

## Health Insurance Bulletin 2015-3

Effective November 23, 2015

### Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression

**Background and Purpose.** This Bulletin is issued by the Office of the Health Insurance Commissioner (“OHIC”) for the purpose of advising health insurers<sup>1</sup>, health care providers and consumers of health insurance that discrimination against an individual in the context of health insurance because of the individual’s gender identity or expression constitutes sex discrimination prohibited by Rhode Island law. This prohibition extends both to the availability of health insurance coverage and to the provision of health insurance benefits, including medically necessary transgender surgery and gender identity or gender dysphoria related health care services.

**Authority.** The Commissioner hereby issues this Bulletin in accordance with RIGL §§42-14.5-1 et seq., RIGL §42-14-5, RIGL §§27-29-1 et seq., and OHIC Regulation 2.

**Applicability and Scope.** This bulletin is intended to advise the state’s health insurers, health care providers and consumers of health insurance of the prohibitions in Rhode Island and federal law on discrimination in the context of health insurance based on an individual’s gender identity or expression.

**Analysis.** Recent changes in policy at the federal and state levels relating to gender identity related health care services, combined with a growing body of scientific and clinical evidence regarding the potential harm to consumers arising from the denial or exclusion of services on the basis of gender identity or expression and related medical conditions<sup>2</sup>, have prompted an examination of state and federal law on the topic of gender identity related health care service exclusions and denials in health insurance regulated by OHIC.<sup>3</sup>

On the federal level, Section 1557 of the Patient Protection and Affordable Care Act (“ACA”) provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. (race, color, national origin), Title IX of the Education Amendments

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<sup>1</sup> “Health Insurer” is defined in OHIC Regulation 2(3)(e) as “any entity subject to the insurance laws and regulations of this state, or subject to the jurisdiction of the Commissioner, that contracts or offers to contract to provide, deliver, arrange for, pay for, or reimburse any of the costs of health care services, including, without limitation, an insurance company offering accident and sickness insurance, a health maintenance organization, a non-profit hospital service corporation, a non-profit medical service corporation, a non-profit dental service corporation, a non-profit optometric service corporation, a domestic insurance company subject to chapter 1 of title 27 of the General Laws that offers or provides health insurance coverage in the state and a foreign insurance company subject to chapter 2 of title 27 of the General Laws that offers or provides health insurance coverage in the state.” RI ADC 32-1-2:3(e).

<sup>2</sup> See e.g., discussion by the Health and Human Services Departmental Appeals Board in NCD 140.3, Transsexual Surgery, HHS, Dep’t Appeals Bd., App. Div., Docket No. 14 A-13-87, Decision No. 2575 (May 30, 2014).

<sup>3</sup> In recent years, several states, including Colorado, Connecticut, Illinois, Massachusetts, New York, Oregon, Vermont and Washington, and the District of Columbia have issued insurance bulletins or guidance letters on the application of anti-discrimination provisions to health insurance coverage for the treatment of gender dysphoria.

of 10072, 20 U.S.C. 1681 et seq. (sex), the Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq. (age), or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (disability), under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Affordable Care Act or its amendments.<sup>4</sup> Significantly, the federal Department of Health and Human Services' Office for Civil Rights ("OCR"), the agency charged with enforcing this civil rights guarantee, has determined that "Section 1557's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. . . [and] that discrimination against transgender people in federal health programs or health programs that receive federal funds is specifically prohibited under the ACA."<sup>5</sup> Several federal courts and other federal executive agencies have similarly concluded that discrimination on the basis of gender identity constitutes sex discrimination.<sup>6</sup>

At the state level, the Rhode Island General Assembly enacted legislation in 2001 entitled "An Act Relating to Civil Rights," 2001 Rhode Island Laws Ch. 01-340 (01-H 5920A). This law added "gender identity or expression" as an additional protected characteristic to Rhode Island's Fair Employment Practices Act (RIGL §28-5-1, et seq.); Fair Housing Practices Act (RIGL §34-37-1, et seq.); public accommodations law (RIGL §11-24-1, et seq.); and credit discrimination law (RIGL §34-37-4.3).<sup>7</sup> The General Assembly defined "gender identity or expression" to include a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender related self-image, gender-related appearance or gender-related expression is different from that traditionally associated with the person's birth sex. In enacting this legislation, the General Assembly expressed that discrimination on the basis of gender identity or expression is a matter of state concern and threatens the public welfare.<sup>8</sup>

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<sup>4</sup> 42 U.S.C. §18116.

