

# Denied

## Access to Essential Transgender Healthcare

By Jay Kaplan



Many people who are transgender and have been diagnosed with gender dysphoria are seeking healthcare treatment for this diagnosis. Gender dysphoria is a diagnosis in which there is an “incongruence between the individual’s own perception of his/her sex and their biological phenotype.”<sup>1</sup> Affected individuals have a “strong desire to undergo medical and surgical treatment...in order to alleviate physical incongruence and gender dysphoria.”<sup>2</sup> Gender dysphoria “is a clinical term used to describe the symptoms of excessive pain, anguish, agitation, restlessness, and

malaise” transgender people often experience. It “describes the psychological discomfort experienced with the physiological body...as well as a presence of clinical [symptoms] associated with emotional difficulties.”<sup>3</sup> A person with gender dysphoria may experience depression, anxiety, irritation, agitation, and the overall sense that something is very wrong.<sup>4</sup> Before treatment, many individuals with gender dysphoria “live in a dissociated state of mind and body.”<sup>5</sup>

With the help of a therapist or other medical provider, transgender individuals can eliminate dysphoria by taking

steps to live consistently with gender identity instead of the sex assigned to them at birth. The process known as social transition often includes changes to clothing, hair, name, sex designation on identity documents, and the sex one describes oneself to be when interacting with others. Social transition is sufficient treatment for some transgender people, but others require hormone therapy or surgery as medically necessary treatment.

The breadth of discrimination that transgender people face is well documented in the National Transgender Discrimination Survey conducted by the National Center for Transgender Equality and National Gay and Lesbian Task Force.<sup>6</sup> As a result of this pervasive discrimination, more than a quarter of transgender people live below the poverty level with incomes less than \$20,000 a year, making it more likely that they have to depend on Michigan's expanded Medicaid program for health insurance.

Medicaid is a federal-state cooperative program designed to provide healthcare to the indigent.<sup>7</sup> Michigan contracts with private insurance companies to serve as providers and insures beneficiaries through Medicaid health plans. As Medicaid plans, these providers must comply with applicable state and federal Medicaid laws and regulations. Federal Medicaid law requires states to provide certain mandatory healthcare services to Medicaid beneficiaries, including inpatient and outpatient hospital care and physician services.<sup>8</sup> State Medicaid programs are also required to fund all medically necessary care within the mandatory categories.<sup>9</sup>

## At a Glance

**Transgender people face discrimination in all facets of life, including access to healthcare. For years, insurance companies, including Medicaid insurers, have singled out transgender patients to deny them coverage for medically necessary transition procedures. Both the Affordable Care Act and civil rights caselaw precedent provide important tools to combat this discrimination.**

Although federal law lacks an explicit definition of medical necessity,<sup>10</sup> most courts, including the U.S. Court of Appeals for the Sixth Circuit, regard the treating physician's determination of medical necessity as dispositive.<sup>11</sup> Some jurisdictions also consider the scientific and medical consensus regarding a particular medical treatment.<sup>12</sup>

The World Professional Association for Transgender Health (WPATH) is an interdisciplinary professional and educational organization devoted to understanding and treating gender dysphoria. Among other projects, WPATH publishes the leading clinical guidance on gender dysphoria treatment: *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*. Currently in its seventh edition, this publication is the most widespread peer-reviewed treatment protocol for treating gender dysphoria and related conditions.<sup>13</sup> Federal courts and administrative agencies regularly cite it in cases challenging access barriers to healthcare.<sup>14</sup>

*Standards of Care* states that assessment of medical necessity for transgender patients should be made on an individualized basis. Furthermore, in a position statement dated December 21, 2016, WPATH asserts that in general medical transition care, hormone treatment and surgical procedures that both confirm and affirm gender identity are medically necessary and not "cosmetic or 'elective' or 'for the mere convenience of the patient.'" These reconstructive procedures are not optional in any meaningful sense but are understood to be medically necessary for the treatment of the diagnosed condition. In some cases, such surgery is the only effective treatment of the condition.<sup>15</sup>

Despite this framework for how Medicaid insurers should determine coverage for medical treatment for transgender recipients, Michigan Medicaid plans have for years ignored federal caselaw precedent and have had blanket exclusions on covering trans-related medical procedures. They have singled out transgender recipients for discriminatory treatment, citing their own policies that label all trans medical procedures as "cosmetic," ignoring the recommendations of the patient's medical team and the consensus of experts in the transgender medical field.

