WRITTEN TESTIMONY
BEFORE THE NEW HAMPSHIRE JOINT LEGISLATIVE COMMITTEE ON ADMINISTRATIVE RULES
REGARDING HE-W 531.06(G)

On behalf of the American Civil Liberties Union of New Hampshire (ACLU-NH) and GLBTQ Legal Advocates & Defenders (GLAD), we write in support of the New Hampshire Department of Health and Human Services amendment to He-W 531.06(g) "Physician Services-Non-covered Services." GLAD works in litigation and public policy throughout New England to end discrimination based on sexual orientation, HIV status and gender identity and expression. ACLU-NH is a New Hampshire based organization of over 8,000 members and supporters in the Granite State that has worked to advance civil liberties for nearly 50 years. Together, we support the removal of He-W 531.06(g) from the list of non-covered physician services because the provision refers to treatment that the consensus of medical providers and medical associations consider medically necessary for treatment of gender dysphoria as non-covered services. Moreover, such exclusions for gender transition treatment are not in accordance with medical authorities and, in fact, violate both state and federal law. We therefore urge the New Hampshire Department of Health and Human Services to adopt the proposed amendment to strike He-W 531.06(g), which provides that "Sex change operations shall be non-covered."

A. Scientific and Medical Evidence does not Support Non-Coverage of Sex-Reassignment Procedures

Gender transition-related care, including provision of sex-reassignment surgery (or so-called "sex change operations")[1] and other related surgeries and treatments such as hormone therapy, is recognized as medically necessary for the treatment of gender dysphoria.[2] Gender dysphoria is a real and serious medical condition experienced by many transgender people.[3] The condition is marked by a profound and disorienting misalignment of a person's gender identity (one's internalized sense of who that person is as male or female -- sometimes referred to as "brain sex") and his or her assigned birth sex. The misalignment is debilitating and, without treatment, predictably leads to clinical depression, loss of self-esteem, and serious self-harm including genital self-mutilation and suicide.[4] Because a person's brain sex is fixed and impervious to change, the treatment for the condition of gender dysphoria focuses on medical treatment that aligns the person's body with the brain, a process known as gender transition. The medical professional organizations focused on treatment of gender dysphoria have identified an established course of

[1] The term "sex change operation" does not appear in the medical literature. We assume, however, that it refers to surgery for purposes of sex reassignment or sex-reassignment surgery.
[2] *See* notes 5 and 6, below.
[3] *See* American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 5th ed., (American Psychiatric Publishing, 2013); American Medical Association House of Delegates (hereinafter "AMA"), "Removing Financial Barriers to Care for Transgender Patients" (2008), available at http://www.tgender.net/taw/ama_resolutions.pdf; and The World Health Organization's International Statistical Classification of Diseases and Related Health Problems, version 10 (ICD-10) includes "gender identity disorder," *available at* http://apps.who.int/classifications/icd10/browse/2010/en#/F64.
[4] AMA, above at 1.

care and treatment for the condition that includes, in appropriate cases, hormone therapy and surgeries relating to sex-reassignment.[5]

Major medical organizations including the American Psychiatric Association, the American Medical Association, and the World Health Organization have recognized the treatment to be medically necessary.[6] In addition, the American Psychological Association; the American Psychiatric Association; the American Academy of Family Physicians; the American Congress of Obstetricians and Gynecologists; the Endocrine Society; the National Association of Social Workers; and the World Professional Association for Transgender Health have all issued public statements to this effect.[7] Every court to consider the question has also recognized gender dysphoria (and its predecessor diagnosis of gender identity disorder ("GID") to be real and serious and the aforementioned protocol of treatment to be the standard of care.[8]

The American Medical Association has also concluded that medical research demonstrates the necessity and effectiveness of hormone therapy and surgeries for the purpose of sex-reassignment for many individuals diagnosed with gender dysphoria. As such, the AMA supports public and private health insurance coverage for medically necessary treatments and opposes the kind of exclusions included within New Hampshire's Medicaid regulations.[9]

If the proposed amendment is adopted and the exclusion in He-W 531.06(g) is removed, any individual claimant would still have to demonstrate that the particular treatment requested is medically necessary as to that particular individual. Not every possible transition related treatment

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[5] World Professional Association for Transgender Health, "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People," 7th ed., 2011, *accessed at* http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.

