:49 23 something I never thought I'd hear a kid say. They love  
15:41:50 24 being back in school.

15:41:52 25 THE COURT: But that's your own patients, your

15:41:54 1 own limited practice, as opposed to a study.

15:41:58 2 THE WITNESS: I haven't seen studies. We're  
15:41:59 3 looking for them. Like the entire medical staff is open  
15:42:02 4 minded. We're trying to find studies but we just aren't  
15:42:06 5 finding them.

15:42:08 6 THE COURT: Well, so you do agree then that  
15:42:09 7 masks are a substantial change from past practice for  
15:42:13 8 many people in American society today?

15:42:15 9 THE WITNESS: Of course it is, yeah. It's not  
15:42:17 10 part of our culture. It's part of other cultures but not  
15:42:17 11 part of ours.

15:42:20 12 THE COURT: Do you also agree that wearing  
15:42:22 13 masks are tiring, unsettling perhaps is the best word,  
15:42:29 14 for many people who haven't worn them regularly, fair to  
15:42:29 15 say?

15:42:33 16 THE WITNESS: I don't know if that's true, your  
15:42:35 17 Honor. I mean quite frankly, people get used to it.  
15:42:37 18 Like I wear a mask, and quite frankly I'm not that all  
15:42:41 19 bummed out about it. A lot of people just wear the mask  
15:42:41 20 throughout the day, I mean I have to admit, I think  
15:42:45 21 people will definitely be happy to get rid of these  
15:42:47 22 things, but, you know, I mean I can't say that generally  
15:42:49 23 people feel tired about or upset about it.

15:42:50 24 THE COURT: Well, what about children?

15:42:52 25 THE WITNESS: So I don't know because kids

15:42:55 1 haven't been complaining about this --

15:42:57 2 THE COURT: You're an expert in pediatrics?

15:42:58 3 THE WITNESS: I am.

15:43:00 4 THE COURT: That includes not only physical  
15:43:02 5 health but also mental health.

15:43:04 6 THE WITNESS: So I haven't seen kids, studies  
15:43:07 7 showing children adversely effected by mask wearing.

15:43:09 8 The study I quoted yesterday that I read talked  
15:43:12 9 about actually a benefit effect in this. I think the  
15:43:17 10 larger issue is I think children want to be in school and  
15:43:18 11 they don't want to spread Covid to each other. The one  
15:43:21 12 thing that I've seen is these states that ban mask  
15:43:25 13 mandates, like Florida, kids are still wearing masks.

15:43:42 14 THE COURT: You agree that this could effect  
15:43:44 15 the mental and emotional well-being of a school age  
15:43:48 16 child?

15:43:48 17 THE WITNESS: I don't know that that data is  
15:43:50 18 there, quite frankly. It hasn't been studied well enough  
15:43:53 19 for me to draw a conclusion, so I don't know that wearing  
15:43:56 20 a mask is a positive or negative affect on the child, you  
15:43:59 21 know, emotional growth, and the most important thing is  
15:44:03 22 they're back in school.

15:44:09 23 THE COURT: You keep going back to that, back  
15:44:11 24 to school as a positive thing. I suppose it's related to  
15:44:18 25 school when I was in it. Why do you say that that's a

15:44:21 1 positive thing for a child?

15:44:23 2 THE WITNESS: Well, we did introduce several  
15:44:25 3 exhibits that talk about that. It really wasn't in the  
15:44:28 4 children's best interest to be out of school. It  
15:44:31 5 affected their psychological health, their emotional  
15:44:35 6 health, their physical health and their educational  
15:44:35 7 health.

15:44:38 8 Keep in mind, your Honor, schools often provide a  
15:44:41 9 lot more to kids than their education. For many children  
15:44:45 10 it's where they get one or two meals a day, for a lot of  
15:44:48 11 children it's the safest place for them to be during the  
15:44:52 12 day.

15:44:52 13 And for other kids it's where their friends are and  
15:44:55 14 it's where they interact with a positive role model in  
15:44:57 15 their life. There's just a lot of evidence that being in  
15:45:00 16 school is really a child's best interest.

15:45:03 17 So this has been all studied, and I think it makes  
15:45:07 18 sense to all of us too. In fact, kids being out of  
15:45:08 19 school for that long period of time that was highly  
15:45:12 20 unusual, very disruptive to kids, and it also disrupted  
15:45:15 21 their family. How can they find someone to watch their  
15:45:18 22 kids? People often couldn't work. It was very  
15:45:21 23 disruptive to our culture.

15:45:24 24 THE COURT: Thank you. I'm all set.

15:45:26 25 Ms. Wyrzykowski, do you have any rebuttal?