Michigan Medicaid plans cannot create policies that arbitrarily deny medically necessary care to transgender recipients. In *Good v Iowa Department of Human Services*,<sup>16</sup> the Iowa Supreme Court struck down Iowa Medicaid's explicit prohibition on coverage of surgical procedures related to "gender identity disorders" as violating the state's civil rights law (which specifically addresses gender identity discrimination) prohibiting discrimination in public accommodations. Nearly 40 years previously, the U.S. Court of Appeals for the Eighth Circuit ruled in *Pinneke v Pressier* that it was improper for the Iowa Department of Health and Human Services to informally characterize sex reassignment surgery as "cosmetic surgery" in its denial of sex reassignment surgery.<sup>17</sup> The court held that this blanket exclusion also violated federal Medicaid

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law because it arbitrarily denied services “to an otherwise eligible individual solely because of the diagnosis, type of illness or condition.”<sup>18</sup> The court also asserted that the policy was not consistent with the objectives of the Medicaid statute because the Iowa Department of Social Services established an irrebuttable presumption that sex reassignment surgery can never be medically necessary when the treatment is for gender dysphoria.<sup>19</sup>

Under Section 1557 of the Affordable Care Act, health programs and activities receiving federal financial assistance are prohibited from discriminating against individuals based on any ground listed under four different civil rights laws, including Title IX, which prohibits discrimination on the basis of sex.<sup>20</sup> A person’s transgender status is an inherently sex-based characteristic. “[D]iscrimination . . . on the basis of being transgender . . . constitutes discrimination on the basis of properties or characteristics manifested in sum as male and female, that discrimination is literally discrimination ‘because of sex.’”<sup>21</sup>

Discriminating against people because they are transgender is sex discrimination under Section 1557 because it inherently rests on sex stereotypes and gender-based presumptions. As the Supreme Court recognized in *Price Waterhouse v Hopkins*,<sup>22</sup> “assuming or insisting that [an individual man or woman] match the stereotype associated with their group” is discrimination because of sex. As the courts of appeals have uniformly held after *Price Waterhouse*, there is no basis for denying transgender employees Title VII protections against discriminatory treatment motivated by stereotypes about how men and women should look and act.<sup>23</sup> Applying *Price Waterhouse*, the Sixth Circuit held in the Michigan case of *EEOC v RG and GR Harris Funeral Homes* that discrimination because of transgender or transitioning status or gender stereotyping constitutes sex discrimination in violation of Title VII.<sup>24</sup> Because medical transition from one sex to another inherently violates gender stereotypes, denying medically necessary coverage for such care constitutes impermissible discrimination based on gender nonconformity. When a Medicaid program excludes coverage for this medically necessary transgender care it is “insisting that [transgender beneficiaries] match the stereotype associated with their group.”<sup>25</sup>

In May 2018, the Michigan Civil Rights Commission—pursuant to its authority under MCL 37.2601(f) (the Commission has the authority to issue “rules to carry out” the Elliott-Larsen

Civil Rights Act, MCL 37.2101 *et seq.*) and MCL 24.207(h) (the agency rulemaking power includes the power to issue “interpretative statements”)—issued an interpretative statement that Elliott-Larsen’s prohibition on sex discrimination in employment, housing, education, and public accommodations includes discrimination on the basis of sexual orientation and gender identity.<sup>26</sup> In support of this interpretation, the Commission cited the *EEOC v Harris* decision. Article 3 of Elliott-Larsen refers to public accommodations as including businesses that offer their goods to the public.<sup>27</sup> Public service includes a department of state government, such as the Michigan Department of Health and Human Services, which administers Michigan’s Medicaid program.<sup>28</sup> Indeed, when Governor Gretchen Whitmer issued her Executive Directive on January 7, 2019, prohibiting discrimination in accessing state government services like Medicaid, she cited the Michigan Civil Rights Commission’s interpretative statement to support that lesbian, gay, bisexual, and transgender people were protected.<sup>29</sup> In response to both the interpretative statement and the governor’s directive, the Michigan Department of Health and Human Services issued a Medicaid policy (effective April 1, 2019) requiring that all Medicaid programs adhere to Section 1557 of the Affordable Care Act and not discriminate against recipients under a number of categories, including gender identity.<sup>30</sup> This should prohibit Medicaid insurers from having blanket exclusions on trans-related medical care and should require them to adhere to federal Medicaid law regarding the determination of whether trans-related care is medically necessary.