[6] *See* American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 5th ed., (American Psychiatric Publishing, 2013); American Medical Association House of Delegates (hereinafter "AMA"), "Removing Financial Barriers to Care for Transgender Patients" (2008), available at http://www.tgender.net/taw/ama_resolutions.pdf; and The World Health Organization's International Statistical Classification of Diseases and Related Health Problems, version 10 (ICD-10) includes "gender identity disorder," *available at* http://apps.who.int/classifications/icd10/browse/2010/en#/F64.

[7] American Medical Association House of Delegates, "Removing Financial Barriers to Care for Transgender Patients," Resolution 122, A-08 (2008); Anton, B. S. "Proceedings of the American Psychological Association for the legislative year 2008: Minutes of the annual meeting of the Council of Representatives," *American Psychologist*, 64, 372–453 (2009); Drescher, J., M.D., Ellen Haller, M.D., and APA Caucus of Lesbian, Gay and Bisexual Psychiatrists, American Psychiatric Association, "APA Official Actions: Position Statement on Access to Care for Transgender and Gender Variant Individuals," (2012); American Academy of Family Physicians, "Summary of Actions: 2007 National Conference of Special Constituencies," Resolution 64, 22. (2007); American College of Obstetricians and Gynecologists, "Committee Opinion No. 512: Health care for transgender individuals," Obstet Gynecol; 118: 1454-8 (2011); Hembree WC, Cohen-Kettenis P, Delemarre-van de Waal HA,Gooren LJ, Meyer WJ 3rd, Spack NP, et al. "Endocrine treatment of transsexual persons: an Endocrine Society clinical practice guideline." J Clin Endocrinol Metab;94:3132–54 (2009); Committee on Lesbian, Gay, Bisexual, and Transgender Issues, National Association of Social Workers, "Position Statement: Transgender and Gender Identity Issues, Second Round Policy Panel Revision," (2008); and World Professional Association for Transgender Health, "WPATH Clarification on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A," (2007).

[8] *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995); *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997); *Cuoco v. Moritsugu*, 222 F.3d 99 (2nd Cir. 2000); *O'Donnabhain v. Commissioner of Internal Revenue Service*, 134 T.C. 34 (U.S. Tax Ct. 2010); *Battista v. Clarke*, 645 F. 3d 449 (1st Cir. 2011); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Soneeya v. Spenser*, 851 F. Supp. 2d 228 (D. Mass. 2012); *Kosilek v. Spencer*, No. 00-12455, 2012 U.S. Dist. LEXIS 124758 (D. Mass. Sept. 4, 2012).

[9] *See* note 7, above.

is medically necessary for every transgender individual. Medical necessity is defined in the Medicaid regulations as

> "health care services that a licensed health care provider, exercising prudent clinical judgment, would provide, in accordance with generally accepted standards of medical practice, to a recipient for the purpose of evaluating, diagnosing, preventing, or treating an acute or chronic illness, injury, disease, or its symptoms, and that are: (1) Clinically appropriate in terms of type, frequency of use, extent, site, and duration, and consistent with the established diagnosis or treatment of the recipient's illness, injury, disease, or its symptoms; (2) Not primarily for the convenience of the recipient or the recipient's family, caregiver, or health care provider; (3) No more costly than other items or services which would produce equivalent diagnostic, therapeutic, or treatment results as related to the recipient's illness, injury, disease, or its symptoms; and (4) Not experimental, investigative, cosmetic, or duplicative in nature." He-W 530.01(e).

