CONFIDENTIAL

August __, 2014

Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Cindy Mann
Deputy Administrator and Director
Center for Medicaid, CHIP, and Survey and Certification
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Medicaid Coverage of Health Care Services Related to Gender Transition

Dear Administrator Tavenner and Deputy Administrator and Director Mann:

As organizations committed to the health and well-being of all Medicaid beneficiaries, we write to urge you to provide guidance clarifying your policies concerning Medicaid coverage of health care services related to gender transition. Such guidance is necessary to ensure that transgender beneficiaries have access to the medically necessary services to which they are entitled under federal law.

Under federal law, state Medicaid programs must cover certain "mandatory" services for the categorically needy and also have the option to cover a variety of "optional" services.[1] Among others, states must cover inpatient hospital services, outpatient hospital services, and physician services.[2] A state may establish reasonable standards, consistent with the objectives of the Medicaid statute, for determining the extent of coverage for any mandatory or optional categories of services, based on such criteria as medical necessity or utilization control.[3] The state must also ensure that the amount, duration, and scope of coverage are reasonably sufficient to achieve the purpose of the category of service.[4] Further, federal regulations explicitly prohibit states from using a recipient's diagnosis, type of illness, or condition as the basis for arbitrarily limiting or denying coverage.[5] Section 1557 of the Affordable Care Act also prohibits

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[1] 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(1)-(5), (17), & (21); 42 C.F.R. § 440.210; CMS, *State Medicaid Manual* § 4130 (mandatory services); *see also* 42 U.S.C. § 1396d(a)(6)-(29) (optional services).

[2] 42 U.S.C. § 1396d(a)(1); 42 C.F.R. § 440.2(a) (defining inpatient); *id.* § 440.10 (defining inpatient hospital services); *id.* § 456.50-456.145 (prescribing requirements for utilization control of inpatient hospital services); 42 U.S.C. § 1396d(a)(2)(A); 42 C.F.R. § 440.2(a) (defining outpatient); *id.* § 440.20(a) (defining outpatient hospital service); 42 U.S.C. § 1396d(a)(5)(A). Services may be furnished by a physician in an office, the patient's home, a hospital, a nursing facility, or elsewhere. 42 C.F.R. § 440.50(a).

[3] 42 U.S.C. § 1396a(a)(17); 42 C.F.R. § 440.230(d).

[4] *Id.* at. § 440.230(b).

[5] *Id.* at § 440.230(c).

discrimination on the basis of sex, which the Department of Health and Services (HHS) Office of Civil Rights agrees protects against discrimination based on gender identity or failure to conform to stereotypical notions of masculinity and femininity.[6]

In light of all of these requirements, a state may not, consistent with federal law, exclude under its Medicaid program a specific kind of treatment that falls within either a mandatory category or an optional category the states chooses to provide, absent clear evidence that a treatment is experimental. This applies equally to transgender health treatment as to any other type of medical treatment.

Specifically, for many transgender individuals, gender identity is closely connected with the medical condition known as gender dysphoria. Prevailing standards of medical care recognize that gender transition-related care, including mental health services, hormone therapy, and surgery, is non-experimental, non-cosmetic, and constitutes good medical practice that is "effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria."[7] According to the American Medical Association (AMA), "an established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with [gender dysphoria]."[8] Created in 1979, the World Professional Association for Transgender Health (WPATH) is an international multidisciplinary professional association that establishes standards of care to ensure and legitimize access to the psychiatric, psychological, medical, and surgical treatment and management of gender dysphoria. WPATH has "expressed its conviction" that "medical procedures attendant to sex reassignment are not 'cosmetic' or 'elective' . . . , but are understood to be medically necessary for the treatment of the diagnosed condition."[9]

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[6] Letter from Director, U.S. Office for Civil Rights, to Federal Policy Director, Nat'l Ctr. for Lesbian Rights, OCR Transaction No. 12-000800 (July 12, 2012).

[7] World Prof'l Ass'n for Transgender Health, *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide* (2008), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947.

[8] AMA, *Removing Financial Barriers to Care for Transgender Patients*, Policy No. H-185.950 (adopted 2008). Gender dysphoria now replaces the diagnostic name "gender identity disorder." *See* Am. Psychiatric Ass'n, *Gender Dysphoria* (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf.

[9] World Prof'l Ass'n for Transgender Health, *supra* note 7; *see also* Council of Representatives, Am. Psychol. Ass'n, *Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination* (adopted 2008), http://www.apa.org/news/press/releases/2008/08/gender-variant.aspx ("oppos[ing] all public and private discrimination on the basis of actual or perceived gender identity and expression . . . urg[ing] the repeal of discriminatory laws and policies . . . call[ing] upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals . . .encourag[ing] psychologists

Further, many of the treatments that are necessary for transition-related treatment are already covered in state Medicaid programs for individuals who are not transgender. For example, the hormone therapy used in gender transition is provided to patients with endocrine disorders and to women with menopausal symptoms. Similarly, transition-related surgeries use procedures that are routinely covered when provided to non-transgender people for the purposes of reconstruction, treatment of cancer, or treatment of traumatic injury. State Medicaid program rules that exclude coverage of medically necessary treatment related to gender transition are accordingly arbitrary and discriminatory and violate federal law.