Nevertheless, the challenge to obtain coverage for medically necessary care continues. In May 2019, the Trump administration announced its proposed new interpretative guidance





for Section 1557, arguing that sex discrimination laws such as Title IX do not cover LGBT people and, therefore, that they are not protected against discrimination under the Affordable Care Act.<sup>31</sup> This interpretation would seem to contradict the already established body of caselaw precedent,<sup>32</sup> and no doubt there will be litigation over this issue. If this rule takes effect, both private and Medicaid insurers may attempt to reinstate blanket exclusions on covering trans-related medical care, arguing that transgender persons are not protected under the Affordable Care Act. ■



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## ENDNOTES

1. Lunqvist et al, *Quality of life improves after gender reassignment surgery in transgender women*, 40 Eur J of Plastic Surgery 223 (2017), p 223, available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5440516/>> [<https://perma.cc/4JJ6-TW55>]. All websites cited in this article were accessed October 16, 2019.
2. *Id.*
3. Lev, *Transgender Emergence: Therapeutic Guidelines for Working with Gender-Variant People and Their Families* (Binghamton: Howorth Clinical Practice Press, 2004).
4. Makadon et al, eds, *The Fenway Guide to Lesbian, Gay, Bisexual and Transgender Health* (Philadelphia: American College of Physicians, 2007), pp 331, 337, available at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.395.2983&rep=rep1&type=pdf>> [<https://perma.cc/WF6H-Z76L>].
5. Drescher & Leli, eds, *Transgender Subjectivities: A Clinician's Guide* (New York: CRC Press, 2004), p 115 (describing diagnosis and treatment of 271 transgender patients between 1979 and 2001).
6. Grant et al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Ctr for Transgender Equality (2011) <[https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf)> [<https://perma.cc/PY2C-CE4Q>].
7. *Planned Parenthood Affiliates of Michigan v Engler*, 73 F3d 634, 636 (CA 6, 1996).
8. 42 USC 1396a(10), 42 USC 1396d(a), and 42 CFR 440.210(a)(1).
9. *Beal v Doe*, 432 US 438, 444-445; 97 S Ct 2366; 53 L Ed 2d 464 (1977). See also *Planned Parenthood*, 73 F3d at 635-636.
10. *Thie v Davis*, 688 NE2d 182, 187 (Ind App, 1997).
11. See *Planned Parenthood*, 73 F3d at 636. See also *Pinneke v Pressier*, 623 F2d 546, 550 (CA 8, 1980) ("The decision of whether or not certain treatment or a particular type of surgery is 'medically necessary' rests with the individual recipient's physician and not with clerical personnel or government officials.") and *Weaver v Reagan*, 886 F2d 194, 200 (CA 8, 1989) ("[P]ursuant to the objectives of [Medicaid law], Missouri Medicaid may not deny coverage of AZT to AIDS patients who are eligible for Medicaid and whose physicians have certified that AZT is medically necessary treatment.").
12. See *Utah Women's Clinic v Graham*, 892 F Supp 1379, 1383 (D Utah, 1995).
13. The publication is available at <[https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf)> [<https://perma.cc/CWT9-D5DF>]. These standards of care have the endorsement and support of the following organizations: American Academy of Family Physicians, American College of Obstetrics and Gynecology, American Medical Association, American Psychiatric Association, American Psychological Association, American Public Health Association, American Society of Plastic Surgeons, Endocrine Society, National Association of Social Workers, National Commission of Correctional Healthcare, and the World Health Organization. *Professional Organization Statements Supporting Transgender People in Health Care*, Lambda Legal (2018) <[https://www.lambdalegal.org/publications/fs\\_professional-org-statements-supporting-trans-health](https://www.lambdalegal.org/publications/fs_professional-org-statements-supporting-trans-health)> [<https://perma.cc/9B2Q-MLF5>].