As discussed above, gender transition services for transgender individuals, or, as referred to in the current regulations, "sex change operations" clearly meet the regulatory definition of medical necessity. The treatment of this condition is of a quality that meets professionally recognized standards of health care and can be substantiated by records showing the treatment's medical necessity and quality. Generally accepted standards of medical practice, the Standards of Care, provide that these procedures are medically necessary treatment for gender dysphoria. The procedures are recommended on a case by case basis consistent with the established diagnosis or treatment of the recipient's illness or its symptoms, and are not primarily for the recipient's convenience. It is difficult to believe that any individual would seek gender transition treatment, especially surgery, for anything but a life-threatening medical condition. Finally, as discussed above and as established by major medical authorities, the services are not experimental, investigative, or cosmetic in nature.

There is no other medical service for treatment for gender dysphoria that is comparable in effect, available, and suitable for treatment of the condition, that is more conservative or less costly than sex reassignment treatment. Although a variety of therapeutic options can be considered to treat gender dysphoria, for many individuals, surgery is the last and necessary step to resolve gender dysphoria.[10] The American Medical Association has stated that delaying treatment for gender dysphoria "can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health and strain the health care system."[11] That finding is based on numerous studies tracking post treatment outcomes of individuals who have undergone sex reassignment surgery. The vast majority of follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes.[12]

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[10] Hage, J. J., & Karim, R. B. (2000). Ought GIDNOS get nought? Treatment options for nontranssexual gender dysphoria. Plastic and Reconstructive Surgery, 105(3), 1222-1227.

[11] American Medical Association House of Delegates, Resolution 122, A-08, supra note 7.

[12] See, e.g. De Cuypere, G., & Vercruysse, H. (2009). Eligibility and readiness criteria for sex reassignment surgery: Recommendations for revision of the WPATH standards of care. International Journal of Transgenderism, 11(3), 194-205.; Garaffa, G., Christopher, N. A., & Ralph, D. J. (2010). Total phallic reconstruction in female-to-male transsexuals. European Urology, 57(4), 715-722; Klein, C., & Gorzalka, B. B. (2009). Sexual functioning in transsexuals following hormone therapy and genital surgery: A review (CME). The Journal of Sexual Medicine, 6(11), 2922-2939.

The medical necessity of surgery as well as its efficacy and safety is so well established for patients with severe gender dysphoria that federal courts have held that categorical bans on sex reassignment surgery, even in the context of prisoner care, violate basic guarantees of the most minimal standards of adequate care. *See De'Lonta v. Johnson*,708 F.3d 520, 522-23 (4th Cir. 2013) (explaining that under "the generally accepted protocols for the treatment of GID . . . the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment for GID"); *Fields v. Smith*, 658 F.3d 550 (7th Cir. 2011) (holding that categorical ban on hormone therapy and surgery to treat gender dysphoria is facially unconstitutional); *Kosilek v. Spenser*, 889 F. Supp.2d 190 (D. Mass. 2012) (issuing injunction to provide sex reassignment surgery after determining that surgery was medically necessary); *Soneeya v. Spenser*, 851 F.Supp. 2d 228 (D. Mass. 2012 (injunction requiring evaluation of inmate for whether sex reassignment surgery is medically necessary); see also *O'Donnabhain v. Comm'r*, 134 T.C. 34, 70 (2010) (holding that surgery to treat gender dysphoria is medically necessary and not cosmetic for purposes of tax deduction).

B. Federal and State Law Prohibits Exclusions for Gender Transition Treatment

The current exclusion in He-W 531.06(g) conflicts with state law relating to non-discrimination and with the Affordable Care Act and must be removed to ensure that New Hampshire's Medicaid regulations are in compliance with current state constitutional guarantees and state and federal law.

The New Hampshire General Court has declared that "practices of discrimination against any of its inhabitants because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants."[13] The exclusion of medically necessary treatment for gender transition violates New Hampshire's prohibitions against sex and disability discrimination as explained below.

A state public health plan that targets transgender persons for denial of medically necessary care discriminates on the basis of sex. Federal courts have found that discrimination against transgender individuals is impermissible sex discrimination under Title VII.[14] New Hampshire courts have held that in matters of first impression under New Hampshire antidiscrimination law, New Hampshire will look to federal Title VII precedent, and thus, discrimination against

[13] RSA 354-A:1.

