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Bulletin 2018-013
August 23, 2018

TO: ALL HEALTH INSURANCE CARRIERS IN NEW MEXICO

RE: TRANSGENDER NON-DISCRIMINATION IN HEALTH INSURANCE BENEFITS

THIS BULLETIN outlines nondiscrimination requirements for health insurance carriers offering coverage in New Mexico.

The purpose of this Bulletin is to provide New Mexico-licensed insurance companies guidance regarding compliance with the nondiscrimination provisions applicable to transgender persons found in the Affordable Care Act, New Mexico Human Rights Act, and New Mexico Insurance Code. Together these laws prohibit discrimination against transgender persons because of their actual or perceived gender identity or health conditions. This prohibition extends to the availability of health insurance coverage, the provision of Essential Health Benefits, and the requirements for certification as a Qualified Health Plan.

Section 1557(a) (42 U.S.C. § 18116) of the Affordable Care Act ("ACA") has been determined to prohibit discrimination on the basis of gender identity and sex stereotyping in any health program receiving federal funds or by an entity established under the ACA including exchanges.¹ Health insurers, hospitals, the health insurance exchanges, and any other entities that

¹ Boyden v. Conlin, No. 17-cv-264-WMC, 2018 WL 2191733 (W.D. Wis. May 11, 2018) (implicitly assuming that Title VII and Section 1557 of the Affordable Care Act prohibits anti-transgender discrimination); Flack v. Wisconsin Department of Health Services, 18-cv-309-wmc (W.D. Wis July 25, 2018) (implicitly assuming that Title VII and Section 1557 of the Affordable Care Act prohibits anti-transgender discrimination); Cruz v. Zucker, 195 F.Supp.3d 554 (S.D.N.Y. Jul. 5, 2016) (holding that discrimination on the basis of gender identity is sex discrimination under Section 1557 of the Affordable Care Act); Rumble v. Fairview Health Servs., No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act).

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receive federal funds are covered by this law. The Superintendent of Insurance has the authority to implement and enforce provisions of the Affordable Care Act pursuant to N.M.S.A. 1978, § 59A-23F-7.

New Mexico's Insurance Code prohibits discrimination on a number of grounds, including on the basis of sex, as well as any "unfair discrimination...between individuals and risks of the same class and essentially the same hazard" in the benefits, terms, or conditions of a health insurance policy. See N.M. Stat. Ann. § 59A-16-13 and N.M. Stat. Ann. § 59A-16-11, respectively. Because transgender exclusions for gender dysphoria care are explicitly gender-based and arbitrarily single out a specific population, often for identical services provided to non-transgender people, they also violate these Insurance Code provisions.

Additionally, the New Mexico Human Rights Act, N.M.S.A. §28-1-7(F), prohibits gender identity discrimination in several areas, including public accommodations. The Office of the Superintendent of Insurance has historically interpreted the New Mexico Human Rights Act's public accommodations provisions to apply to the business of insurance. See N.M. Bulletin No. 2013-007. Exclusions of care for gender dysphoria violate the Human Rights Act's mandate.

Accordingly, the New Mexico Office of the Superintendent of Insurance has concluded that coverage exclusions for gender identity or gender dysphoria-related treatment are prohibited forms of sex-discrimination because they are limitations on covered services based on the sex of the insured. As a result, an insurer shall not, in connection with health insurance as defined in N.M.S.A. 1978, § 59A-7-3, discriminate on the basis of an insured's or prospective insured's actual or perceived gender identity or on the basis that the insured or prospective insured is a transgender person. The discrimination prohibited by this bulletin includes any of the following:

- (1) Denying, cancelling, limiting or refusing to issue or renew an insurance policy on the basis of an insured's or prospective insured's actual or perceived gender identity, or for the reason that the insured or prospective insured is a transgender person;
- (2) Demanding or requiring a payment or premium that is based in whole or in part on an insured's or prospective insured's actual or perceived gender identity, or for the reason that the insured or prospective insured is a transgender person;

(3) Designating an insured's or prospective insured's actual or perceived gender identity, or the fact that an insured or prospective insured is a transgender person, as a preexisting condition for which coverage will be denied or limited; or

(4) Denying or limiting coverage, or denying a claim, for services including but not limited to the following, due to an insured's actual or perceived gender identity or for the reason that the insured is a transgender person:

(A) Health care services related to gender transition if coverage is available for those services under the policy when the services are not related to gender transition, including but not limited to hormone therapy, counseling, hysterectomy, mastectomy, and vocal training; or

(B) Any health care services that are ordinarily or exclusively available to individuals of one sex when the denial or limitation is due only to the fact that the insured is enrolled as belonging to the other sex or has undergone, or is in the process of undergoing, gender transition.

This bulletin shall have no bearing on the question of whether or not a particular health care service is medically necessary in any individual case.

Please contact Paige Duhamel at paige.duhamel@state.nm.us with any questions or concerns.

DONE and ORDERED this 23rd day of August, 2018.


JOHN G. FRANCHINI
Superintendent of Insurance