14. *De'Lonta v Angelone*, 330 F3d 630, 636 (CA 4, 2003) and *Fields v Smith*, 653 F3d 550, 557 (CA 7, 2011) (WPATH Standards are the accepted standards of care).
15. *Position Statement on Medical Necessity of Treatment, Sex Reassignment and Insurance Coverage in the U.S.A.*, WPATH (December 21, 2016) <<https://www.wpath.org/newsroom/medical-necessity-statement>> [<https://perma.cc/A3FU-S6RV>].
16. *Good v Iowa Dept of Human Servs*, 924 NW2d 853 (2019).
17. *Pinneke v Pressier*, 623 F2d 546, 548 n 2 (CA 8, 1980).
18. *Id.* at 549.
19. *Id.*
20. *Prescott v Rady Children's Hosp-San Diego*, 265 F Supp 3d 1090, 1098 (SD Cal, 2017).
21. *Fabian v Hosp of Cent Conn*, 172 F Supp 3d 509, 527 (D Conn, 2016) and *Id.* at 1098 ("[I]n evaluating Title IX claims, federal courts generally look to Title VII cases for guidance.").
22. *Price Waterhouse v Hopkins*, 490 US 228, 251; 109 S Ct 1775; 104 L Ed 2d 268 (1989).
23. See, e.g., *Glenn v Brumby*, 663 F3d 1312 (CA 11, 2011), *Smith v City of Salem, Ohio*, 378 F3d 566, 568 (CA 6, 2004), and *Schwenk v Hartford*, 204 F3d 1187, 1201 (CA 9, 2000).
24. *EEOC v RG and GR Harris Funeral Homes*, 884 F3d 560, 575 (CA 6, 2018), cert granted in part, *RG and GR Harris Funeral Homes v EEOC*, 139 S Ct 1599; 203 L Ed 2d 754 (2019). This case was heard by the United States Supreme Court on October 8, 2019, with a decision forthcoming. The defendant is arguing that Title VII does not protect transgender people from discrimination. The solicitor general, representing the EEOC, is also arguing that federal civil rights laws prohibiting sex discrimination do not cover transgender individuals.
25. *Price Waterhouse*, 490 US at 251.
26. Resolution to Adopt Interpretive Statement 2018-1, MCRC (May 21, 2018), available at <[https://www.michigan.gov/documents/mdcr/MCRC\\_Interpretive\\_Statement\\_on\\_Sex\\_05212018\\_625067\\_7.pdf](https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf)> [<https://perma.cc/XBH8-PHN8>].
27. MCL 37.2301(a).
28. MCL 37.2301(b).
29. Executive Directive 2019-9, Office of the Governor, State of Michigan (January 7, 2019) <[https://content.govdelivery.com/attachments/MIEOG/2019/01/07/file\\_attachments/1132869/Executive%20Directive%202019-9.pdf](https://content.govdelivery.com/attachments/MIEOG/2019/01/07/file_attachments/1132869/Executive%20Directive%202019-9.pdf)> [<https://perma.cc/43SP-5B9Q>].
30. MSA Bulletin 19-06 (issued March 1, 2019), available at <[https://www.michigan.gov/documents/mdhhs/MSA\\_19-06\\_647807\\_7.pdf](https://www.michigan.gov/documents/mdhhs/MSA_19-06_647807_7.pdf)> [<https://perma.cc/VRV3-4CWC>].
31. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed Reg 27846 (June 14, 2019) <<https://www.govinfo.gov/content/pkg/FR-2019-06-14/pdf/2019-11512.pdf>> [<https://perma.cc/AZ9L-94BF>].
32. If the United States Supreme Court determines in the pending cases of *Bostock v Clayton County, Georgia*, unpublished per curiam opinion of the United States Court of Appeals for the Eleventh Circuit, issued May 10, 2018 (Case No. 17-13801), cert granted, 139 S Ct 1599 (2019); *Altitude Express Inc v Zarda*, 883 F3d 100 (CA 2, 2018), cert granted, 139 S Ct 1599 (2019); and *EEOC v Harris*, 884 F3d 560 (CA 6, 2018), cert granted, 139 S Ct 1599 (2019), that LGBT people are not protected against discrimination under Title VII sex discrimination law, this could completely undermine the protections against discrimination for LGBT people under the theory of gender stereotyping.