[14] Both federal courts and executive agencies have repeatedly indicated that sex-based protections cover transgender people through a definition of the term "sex" that includes gender identity and nonconformity with sex stereotypes. The U.S. Equal Employment Opportunity Commission recently issued a formal ruling that gender identity discrimination is *per se* sex discrimination, Macy v. Eric Holder, Atty. General, U.S. Dept. of Justice, EEOC Appeal No. 0120120821 (April 24, 2012).. *See, e.g.*, Glenn v. Brumby, 665 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); and Schroer v. Billington, 577 F. Supp. 2d 293 653 (D.D.C. 2008).

transgender individuals is also impermissible sex discrimination under New Hampshire antidiscrimination's related law.[15]

To highlight the sex discrimination at the root of the New Hampshire exclusions, consider the situation for a transgender woman and a non-transgender woman who both have a medical need for surgery. The non-transgender woman would be covered under the New Hampshire Medicaid regulations. The transgender woman, regardless of her medical need, would not be. The distinction between the transgender woman and the non-transgender woman is the fact that transgender woman's birth sex was male. Accordingly, the reason for the differential treatment of the transgender woman is the transgender woman's birth sex. Had her sex at birth been female, she would not be denied coverage for precisely the same treatment. Therefore, exclusions for medically necessary treatment exclusively because a person is transgender violate the state's prohibition against sex discrimination in the state antidiscrimination laws.

A state Medicaid plan that excludes treatments and procedures when the insured is transgender but permits the same treatments or procedures in circumstances when the insured is not transgender violates the state nondiscrimination law because such a plan discriminates on the basis of sex. Because many, if not most, of the treatments that are not covered for transgender individuals are the same treatments that are covered for non-transgender individuals, denial of coverage of gender transition treatment is denial of coverage because of the person's transgender status and, therefore, because of the person's sex.

In addition, the regulatory exclusion is also impermissible disability discrimination. New Hampshire courts have held that discrimination based on an individual's gender identity is disability discrimination. In Doe v. Electro-Craft, the Superior Court noted that the inclusion of gender identity disorder in the DSM supported inclusion of gender identity disorder as a "handicap" for purposes of New Hampshire antidiscrimination law,[16] 1988 WL 1091932 (N.H.Super.). Since the date of that decision in 1988, it is even more clear that transgender individuals would be included in the disability definition, because, as noted above, not only the DSM but also major medical associations including the American Medical Association and American Psychiatric Association agree that gender dysphoria is a medical condition for which there is an established course of treatment that is considered medically necessary. By excluding such treatment from Medicaid coverage, the State of New Hampshire impermissibly discriminates on the basis of disability, not just under state law, but also under federal law.

The current regulations, by excluding treatment for gender dysphoria, violate federal Medicaid laws and regulations. The State of New Hampshire is bound by federal Medicaid laws in determining the scope of coverage available to Medicaid recipients. Creating a categorical exclusion of coverage for all sex reassignment surgeries violates federal law. The Office of Health and Human Services has stated that current Medicaid regulations prohibit discrimination based on gender identity. 78 Fed. Reg. 42209. The Federal Medicaid Act, 42 U.S.C. §1396a, requires that medical assistance made available shall not be less in amount, duration, or scope than the medical

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[15] Madeja v. MPB Corp., 149 N.H. 371, 378, 821 A.2d 1034, 1042 (citing N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 680).

[16] RSA 354:A-2 defines disability as "(a) A physical or mental impairment which substantially limits one or more of such person's major life activities; (b) A record of having such an impairment; or (c) Being regarded as having such an impairment. Provided, that "disability" does not include current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).

assistance made available to any other individual. The Office of Medicaid "may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 420.230(c). Specifically excluding coverage for all sex reassignment surgeries regardless of individual medical need in any particular case does exactly that; it arbitrarily denies coverage for treatment exclusively based on a Medicaid recipient's diagnosis of gender dysphoria.