15:45:28 1 MS. WYRZYKOWSKI: I do not, your Honor. I have  
15:45:29 2 no questions.

15:45:30 3 THE COURT: No questions. Mr. Piccirilli,  
15:45:32 4 because I asked some questions, do you want to ask  
15:45:34 5 anything else?

15:45:35 6 MR. PICCIRILLI: Just one.

15:45:35 7 THE COURT: You don't have to.

15:45:35 8 MR. PICCIRILLI: I know. I can't help myself.

15:45:35 9 **FURTHER CROSS-EXAMINATION BY MR. PICCIRILLI.**

15:45:41 10 Q Now, he mentioned a China study that he just read over  
15:45:46 11 the weekend. Are you aware of the study that was done in  
15:45:49 12 Hong Kong back in 2006?

15:45:52 13 MS. WYRZYKOWSKI: Objection, your Honor. The  
15:45:53 14 question should be limited to the questions that you  
15:45:55 15 asked. This should be a limited cross-examination, just  
15:45:58 16 as I had to do with redirect, to stay within the scope.

15:46:02 17 THE COURT: Maybe it is. Hong Kong is a port  
15:46:04 18 of China. I'm not quite sure what --

15:46:05 19 MS. WYRZYKOWSKI: Hong Kong is a separate  
15:46:09 20 country. It happened in 1999 or '98.

15:46:12 21 MR. PICCIRILLI: Not any more.

15:46:15 22 THE COURT: Overruled.

15:46:16 23 Q BY MR. PICCIRILLI: Again, the question the Judge was  
15:46:18 24 asking you was about whether the social emotional harm to  
15:46:23 25 children wearing masks, and you cited one study that you

15:46:27 1 just read over the weekend from China, correct?

15:46:29 2 A I read it yesterday.

15:46:30 3 Q Yesterday, I'm sorry. Well, were you aware that this  
15:46:34 4 study was done in Hong Kong in 2006 and published in  
15:46:39 5 2006, and actually found there was harm, social emotional  
15:46:45 6 harm to children from wearing masks. Were you aware of  
15:46:48 7 that?

15:46:49 8 MS. WYRZYKOWSKI: Objection, your Honor. The  
15:46:49 9 Doctor already said he wasn't aware of the study. If  
15:46:53 10 we're gonna ask questions with respect to that the Doctor  
15:46:53 11 should be given an opportunity to review it. The proof  
15:46:56 12 of impeachment has already been accomplished if that's  
15:46:59 13 the goal.

15:47:00 14 THE COURT: Are you aware? Overruled.

15:47:01 15 A I'm not aware of the study and it's before the pandemic.  
15:47:04 16 The pandemic is a big variable for everybody. There's a  
15:47:07 17 lot of confounding variables with the pandemic. That  
15:47:09 18 study was done before the pandemic. I'm not familiar  
15:47:12 19 with it but quite frankly, the pandemic affects  
15:47:14 20 everybody, including children.

15:47:15 21 Q In the study it says children experience discomfort when  
15:47:21 22 talking while wearing a mask, and teachers and students  
15:47:24 23 could not read each other's facial expressions because of  
15:47:27 24 the mask? I mean that's pretty self-evident, isn't it  
15:47:31 25 true, Doctor?



15:47:32 1 MS. WYRZYKOWSKI: Objection, your Honor. If  
15:47:33 2 there's going to be questions about the study he should  
15:47:36 3 be given an opportunity to review the study. We don't  
15:47:39 4 know what he's referencing. We don't know the title to  
15:47:40 5 the article. We don't know the journal that it was  
15:47:42 6 published in. If the Doctor is going to be questioned on  
15:47:45 7 it he needs to be given an opportunity to authenticate  
15:47:45 8 that document and read it in its entirety to be able to  
15:47:49 9 properly answer questions. And again, it's outside the  
15:47:51 10 scope of your questions.

15:47:53 11 THE COURT: Have you read the article or you  
15:47:54 12 just asking the same questions without referencing the  
15:47:54 13 article?

15:47:57 14 MR. PICCIRILLI: Well, that was my intent, your  
15:47:57 15 Honor.

15:47:58 16 Q And by the way, Doctor, you cited an article that you  
15:48:01 17 read yesterday from China. You haven't told us the name  
15:48:04 18 of the article.

15:48:05 19 THE COURT: I didn't let him get to it because  
15:48:07 20 I didn't want to know what he learned last night.

15:48:10 21 Q I'll just take that statement, just in general,  
15:48:13 22 hypothetically. I mean children in school need to see  
15:48:19 23 their teacher's faces to interact with them properly in a  
15:48:24 24 classroom. Would you agree with that?

15:48:25 25 A Ideally, yes.