Indeed, in recognition of these medical standards, professional associations urge health insurers—both private and public—to cover transgender health care services, including transition-related medical services. The AMA "supports public and private health insurance coverage for treatment of gender identity disorder."[10] The American Academy of Family Physicians similarly "endorse[s] payment by third party payors to provide transsexual care benefits for transgender patients."[11] The American College of Obstetricians and Gynecologists "urges public and private health insurance plans to cover the treatment of gender identity disorder."[12] Further, the National Association of Social Workers "supports the rights of all individuals to receive health insurance and other health coverage . . . without exclusion of services related to transgender or transsexual transition."[13]

Recognizing these standards, on May 30, 2014, the HHS Departmental Appeals Board concluded that the National Coverage Determination denying Medicare coverage of all sex reassignment surgery, on the basis of decades old studies which categorized this surgery as experimental, is not valid.[14] The Board wrote that it had "no difficulty

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to take a leadership role in working against discrimination towards transgender and gender variant individuals").

[10] AMA, *supra* note 8.

[11] Am. Acad. of Family Physicians, *Summary of Actions: 2009 Nat'l Conf. of Special Constituencies*, Res. No. 9 (2009), *reaffirming* Am. Acad. of Family Physicians, *Summary of Actions: 2007 Nat'l Conf. of Special Constituencies*, Res. No. 64 (2007).

[12] Comm. On Health Care for Underserved Women, Am. College of Obstetricians & Gynecologists, *Health Care for Transgender Individuals*, Comm. Op. No. 512 (Dec. 2011), https://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co512.pdf?dmc=1&ts=20140619T2016329808.

[13] Comm. on Lesbian, Gay, Bisexual, and Transgender Issues, Nat'l Ass'n of Social Workers, Position Statement, *Transgender and Gender Identity Issues* (2008), http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf.

[14] NCD 140.3, Transsexual Surgery, HHS, Dep't Appeals Bd., App. Div., Docket No. 14 A-13-87, Decision No. 2575 (May 30, 2014).

concluding . . . that transsexual surgery is safe and effective and not experimental."[15] Subsequently, on June 13, 2014, the Office of Personnel Management removed an exclusion of transition-related services, so that government-contracted health insurers may now cover the cost of transgender-related health care for federal employees, retirees, and their survivors.[16] Seven states (CA, CO, CT, MA, OR, VT, WA) and D.C. prohibit insurance carriers in the private market from discriminating on the basis of gender identity in benefits design and require parity in coverage for services—including mental health services, hormones, and surgeries—that are medically necessary for many transgender individuals.[17] Some states, like California, explicitly cover services in their state Medicaid programs.[18] Massachusetts and D.C. recently announced that they will cover services related to gender transition in their Medicaid programs.[19]

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[15] *Id.* at 8.

[16] U.S. Office of Personnel Mgmt, Letter No. 2014-17 (June 13, 2014), http://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-17.pdf.

[17] Cal. Dep't of Managed Health Care, Cal. Health & Human Serv. Agency, *Gender Nondiscrimination Requirements*, Letter No. 12-K (Apr. 9, 2013); Colo. Dep't of Regulatory Agencies, *Insurance Unfair Practices Act Prohibitions on Discrimination Based Upon Sexual Orientation*, Bulletin No. B-4.49 (Mar. 18, 2013); Conn. Ins. Dep't, *Gender Identity Nondiscrimination Requirements*, Bulletin No. IC-37 (Dec. 19, 2013); D.C. Dep't of Ins., Sec. & Banking, *Prohibition of Discrimination in Health Ins. Based on Gender Identity or Expression*, Bulletin No. 13-IB-01-30/15 (Feb. 27, 2014); Cmmw. Mass. Div. of Ins., *Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services*, Bulletin No. 2014-03 (June 20, 2014); Or. Ins. Div., *Application of Senate Bill 2 (2007 Legislative Session) to Gender Identity Issues in the Transaction and Regulation of Insurance in Oregon*, Bulletin No. 2012-01 (Dec. 19, 2012); Vt. Dep't of Financial Regulation, *Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care*, Bulletin No. 174 (Apr. 22, 2013); Letter from Mike Kreidler, Ins. Comm'r, Wash. Office of Ins. Comm'r to Health Ins. Carriers in Wash. (June 25, 2014), http://transgenderlawcenter.org/wp-content/uploads/2014/06/FINAL-gender-identity-discrimination-letter-to-carriers.pdf.

[18] *See e.g.*, Cal. Dep't of Health & Human Svcs., *Ensuring Access to Transgender Svcs.*, All Plan Letter No. 13-011 (Sept. 25, 2013), http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2013/APL13-011.pdf.

