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GARY D. ANDERSON
COMMISSIONER OF INSURANCE

BULLETIN 2021-11

To: Commercial Health Insurers, Health Maintenance Organizations, and Blue Cross and Blue Shield of Massachusetts, Inc.

From: Gary D. Anderson, Commissioner of Insurance 

Date: September 9, 2021

Re: Continuing Applicability of Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Gender Affirming Care and Related Services

The Massachusetts Division of Insurance (“Division”) issues Bulletin 2021-11 to commercial health insurers, health maintenance organizations, and Blue Cross and Blue Shield of Massachusetts, Inc. (“Carriers”) to clarify the continuing applicability of Massachusetts laws that prohibit discrimination on the basis of gender identity or gender dysphoria. The Division issues this Bulletin in light of changes to state law since the publication of Bulletin 2014-03 and to clarify discriminatory practices prohibited in Massachusetts.

Protecting Against Discrimination on the Basis of Gender Identity or Gender Dysphoria

The Division previously issued Bulletin 2014-03¹, which references federal and state laws that protect consumers against discrimination.² The Bulletin states that Chapter 199 of the Acts of 2011, *An Act Relative to Gender Identity* (“Chapter 199”), added “gender identity” as a protected characteristic to state employment, housing, credit, and public education anti-discrimination laws and to state hate crimes laws. The Bulletin adds that Massachusetts’ strong prohibition against sex discrimination in all areas, including health insurance, extends to discrimination on the basis of

¹ Bulletin 2014-03: <https://www.mass.gov/doc/bulletin-2014-03-guidance-regarding-prohibited-discrimination-on-the-basis-of-gender-identity/download>.

² Section 1557 of the Affordable Care Act provides nationwide protections against discrimination based on race, color, national origin, sex, age, or disability in certain health programs and activities. In 2020, the federal government initiated a rollback of 2016 protections under Section 1557 of the ACA: reported at <https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration> and <https://www.natlawreview.com/article/hhs-finalizes-anti-discrimination-revisions-to-aca-section-1557>. Additionally, the Supreme Court in 2020 issued its holding in *Bostock v. Clayton County, VA*, 590 U.S. ___ (2020), that Title VII of the Civil Rights Act, which prohibits sex discrimination, applies to discrimination based on sexual orientation and gender identity. Independent of federal law, Carriers in Massachusetts are required to abide by relevant state laws that prohibit discrimination.

gender identity or gender dysphoria. Bulletin 2014-03 further explains that Massachusetts law prohibits sex discrimination in various types of insurance.³

In addition to the legal protections cited in Bulletin 2014-03, Massachusetts has since enacted certain laws to add protections against discrimination. In 2018, Massachusetts amended its public accommodations law to include gender identity as a protected class.⁴ The amended law provides that “[a]ll persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons,” with no “distinction, discrimination, or restriction on account of . . . sex, gender identity, [and] sexual orientation.”⁵ In 2020, Massachusetts added specific discrimination protections to its laws regarding disability insurance.⁶ The Massachusetts Commission Against Discrimination has also released guidance affirming that places of public accommodation are not restricted to physical structures and include businesses that provide services, such as insurance companies.⁷

Protecting Against Discrimination in Health Insurance

Given these prohibitions against discrimination, the Division reminds Carriers of its prior determination that “denying medically necessary treatment based on an individual’s gender identity or gender dysphoria is prohibited sex discrimination under Massachusetts law.”⁸ Carriers may not categorically exclude services used in the treatment of gender dysphoria when those services are medically necessary or when the same services are covered for the treatment of other conditions.

Carriers should consult the most up-to-date medical standards set forth by nationally recognized medical experts in the transgender health field, including but not limited to those issued by the World Professional Association for Transgender Health (WPATH). Carriers may not single out a treatment or procedure for exclusion of coverage because of its association with transgender people or with gender dysphoria. Additionally, where a treatment is considered medically necessary for a patient, other procedures required in preparation for, as a component of, as a follow-up to, or as a revision of the treatment should also be considered medically necessary and should not be denied based on an individual’s gender identity or because the services are being used in the treatment of gender dysphoria.

Carriers may not impose stricter requirements for coverage of a service when used to treat or ameliorate symptoms of gender dysphoria than when used to treat other conditions. Carriers must comply with applicable mental health parity requirements to ensure that mental health benefits are

³ See M.G.L. c.175, §§ 4C, 24A, and 120F.

⁴ See Chapter 134 of the Acts of 2016 <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter134>; and Ballot Questions, <https://www.sec.state.ma.us/ele/elebalm/balmresults.html#year2018>, or 2018 referendum on the 2016 transgender anti-discrimination law (question and results start on p. 482: <https://archives.lib.state.ma.us/bitstream/handle/2452/820804/ocm05938794-2018.pdf?sequence=1&isAllowed=y>).

⁵ See M.G.L. c. 272, §98.

⁶ See M.G.L. c. 175, §108N, which prohibits discrimination or distinctions in disability policies based on sex, gender identity, or sexual orientation.

⁷ See Massachusetts Commission Against Discrimination, Gender Identity Guidance, 4 (Dec. 5, 2016) <https://www.mass.gov/files/documents/2016/12/ww/gender-identity-guidance-12-05-16.pdf>

⁸ See Bulletin 2014-03 -<https://www.mass.gov/doc/bulletin-2014-03-guidance-regarding-prohibited-discrimination-on-the-basis-of-gender-identity/download>

not subject to more restrictive financial requirements or treatment limitations than those applied to similarly classified medical and surgical benefits. For minors seeking access to gender affirming medical or surgical procedures, Carriers must undertake case-by-case review of individual circumstances and authorize coverage for these treatments when such treatments are determined to be medically necessary.

Carriers Acting As Administrators

When Carriers are acting as administrators for employment-sponsored non-insured health benefit plans, the Division expects Carriers to encourage plan sponsors to take steps that are consistent with the provisions of this Bulletin. Plan sponsors should be made aware of potential discrimination in access to medically necessary health benefits, and Carriers should do all they can to encourage plan sponsors to take steps to remove barriers to accessing appropriate medically necessary care.

Carriers with questions regarding this Bulletin are requested to contact Niels Puetthoff, Director of the Bureau of Managed Care, at niels.puetthoff@mass.gov or (617) 521-7326.