15:48:28 1 Q Ideally. Ideally but we're in a pandemic that kids don't  
15:48:34 2 get sick. Kids don't go to the hospital and kids don't  
15:48:37 3 die.

15:48:37 4 A That's not true.

15:48:38 5 Q That's the pandemic we're in and kids are being deprived  
15:48:41 6 of that facial expression in school for a disease that  
15:48:45 7 has practically no effect on them; isn't that true,  
15:48:45 8 Doctor?

15:48:50 9 MS. WYRZYKOWSKI: Objection, your Honor. The  
15:48:50 10 same objection. That is outside of the purpose of your  
15:48:51 11 questions with respect to the study that the Doctor  
15:48:55 12 hasn't seen a hypothetical question, calls for  
15:48:57 13 speculation and hearsay.

15:49:01 14 THE COURT: I think after all this time  
15:49:03 15 Dr. McDonald -- I can conclude that Dr. McDonald isn't  
15:49:06 16 going to speculate without having some substance. He  
15:49:10 17 knows what an expert opinion is. He doesn't tend to  
15:49:15 18 speculate. If he does, you can both call him on it.

15:49:20 19 You weren't referencing the article. Do you  
15:49:22 20 remember the question, Doctor. Do you want her to read  
15:49:22 21 it back?

15:49:22 22 THE WITNESS: If you could read it back?

15:49:22 23 (Record read)

15:49:45 24 A Yup, you're wrong.

15:49:47 25 Q I'm wrong?

15:49:47 1 A Yes, you're wrong.

15:49:49 2 Q And I'm wrong because kids don't need to see the facial  
15:49:53 3 expressions of their teachers?

15:49:54 4 A No. You're wrong because children do get infected, the  
15:49:59 5 case rates is the highest among children and we're trying  
15:50:01 6 to keep the cases as low as possible but the case rates  
15:50:05 7 is highest in the unvaccinated population. Yes, some  
15:50:07 8 children do end up in the hospital. Some kids do end up  
15:50:10 9 with the inflammatory syndrome we see in children. Yes,  
15:50:12 10 in this country some children have died from Covid.  
15:50:14 11 These are horrible things that we're spreading.

15:50:18 12 The way I look at this, and this is where I think we  
15:50:20 13 fundamentally disagree, we're doing public health counter  
15:50:23 14 measures prior to having a vaccine available so we can  
15:50:27 15 protect our children and reduce the number of cases.

15:50:31 16 Keep in mind, vulnerable children, comorbidities are  
15:50:33 17 much higher risk. To make this claim that children do  
15:50:38 18 not get sick with Covid, in my opinion, is factually  
15:50:40 19 wrong.

15:50:40 20 Q But you ignored the part of the question where I said, or  
15:50:46 21 I asked, children need to see the facial expressions of  
15:50:50 22 their teachers. You just dismissed that out of hand like  
15:50:53 23 it doesn't matter?

15:50:54 24 A No, I didn't dismiss it out of hand. I took the bulk of  
15:50:58 25 your question, which was factually inaccurate, and

15:51:00 1 corrected it.

15:51:01 2 Q So you do agree that children need to see the facial  
15:51:04 3 expressions of their teachers?

15:51:05 4 A I think kids would love to see the teacher's facial  
15:51:08 5 expression. I would love to see everyone's expression.

15:51:10 6 Q And they need to see the facial expressions of their  
15:51:13 7 peers as well, right?

15:51:15 8 A I think kids would like to do that but it's about risk  
15:51:19 9 and benefit.

15:51:20 10 Q Well, risk and benefit, yes. So I finally got you to  
15:51:24 11 concede, Doctor, that there is a risk that children have,  
15:51:28 12 a risk of suffering some emotional harm by having to wear  
15:51:34 13 a mask. Your testimony is that risk is outweighed by the  
15:51:38 14 benefit, is that your testimony?

15:51:40 15 A I have not conceded. The point is if there's a risk of  
15:51:44 16 kids wearing a mask, if there's any risk it's minimal. I  
15:51:47 17 think the benefit of not transmitting cases in school is  
15:51:50 18 really important. I think the benefit of kids not taking  
15:51:54 19 cases home to their loved ones and family members is very  
15:51:57 20 important. These are things that I think are very self  
15:52:00 21 evident.

15:52:00 22 Q So you think it's minimal, I have 38 parents here. Their  
15:52:07 23 concerns don't matter?

15:52:09 24 A I didn't say their concerns don't matter.

15:52:10 25 MS. WYRZYKOWSKI: Objection, your Honor. We're

15:52:12 1 well outside of the scope here.

15:52:13 2 THE COURT: Sustained.

