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CALIFORNIA INSURANCE COMMISSIONER

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Via Email (kathie@transfamilysos.org)

Kathie Moehlig
Executive Director
Trans Family Support Services
12463 Rancho Bernardo Rd. #218
San Diego, CA 92128

SUBJECT: Permissibility of denial of coverage based solely on age for female-to-male chest reconstruction surgery as part of a treatment for gender dysphoria

Dear Ms. Moehlig:

The California Department of Insurance ("Department") received a request for a legal opinion regarding the issue set forth below. The following legal opinion is issued pursuant to California Insurance Code section 12921.9.

I. Issue Presented

May a health insurer deny coverage for male chest reconstruction surgery (mastectomy and creation of a male chest) for female-to-male patients undergoing treatment for gender dysphoria based solely on the patient's age?

II. Summary Conclusion

No. An insurer may not deny coverage for male chest reconstruction surgery for female-to-male patients undergoing treatment for gender dysphoria based solely on a patient's inability to meet a minimum age threshold because insurers must consider a patient's specific clinical situation to determine actual medical necessity based on evidence-based standards of care. Failure to consider a patient's specific clinical situation in determining medical necessity violates state gender nondiscrimination laws and regulations, and the other coverage and nondiscrimination standards discussed below.

III. Background

Trans Family Support Services submitted a request to the Department regarding the permissibility of insurers restricting access to coverage for mastectomy and creation of a male chest ("male chest reconstruction surgery") for transgender patients based solely on their age. In its letter to the Department, Trans Family Support Services states that, as a general practice, health insurers in California limit coverage of all surgical interventions for treating gender

dysphoria to insureds age 18 or older, without affording an individualized process to consider coverage based on a patient's specific clinical situation.¹

Insurance Code section 10123.88 requires all health insurance policies to cover reconstructive surgery necessary to "improve function" or "create a normal appearance, to the extent possible."² Reconstructive surgery is defined as "surgery performed to correct or repair abnormal structures of the body caused by congenital defects, developmental abnormalities, trauma, infection, tumors, or disease to do either of the following: (A) To improve function. (B) To create a normal appearance, to the extent possible."³ The statute clarifies that the mandate in Section 10123.88 does not require coverage for "cosmetic surgery," which is defined as "surgery that is performed to alter or reshape normal structures of the body in order to improve the patient's appearance."⁴ Insurance Code section 10123.88 permits insurers to impose prior authorization and utilization review on coverage of reconstructive surgery within specified parameters.⁵

Insurance Code section 10140 prohibits admitted insurers licensed to issue life or disability insurance from

fail[ing] or refus[ing] to accept an application for that insurance, to issue that insurance to an applicant therefor, or issue or cancel that insurance, under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, sex, gender, gender identity, gender expression, national origin, ancestry, or sexual orientation.⁶

The Department's regulations implementing Section 10140 prohibit, in relevant part, discrimination "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."⁷ Section 2561.2(a)(4) of title 10 of the California Code of Regulations, in part, specifically prohibits the following discriminatory conduct:

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, 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

¹ The Department is unaware whether all insurers in fact currently impose a strict age restriction on reconstruction surgery for gender transition.

² Cal. Ins. Code § 10123.88(a), (c)(1)(A) & (B).

³ § 10123.88(c)(1).

⁴ § 10123.88(d).

⁵ § 10123.88(e).

⁶ § 10140(a).

⁷ Cal. Code Regs., tit. 10, § 2561.2(a).

belonging to the other sex or has undergone, or is in the process of undergoing, gender transition.⁸

In addition, Insurance Code sections 10965.5(a)(3) and 10753.05(h)(3) prohibit discrimination in marketing and benefit plan designs in nongrandfathered individual and small group health insurance policies based upon age, sex, gender identity, sexual orientation, or health conditions, among other factors.⁹ Federal law similarly prohibits discrimination in marketing and benefit plan designs in all nongrandfathered policies, including large group, based on an individual's present or predicted disability, age, sex, degree of medical dependency, quality of life, or other health conditions, among other factors.¹⁰

Section 2594.2(g)(2) of title 10 of the California Code of Regulations prohibits a benefit plan design or the implementation of a plan design that discriminates against an individual based on sex, gender, gender identity, or gender expression in nongrandfathered individual and small group policies. And section 2695.7(a) prohibits discriminatory claims settlement practices based on age, gender, or sexual orientation, among other factors.