The current exclusions also violate the Affordable Care Act regulations under the Medicaid program. Section 1557 of the Affordable Care Act, the antidiscrimination provision, applies to "any program or activity that is administered by an Executive Agency," which includes New Hampshire's Medicaid program. This provision prohibits discrimination on bases addressed by federal civil rights laws, including Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. Through this non-discrimination law, §1557 incorporates nondiscrimination protections on the basis of sex which includes protections based on gender identity or, stated otherwise, prohibitions against discrimination on the basis of transgender status. The Office of Health and Human Services Office of Civil Rights has clarified that Section 1557 prohibits discrimination based on gender identity or sex stereotyping.[17]

A regulation that would permit coverage of a procedure, for example, a hysterectomy, when medically necessary for a non-transgender woman but that would deny coverage of this same procedure to a transgender man for whom it is also medically necessary for gender transition treatment discriminates based on sex, gender identity, and sex stereotyping. This is the effect of He-W 531.06(g) as currently written.

Regulations implementing the Affordable Care Act that are applicable to Medicaid programs provide that these programs must provide essential health benefits coverage and that "[e]ssential health benefits cannot be based on a benefit design or implementation of a benefit design that discriminates based on an individual's age, expected length of life, present or predicted disability, degree of medical dependency, quality of life or other health conditions." 42 C.F.R. 440.347(e). The EHB standard requires that the benefits established as essential not be subject to denial based on present or predicted disability, degree of medical dependency, or quality of life.[18] Gender dysphoria is a health condition, as discussed above, and therefore, state Medicaid regulations may not lawfully contain an exclusion for all treatment for a medical condition and at the same time comply with Medicaid requirements. Currently, He-W 531.06 does not comply with Medicaid requirements.

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[17] Office for Civil Rights, *Questions and Answers on Section 1557 of the Affordable Care Act*, http://www.hhs.gov/ocr/civilrights/resources/laws/section1557_questions_answers.html (last accessed July 17, 2013); Letter from Leon Rodriguez, Director of the Office for Civil Rights, U.S. Department of Health and Human Services. July 12, 2012. Available at: http://hrc.org/files/assets/resources/HHSResponse8612.pdf. Not only has the Office for Civil Rights clarified that discrimination on the basis of gender identity is sex discrimination; both federal courts and executive agencies have repeatedly indicated that sex-based protections cover transgender people through a definition of the term "sex" that includes gender identity and nonconformity with sex stereotypes. The U.S. Equal Employment Opportunity Commission recently issued a formal ruling that gender identity discrimination is *per se* sex discrimination, Macy v. Eric Holder, Atty. General, U.S. Dept. of Justice, EEOC Appeal No. 0120120821 (April 24, 2012).. *See, e.g.*, Glenn v. Brumby, 665 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); and Schroer v. Billington, 577 F. Supp. 2d 293 653 (D.D.C. 2008).

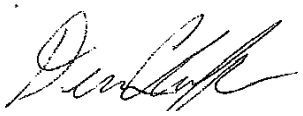
[18] 42 U.S.C. 18022(b)(4)

A decision issued by a federal district court in Texas has not changed the legal analysis set forth above. *See* Franciscan Alliance v. Burwell, no. 7:16-cv- 00108-o (N.D. Tex. Dec. 31, 2016). That decision did not change the scope of the non-discrimination provision of the Affordable Care Act as set forth in Section 1557 nor could it. Only Congress can do that. The case was not a challenge to the non-discrimination provision of the Affordable Care Act. It was a challenge to regulations issued by United States Department of Health and Human Services (USHHS) that interpreted the non-discrimination provision of the ACA. The Court's ruling prevents USHHS from investigating and acting on complaints of discrimination brought by transgender people challenging denials of health care. It has no impact on transgender people's ability to bring ACA discrimination claims in courts. While the new federal administration has indicated that it intends to review USHHS's interpretation of the ACA, it has also stated its intentions to repeal and revise the ACA. Neither of those efforts have yet resulted in legal changes to the ACA. As a result, and until Congress says otherwise, Section 1557 remains a vehicle for transgender people to bring legal challenges for the denial of gender transition-related care.

Conclusion

GLAD and the ACLU-NH strongly support the removal of exclusions for gender transition treatment for the reasons given above. We therefore support the adoption of the rule amendment proposed by the New Hampshire Department of Health and Human Services.

Sincerely,



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