15:52:15 3 MS. WYRZYKOWSKI: Which you've been continuing.

15:52:15 4 Q All right. Well, I'll just end it with this, Doctor. So  
15:52:21 5 you are the operative of the risk benefit analysis, not  
15:52:27 6 the regulatory process, not what the statute says, people  
15:52:31 7 can come in, present evidence, argue the risk and benefit  
15:52:36 8 and then the regulatory agency has to make a decision and  
15:52:41 9 give a reason why they weigh the risk benefit in a  
15:52:45 10 certain way. You circumvented that whole process and now  
15:52:50 11 you're the one that's deciding which risk benefit is  
15:52:52 12 appropriate?

15:52:52 13 MS. WYRZYKOWSKI: Objection --

15:52:52 14 Q Isn't that true?

15:52:53 15 MS. WYRZYKOWSKI: -- that's argumentative.

15:52:53 16 That is not what the Doctor testified to. It's a  
15:52:55 17 regulatory process. There are other people involved with  
15:52:58 18 this. It's again outside the limited scope of the  
15:53:01 19 questions that were asked.

15:53:02 20 THE COURT: It is cross-examination. You can  
15:53:05 21 answer.

15:53:06 22 THE WITNESS: Yes, so I'm not the only person  
15:53:08 23 who is involved with this. I have a medical staff. I  
15:53:11 24 have a leadership team. I have a whole Department of  
15:53:14 25 Health around me. We balance equities as best we can.

15:53:17 1 Throughout the entire pandemic, over these 19 months, I  
15:53:20 2 have been part of very unpopular decisions and I've  
15:53:23 3 gotten used to being part of the unpopular decisions.

15:53:25 4 Q Doctor, that is not responsive to my question.

15:53:28 5 THE COURT: It is. It is. You asked him if  
15:53:30 6 he's the one with his own opinion in there. Were you the  
15:53:34 7 one who signed the executive order, Doctor?

15:53:35 8 THE WITNESS: No, Judge, I'm not.

15:53:37 9 Q Do you recommend -- you're the person that recommend --

15:53:41 10 THE COURT: He's not the one. He clearly  
15:53:43 11 labeled that. I can answer that for him. But your  
15:53:48 12 question was are you the one who takes over for everybody  
15:53:51 13 else and makes the decision? And he's not. He doesn't  
15:53:54 14 sign the regulation. I think the Director does that but  
15:53:58 15 we'll see, and he doesn't sign the executive order. He's  
15:54:01 16 not the Governor.

15:54:03 17 MR. PICCIRILLI: All right, Doctor. Nothing  
15:54:05 18 further.

15:54:06 19 THE COURT: Your point is well taken,  
15:54:07 20 Mr. Piccirilli. I understand. With that, Mr. Piccirilli  
15:54:15 21 continues.

15:54:16 22 MR. PICCIRILLI: We conclude, your Honor.

15:54:17 23 THE COURT: Thank you. The plaintiff rests.  
15:54:22 24 Actually, that was the defense witness. Any more with  
15:54:28 25 the State?

15:54:28 1 MS. WYRZYKOWSKI: The State doesn't have  
15:54:28 2 anything further.

15:54:29 3 THE COURT: Both parties rest and there's no  
15:54:31 4 rebuttal, correct?

15:54:33 5 MR. PICCIRILLI: Yes. Technically, your Honor,  
15:54:34 6 there's no rebuttal, yes.

15:54:36 7 THE COURT: Okay. I wasn't sure. So the  
15:54:38 8 evidence is now concluded. There's nothing else to be  
15:54:42 9 submitted, and therefore, the only thing we need to do is  
15:54:44 10 come up with -- and you can step down, Doctor. And we  
15:54:50 11 need to come up with a briefing schedule. My  
15:54:55 12 understanding is there's a brief instead of arguing, is  
15:55:00 13 that correct?

15:55:01 14 MR. PICCIRILLI: That's correct, Judge.

15:55:05 15 MR. FIELD: Judge, we'd like to do briefs and  
15:55:06 16 argument, if that's possible?

15:55:07 17 THE COURT: In what order?

15:55:09 18 MR. FIELDS: Well, the regular order, briefing  
15:55:12 19 first, have the Court have the opportunity to review the  
15:55:15 20 briefs and have the Court schedule us for argument when  
15:55:18 21 the Court is ready for us or the Court can set a date now  
15:55:21 22 whatever the Court says.

15:55:22 23 THE COURT: Okay. Let me talk to all counsel  
15:55:25 24 and then we'll set a date. I'll talk to counsel first.  
15:55:30 25 Thank you. The trial is at recess.

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THE SHERIFF: All rise.

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**A-D-J-O-U-R-N-E-D**

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