The World Professional Association for Transgender Health (WPATH), an international professional association that provides evidence-based standards of care for transgender people, generally recommends chest surgery for transitioning individuals who, among meeting other criteria, are at the age of majority (least 18 years of age in California).¹¹ The WPATH standards of care also state, however, that male chest reconstruction surgery for female-to-male patients "could be carried out earlier" than the age of majority in certain cases, and ultimately should be considered on a case-by-case basis "depending on an adolescent's specific clinical situation and goals for gender identity expression."¹²

IV. Discussion

Male chest reconstruction surgery (mastectomy and creation of a male chest) recommended by a health care provider for treating gender dysphoria in a patient transitioning from the female to male gender constitutes reconstructive surgery as defined in Insurance Code section 10123.88(c)(1)(B), as it creates a normal appearance, to the extent possible, as part of the treatment of gender dysphoria. Gender dysphoria is a recognized diagnosis in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth edition*, as well as in the *International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10)*.¹³ WPATH considers gender transition surgery to be an effective and medically necessary treatment for gender dysphoria, describing such surgery as "essential and medically necessary to alleviate [individuals'] gender dysphoria ..." for many individuals diagnosed with

⁸ § 2561.2(a)(4).

⁹ See also § 2594.2(g)(2).

¹⁰ 45 C.F.R. § 147.104(e).

¹¹ WPATH, *Standards of Care for the Health of Transsex, Transgender, and Gender Nonconforming People* (Ver. 7, 2012) (WPATH SOC), at 21, available at <https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf? t=1605186324>.

¹² *Id.* at 59.

¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth edition, (DSM-5)*, at 451-460 (2013); World Health Organization, *International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10)* (2016).

the disorder.¹⁴ For such patients, “relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.”¹⁵

Accordingly, WPATH’s standards of care expressly recommend mastectomies and creation of a male chest as a medically necessary surgical treatment of gender dysphoria for female-to-male patients who meet specified criteria.¹⁶ As such, in an individual diagnosed with gender dysphoria, who is born with female characteristics and identifies as male, the presence of a female chest is an abnormal body structure caused by gender dysphoria, which is a medically recognized condition within the meaning of Insurance Code section 10123.88.

Consequently, male chest reconstruction surgery for treating gender dysphoria is performed to “correct or repair abnormal structures of the body caused by congenital defects, developmental abnormalities, trauma, infection, tumors, or disease” in order to “create a normal appearance, to the extent possible” in an individual transitioning from female to male.¹⁷ As such, a male chest reconstruction surgery in such circumstances is not “performed to alter or reshape normal structures of the body in order to improve the patient’s appearance,” and is therefore not “cosmetic surgery” excludable from coverage pursuant to Section 10123.88(d).¹⁸

While WPATH’s current standards of care recommend “age of majority” as a criterion for mastectomy and creation of a male chest in female-to-male patients, the standards acknowledge that male chest reconstruction surgery for female-to-male patients “could be carried out earlier” than the age of majority in certain cases and ultimately should be considered on a case-by-case basis “depending on an adolescent’s specific clinical situation and goals for gender identity expression.”¹⁹

Accordingly, a health insurance policy must cover male chest reconstruction surgery for treating gender dysphoria in insured individuals transitioning from female to male as a reconstructive surgery under Section 10123.88. Thus, a health insurance policy that restricts coverage of male chest reconstruction surgery for gender dysphoria strictly to insured individuals who meet a minimum age threshold (in addition to other clinical criteria), without affording a process to consider the specific clinical situation of an individual who falls below the age minimum, would

¹⁴ *WPATH SOC, supra*, at 54.

¹⁵ *Id.* at 55. The WPATH standards of care further state, “Genital and breast/chest surgical treatments for gender dysphoria are not merely another set of elective procedures.” *Ibid.*

¹⁶ *Id.* at 21, 59.

¹⁷ Ins. Code § 10123.88(c)(1) & (C)(1)(B).

¹⁸ In recognition of that fact (that chest surgery is a medically necessary treatment for gender dysphoria under generally accepted standards of care), health insurers have in recent years ceased attempts to exclude such gender reassignment surgeries as “cosmetic” services, and instead cover them subject to the insured meeting the insurer’s medical necessity criteria.

