



November 9th, 2021

Shari Maier, Rules Coordinator
Washington State Health Insurance Commissioner's Office
PO Box 40260, Olympia, WA 98504-0260
Sent via e-mail to rulescoordinator@oic.wa.gov

**Re: CR-102 - WSR 21-20-110
Implements RCW 34.05.32
The Gender Affirmative Care Act**

Dear Ms. Maier:

On behalf of the below listed organization and providers, we are submitting these comments on the CR-102 draft that was circulated to stakeholders, concerning the proposed rules to implement the Gender Affirming Treatment Act (GATA).

We applaud the Office of Insurance Commissioner's support and partnership in the development and passage of GATA and enthusiastically provide these comments to the proposed rulemaking. We look forward to future partnership with OIC on issues of GATA implementation. Our most significant concerns about this rule are as follows:

- 1. The proposed rules may create confusion about the coverage requirements for many non-surgical treatments such as hair removal, including laser hair removal, which is different than electrolysis.**
- 2. Consumers and insurers may need clarification about the restrictions around "automatic denials of coverage" and "blanket exclusions" under the sections (4)(a) and (4)(b).**
- 3. Under sections (4)(i)(c) we would like to see OIC rulemaking clarify further that the legislature intended to ban the use of "cosmetic exclusions" for a wide variety of gender affirmation surgeries, treatments, and procedures and not simply exclude the procedures and care listed in the statute.**
- 4. We encourage OIC to clarify for insurers that it is inappropriate to categorically exclude transgender people from benefits coverage for life saving gender affirming medical care based solely on body-mass index (BMI).**



Background:

The Coalition for Inclusive Healthcare is comprised of more than a dozen local, statewide, and national organizations that represent two-spirit, transgender, non-binary, and gender diverse people. Since 2014, we have worked to expand access to medically necessary gender affirming care in Washington State through advocacy, education, impact litigation, and legislation, including the 2014 Insurance Commissioner's memo on non-discrimination.

Throughout our organizations' collective experience in attempting to expand access to gender affirming care we have seen numerous examples in which insurers have interpreted guidance narrowly to exclude gender affirming care. We view this as insurance companies' exploitation and discrimination, bigotry, and transphobia. As OIC may be aware, despite clear guidance in the 2015 memo on non-discrimination in transgender healthcare, insurers repeatedly extended categorical exclusions for breast augmentation, gender affirming facial surgeries, hair removal, and other procedures which disproportionately impacted transgender women, which rendered the memo largely unhelpful in addressing the sexism and health disparities transgender women face in the insurance marketplace.

Gender Affirming Care is Lifesaving Care:

Research has repeatedly shown that gender affirming care is life saving care for transgender and non-binary Washingtonians. A meta analysis of 42 studies since 1997 found a suicide attempt rate of 28.6% among transgender and non-binary people, which is 16 times the rate among the general public¹. Unfortunately, this means that 2% of all transgender people will die by suicide². Several studies have shown that when transgender people encounter barriers in the healthcare system, from unsupportive doctors to insurance company denials for medically necessary care, they report higher rates of depression and delay future medical care.

1. The proposed rules may create confusion about the coverage requirements for many non-surgical treatments such as hair removal, including laser hair removal, which is different than electrolysis.

¹ Adams, N., Hitomi, M., & Moody, C. (2017). Varied Reports of Adult Transgender Suicidality: Synthesizing and Describing the Peer-Reviewed and Gray Literature. *Transgender Health*, 2(1), 60-75.

² Owens D, Horrocks J, and House A. Fatal and non-fatal repetition of self-harm: systematic review. *British Journal of Psychiatry*. 2002;181:193-199.



At several points in the CR-102 the rules state:

“WAC 284-43-5151 Unfair practice relating to gender affirming treatment and services.

...

(3) When prescribed as medically necessary, exclude facial feminization surgeries and other facial gender affirming treatment (such as tracheal shaves), hair electrolysis and other care (such as mastectomies, breast reductions, breast implants, or any combination of gender affirming procedures, including revisions to prior treatment) as cosmetic services.”

And also in section WAC 284-43-7080 Prohibited exclusions (4)(i)(c) the same language as above.