<sup>5</sup> See Letter from Leon Rodriguez, Director of Office of Civil Rights, Department of Health and Human Services ("HHS), to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights, dated July 12, 2012, Office of Civil Rights letter dated July 12, 2012, *available at* <http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services#scribd>; See also HHS.gov website page entitled "OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases" *available at* <http://www.hhs.gov/ocr/civilrights/understanding/section1557/casesum.html>.

<sup>6</sup> See e.g., *Macy v. Eric Holder, Atty. General*, U.S. Dept. of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*11 (April 20, 2012) (wherein the U.S. Equal Employment Opportunity Commission ruled that gender identity discrimination is, by definition, discrimination "based on . . . sex" and that such discrimination therefore violates Title VII); and *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held.").

<sup>7</sup> Prior to the 2001 amendments, these laws provided protection against discrimination with respect to several other characteristics such as race, color, religion, sex, etc.

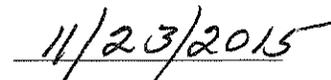
<sup>8</sup> For example, RIGL §28-5-2 was amended to state "The practice or policy of discrimination against individuals because of their race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin is a matter of state concern. Such discrimination foments

Although the 2001 legislation did not specifically amend any laws in the area of health insurance, state law specific to the business of insurance prohibits “making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable under any policy or contract or in any of the terms or conditions of that policy, or in any other manner,” (RIGL §27-29-4(7)(ii)), as well as prohibits, on the basis of an individual’s sex, refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual (RIGL §27-29-4(7)(v)).

**Conclusion.** OHIC has considered the above factors, specifically Rhode Island’s strong prohibitions in the context of health insurance against unfair discrimination generally and discrimination on the basis of sex; our General Assembly’s broad prohibitions against discrimination on the basis of sex and gender identity; and recent federal guidance on the scope of prohibited “discrimination on the basis of sex.” Moreover, OHIC has considered these factors in the context of OHIC’s statutory responsibility pursuant to RIGL § 42-14.5-2 to “protect the interests of consumers,” and “encourage and direct insurers towards policies that advance the welfare of the public through overall efficiency, improved health care quality, and appropriate access.” OHIC has concluded that discrimination on the basis of gender identity or expression in the context of health insurance is sex discrimination prohibited by state law and constitutes an unfair trade practice pursuant to state law.<sup>9</sup>

Accordingly, denial, exclusion or other limitations of coverage by a health insurer for medically necessary treatment otherwise covered by a health insurance policy or contract based solely on an individual’s gender identity, expression or gender dysphoria is sex discrimination prohibited under Rhode Island law.

  
Kathleen C. Hittner, MD, Commissioner

  
Date

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domestic strife and unrest, threatens the rights and privileges of the inhabitants of the state, and undermines the foundations of a free democratic state. The denial of equal employment opportunities because of such discrimination and the consequent failure to utilize the productive capacities of individuals to their fullest extent deprive large segments of the population of the state of earnings necessary to maintain decent standards of living, necessitates their resort to public relief, and intensifies group conflicts, thereby resulting in grave injury to the public safety, health, and welfare.”

<sup>9</sup> This analysis is similar, in part, to that conducted by the Division of Insurance for the Commonwealth of Massachusetts in their Bulletin 2014-03 Re: Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services (June 20, 2014), wherein the Division concluded that “the strong prohibition in Massachusetts against sex discrimination in all areas including with respect to health insurance, must likewise be interpreted as prohibiting discrimination in healthcare coverage on the basis of gender identity or gender dysphoria.”