¹⁹ *WPATH SOC, supra* note 11, at 21, 59. The Department notes further that, with the enactment of Senate Bill 855 (stats. 2020, ch. 151, codified at Ins. Code §§ 10144.5 & 10144.52, eff. Jan. 1, 2021), the WPATH standards of care will apply to coverage of gender transition services, to the extent they represent current generally recognized standards of care for treating gender dysphoria effective January 1, 2021. Ins. Code § 10144.52(b) & (c) (added by S.B. 855).

violate the mandate of Insurance Code section 10123.88 to cover all reconstructive surgery necessary to “create a normal appearance, to the extent possible.”²⁰

Moreover, while Section 10123.88 permits health insurers to use certain utilization management procedures to determine whether reconstructive surgery is covered, insurers are prohibited from denying or limiting coverage for otherwise covered services “due to an insured’s actual or perceived gender identity or for the reason that the insured is a transgender person.”²¹ This prohibition includes denying or limiting coverage for a claim for “[h]ealth 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, hysterectomy, mastectomy, and vocal training.”²²

A health insurer that imposes a strict minimum age threshold on coverage of a mastectomy and accompanying reconstructive surgery—that is, restricting coverage to insured individuals who meet a specified minimum age, without a process to assess medical necessity based on the individual’s specific clinical situation—when the surgery is for the treatment of gender dysphoria, but does not impose the same strict minimum age requirement when the reconstructive surgery is for the treatment of other diagnoses, such as breast cancer or trauma, would violate the gender nondiscrimination requirements of Insurance Code section 10140 and its implementing regulation, section 2561.2(a)(4) of title 10 of the California Code of Regulations.²³

Nongrandfathered health insurance policies that impose such strict age minimums on coverage of male chest reconstruction surgery for the treatment of gender dysphoria, but not other medical conditions, also constitute prohibited discrimination in benefit plan designs based on age, sex, gender identity, gender expression, sexual orientation, and health conditions, among other factors, in violation of state and federal laws.²⁴

Furthermore, denying claims for male chest reconstruction surgery for treating gender dysphoria solely because an insured individual does not meet a strict minimum age threshold, without considering the individual’s specific clinical situation, would constitute a discriminatory claims settlement practice based on age, gender, or sexual orientation, among other factors, in violation of section 2695.7(a) of title 10 of the California Code of Regulations.

V. Conclusion

Pursuant to Insurance Code section 12921.9, insurers may not deny coverage for a mastectomy and creation of a male chest (“male chest reconstruction surgery”) for treating gender dysphoria in female-to-male patients based solely on the insured individual’s age.

²⁰ Ins. Code § 10123.88(a) & (c)(1)(B).

²¹ Cal. Code Regs., tit. 10, § 2561.2(a)(4).

²² § 2561.2(a)(4)(A).

²³ Such strict age minimums are even more suspect when they are in contravention of prevailing standards of care for the condition being treated, as is the case with male chest reconstruction surgeries for the treatment of gender dysphoria in female-to-male patients. See WPATH, *Standards of Care for the Health of Transsex, Transgender, and Gender Nonconforming People* (Version 7, 2012), at 21.

²⁴ 45 C.F.R. § 147.104(e); Ins. Code §§ 10965.5(a)(3) & 10753.05(h)(3); Cal. Code Regs., tit. 10, § 2594.2(g)(2).

A health insurance policy must cover male chest reconstruction surgery for the purpose of treating gender dysphoria in insured individuals transitioning from female to male as a reconstructive surgery under Section 10123.88. Thus, a health insurance policy that restricts coverage of male chest reconstruction surgery for treating gender dysphoria strictly to insured individuals who meet a minimum age threshold (in addition to other clinical criteria), without affording a process to consider the specific clinical situation of an individual who may be below the age minimum, would violate the mandate of Insurance Code section 10123.88 to cover all reconstructive surgery necessary to “create a normal appearance, to the extent possible.”²⁵

Furthermore, the use of a strict age minimum for coverage of male chest reconstruction surgery for treating gender dysphoria would also constitute prohibited discrimination in marketing, benefit plan design, and claims settlement practice based on age, sex, gender identity, gender expression, sexual orientation, and health conditions, among other factors, in violation of state and federal laws.²⁶

Accordingly, health insurers may not employ a strict minimum age threshold as a medical necessity criterion to determine when a male chest reconstruction surgery will be covered for treating gender dysphoria in an insured individual transitioning from female to male.

We trust the foregoing is responsive to your request. If, however, you have additional questions or require further information, please contact the undersigned directly.

Very truly yours,

A handwritten signature in blue ink, appearing to read "KBSchnoll", is written over a light blue circular stamp.

Kenneth B. Schnoll
General Counsel & Deputy Commissioner

²⁵ Ins. Code § 10123.88(a) & (c)(1)(B).

²⁶ 45 C.F.R. § 147.104(e); Ins. Code §§ 10965.5(a)(3) & 10753.05(h)(3); Cal. Code Regs., tit. 10, § 2594.2(g)(2).