We suggest OIC adopt the following language instead:

“(3) When prescribed as medically necessary, exclude facial gender confirmation surgeries (such as rhinoplasty, genioplasty, blepharoplasty, cheek implants, surgical forehead or frontal sinus contouring, jaw augmentation, or tracheal shave, which may also be known as facial feminization or facial masculinization surgeries), and facial gender confirmation treatments (such as hair removal by laser, electrolysis, waxing, or other hair removal methods), as a cosmetic service.
(4) When prescribed as medically necessary, exclude other gender affirming surgical care or treatments (such as mastectomies, chest reconstruction, nipple grafts, breast reductions, breast implants or fat transfers, body contouring, or surgical implants), as a cosmetic service.
(5) When prescribed as medically necessary, exclude revisions to prior surgeries, treatments, or procedures as cosmetic services.”

First, we would like to see OIC use gender-neutral language “facial gender confirmation” vs. facial feminization as it is more accurate and avoids illegal gender-based discrimination between care provided to transgender men vs. transgender women.



Gender affirming care can be divided into three modalities and in three major anatomical regions. OIC should clarify that gender affirming care may include: surgical interventions, non-surgical treatments, and revisions to past treatment. We believe these should be broken out into each of their own bullet points: Facial Gender Affirming Care, Body Gender Affirming Care, and Primary Sex Characteristics (not addressed by this rule or law). OIC should clarify that these rules disallow “cosmetic exclusions” to the first two areas of care - and not merely limited to one anatomical region or surgical procedure.

We encourage OIC **to clarify in rules the intent of the legislation.** The wording is complicated and may be unclear to consumers and insurers. **2: Consumers and insurers may need clarification about the restrictions around “automatic denials of coverage” and “blanket exclusions” under the sections (4)(a) and (4)(b).**

The terms “automatic denials of coverage” and “blanket exclusions” are not defined in the regulation. We would like to see OIC define these terms in a definition section.

“Definitions:

“Blanket Exclusions” means any categorical policy exclusion that does not include an individualized consideration of coverage based on the medical necessity of the patient, including those that exclude procedures, surgeries, or treatment as a matter of policy in the health plan.

“Automatic denials of coverage” means any process that does not review individuals’ need for medical care and may be automated, unsupervised, or done in a manner that does not meet the requirements as laid out in WAC 284-43-3070 (1)(f), (1)(g), and (4), which requires that all denials of benefits be evaluated on a case-by-case basis by a qualified medical professional.

3. Under sections (4)(i)(c) we would like to see OIC rulemaking clarify further that the legislature intended to ban the use of “cosmetic exclusions” for a wide variety of gender affirmation surgeries, treatments, and procedures and not simply exclude the procedures and care listed in the statute.

We believe inserting the language as included in Comment 1 will have this effect.



4. We encourage OIC to clarify for insurers that it is inappropriate to categorically exclude transgender people from benefits coverage for life saving gender affirming medical care based solely on body-mass index (BMI).

OIC should use this rulemaking opportunity to clarify for insurers that it is inappropriate to categorically exclude transgender people from coverage for life saving gender affirming medical care based solely on body-mass index (BMI), an unscientific measurement. In the decade since OIC issued its letter to insurers, our organizations have noted new “BMI exclusions” appearing in gender dysphoria treatment policies. These exclusions pose a significant barrier to accessing insurance coverage for transgender people. We believe these new categorical exclusions represent illegal disability discrimination and gender identity discrimination. Through the creation of new exclusionary criteria, similar to the “cosmetic bans” BMI exclusions have the effect of making these rules null for a large number of transgender people and extend bans on coverage for care. We suggest a new line in WAC 284-43-7080 (4)(iii)(d).

WAC 284-43-7080 Prohibited exclusions

- (4)** When a treatment or service is gender affirming treatment, as defined in RCW 48.43.0128, a health carrier may not:
 - (iii) Prescribed in accordance with accepted standards of care; or
 - (d) apply blanket exclusions related to body mass index (BMI);**

We appreciate the opportunity to provide public comments and questions on the CR-102 and are happy to answer any questions that OIC might have as you move forward to adopt a final rule. We recognize that adopting these changes may require an additional public hearing and delay the timeline slightly and are appreciative of the diligent work that OIC has put into this process to make these rules.

Sincerely,

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Gender Justice League

Catherine West,
Staff Attorney,
Legal Voice

Mattie Mooney
Trans Women of Color
Solidarity Network

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