[19] *See* e.g., Steve LeBlanc, *Massachusetts to remove barriers to transgender related healthcare*, LGBTQNation, June 20, 2014, http://www.lgbtqnation.com/2014/06/massachusetts-to-remove-barriers-to-transgender-related-healthcare/; D.C. Dep't of Health Care Fin., *Non-discrimination in the District's State Medicaid Program Based on Gender Identity or Expression* (Feb. 27, 2014), http://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/publication/attachments/NON-DISCRIMINATION%20IN%20THE%20DISTRICT%E2%80%99S%20STATE%20MEDICAID%20PROGRAM%20BASED%20ON%20GENDER%20IDENTITY%20OR%20EXPRESSION.pdf.

Although the great weight of medical research now unequivocally establishes that hormone therapy and gender confirmation surgery are effective and medically necessary treatment for many transgender individuals, over a dozen states explicitly exclude coverage of transgender health care services from their Medicaid programs.[20] Even in states without explicit exclusions, Medicaid beneficiaries are sometimes denied coverage for transition-related services based on the erroneous basis that these services are "cosmetic" or "experimental" and therefore not medically necessary. It is clear that there is misunderstanding about the safety, effectiveness, and critical importance of this care. Guidance is needed to clarify what coverage exists (or should exist) under the Medicaid program.

We accordingly urge you to undertake the following steps:

(1) Provide up-to-date information and resources to state Medicaid agencies and their contractors explaining the current state of medical research in this area;

(2) Issue guidance clarifying that states cannot categorically exclude coverage for transgender health care services from their state Medicaid programs. CMS should make clear that, though states may establish reasonable standards for determining the extent of such coverage pursuant to 42 C.F.R. § 440.230(d), those standards must not be arbitrary or discriminatory. This means that a state cannot exclude services related to gender transition as medically unnecessary, "cosmetic," or "experimental" because, as the HHS

[20] *See*, *e.g.*, Alaska Admin. Code tit. 7, § 110.405(d)(5); Ariz. Admin. Code § R9-22-205(B)(4)(a); Haw. Admin. R.-§ 17-1737-84(22)(A); Idaho Admin. Code r. 18.01.73.021(19); Ill. Admin. Code tit. 89, § 140.6(l); 405 Ind. Admin. Code § 9-7-13(27); Iowa Admin. Code r. 441-78.1(4)(b), (d)(15); 10-144 Me. R. Ch. 101, Ch. II, § 90.07(C)(8); Md. Code Regs. § 10.09.02.05(A)(20); Mich. Dep't of Cmty. Health, *Medicaid Provider Manual* 12 (July 1, 2014), http://www.mdch.state.mi.us/dch-medicaid/manuals/MedicaidProviderManual.pdf; Minn. Stat. § 256B.0625(3a); Mo. Code Regs. Ann. tit. 22, § 10-2.060(1)(Y); 471 Neb. Admin. Code §§ 10-004.01(31), 18-003.01(30), 18-003.03; N.H. Code Admin. R. Ann. He-W 531.06(g); Nev. Dep't of Health & Human Serv., *Medicaid Serv. Manual* 603.10(3)(F)(k), https://dhcfp.nv.gov/MSM/MSM%20Chapters%207-1-14.pdf; N.Y. Comp. Codes R. & Regs. tit. 18, § 505.2(l); Or. Admin. R. 410-120-1200(2)(z); 55 Pa. Code §§ 1121.54(10), 1126.54(a)(7), 1121.59(7), 1141.59(11), 1163.59(a)(1); Tenn. Comp. R. & Regs. §§ 1200-13-13-10(3)(b)(72), (86), 1200-13-14-10(3)(b)(72); Tex. Medicaid Providers Manual § 1.8 (2012), http://www.tmhp.com/HTMLmanuals/TMPPM/2012/Vol1_01_Provider_Enrollment.03.61.html#1761537; Wis. Adm. Code Health & Family Serv. § 107.03(23)-(24); 26 Wyo Code R. § 6(h)(iv)(xix).

Departmental Appeals Board already recognized, procedures such as gender confirmation surgeries are "safe and effective and not experimental."[21]

(3) Require each state to review their current policies, laws, and state plan amendments to ensure that they comply with these requirements.

(4) Monitor compliance with the statutory and regulatory provisions that are the subject of such guidance, and provide cultural competence training to ensure all Medicaid agencies and their contractors and employees are familiar with best practices for serving transgender patients.

We are hopeful that CMS will clarify its policies as we have outlined above. We appreciate your consideration of these requests and welcome the opportunity for further discussion. If you have any questions or need any further information, please contact Dipti Singh, Staff Attorney at the National Health Law Program, singh@healthlaw.org or Jane Perkins, Legal Director at the National Health Law Program, perkins@healthlaw.org.

Sincerely,

[List of sign-on]
National Health Law Program

[21] NCD 140.3, Transsexual Surgery, HHS, Dep't Appeals Bd., App. Div., Docket No. 14 A-13-87, Decision No. 2575 (May 30, 2014).