OFFICE of the INSURANCE COMMISSIONER
WASHINGTON STATE

Mike Kreidler- Insurance commissioner

As required by

The Washington State Administrative Procedures Act

Chapter 34.05 RCW

Matter No. **R 2021-14**

CONCISE EXPLANATORY STATEMENT; RESPONSIVENESS SUMMARY; RULE DEVELOPMENT PROCESS; AND IMPLEMENTATION PLAN

Relating to the adoption of

Health Insurance Discrimination and Gender Affirming Treatment

November 24, 2021

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Section 1: Introduction

Revised Code of Washington (RCW) 34.05.325 (6) requires the Office of Insurance Commissioner (OIC) to prepare a "concise explanatory statement" (CES) prior to filing a rule for permanent adoption. The CES shall:

1. Identify the Commissioner's reasons for adopting the rule;
2. Describe differences between the proposed rule and the final rule (other than editing changes) and the reasons for the differences;
3. Summarize and respond to all comments received regarding the proposed rule during the official public comment period, indicating whether or not the comment resulted in a change to the final rule, or the Commissioner's reasoning in not incorporating the change requested by the comment; and
4. Be distributed to all persons who commented on the rule during the official public comment period and to any person who requests it.

Section 2: Reasons for Adopting the Rule

Second Substitute Senate Bill 5313 recently passed and was signed into law (Chapter 280, Laws of 2021). The OIC needs to make applicable updates to the existing rules in order for them to align with the legislation's requirements.

Section 3: Rule Development Process

The OIC filed a preproposal statement of inquiry (CR-101) to begin formal rulemaking on July 7, 2021. The CR-101 comment period was open until August 15, 2021.

The OIC released the stakeholder draft on August 20, 2021, and held a stakeholder meeting on September 2, 2021.

On October 4, 2021, the OIC filed a CR-102, and the public hearing was scheduled for November 9, 2021.

The OIC held the public hearing on November 9, 2021. Comments on the CR-102 were also due on November 9, 2021.

Section 4: Differences Between Proposed and Final Rule

The general subject matter of the adopted rule remains the same as the proposed rule. However, references to "facial feminization surgeries" were removed, while the wording "facial gender affirming treatment (such as tracheal shaves)" was retained. And references to "hair electrolysis" were replaced with "hair removal procedures."

Section 5: Responsiveness Summary

The OIC received comments and suggestions regarding this rule. The following information contains a summary of the comments, the OIC's response to the comments, and information about whether the OIC incorporated changes based on the comments.

Comments were received under the proposed rule for R2021-14 (Health Insurance Discrimination and Gender Affirming Treatment) relating to proposed amendments to WAC 284-170-280. However, proposed amendments to WAC 284-170-280 were filed with the proposed rule for R2021-16 (Implementation of E2SHB 1477 and consolidated health care rulemaking) in order to consolidate rulemaking efforts. Therefore, comments and responses relating to all amendments to WAC 284-170-280 will be addressed in the CES for R2021-16.

The OIC received comments from:

- Alex Witt
- Allison McNulty
- American Society of Plastic Surgeons
- Association of Washington Healthcare Plans
- Autumn Lovewell
- Brendan Dieffenbach
- Cambia Health Solutions
- Carolyn Fan
- Corinne Heinen
- Country Doctor Community Health Centers
- EJ Dusic, Robby Hardy, Kat Taylor, Karissa Yamaguchi, Jennifer Perkins, and Arielle Howell
- Gender Justice League
- Dana Savage
- Jay Conrad
- Jessi Murray
- JT Ramsey
- Kaiser Permanente
- Lavendar Rights Project
- Legal Voice
- Molina Healthcare
- Non-Binary, Gender Non-Conforming, and Allies Student Association of Seattle University School of Law
- PacificSource Health Plans
- Paula Weigand
- Providence Health Plan
- QLaw Bar Association of Washington
- Sangyoon (Sophia) Lee

- Sarah Bollard
- Sept Gernez
- Trans Women of Color Solidarity Network

Stakeholder Comments to the CR-101, stakeholder drafts and CR-102

Comment	Response
We are interested in the opportunity to participate in this rulemaking process.	The Commissioner appreciates your interest in this process.
WAC 284-170-260(5)(g) (Provider directories): • Carriers generally contract within scope of practice, rather than at the service-level, and do not specifically contract with providers to perform gender affirming services. • There isn't an equivalent requirement for providers to notify carriers that they perform gender affirming treatment. • Providers don't voluntarily offer this specific information. • Some carriers allow providers to self-report a LGBTQ+ care area of interest or focus, and when it is provided, include that in their provider directory listing. • Carriers are concerned about accurately reflecting provider data regarding gender affirming treatment. • If the data is incomplete, that may be more frustrating to insureds. Can carriers use OON if not adequate? • Adding any new fields of information will require physicians and health care providers to report new data elements and carriers to make provider directory programming changes, both of which will take time. • This requirement undermines a carrier's approach of assuming that, if a service is within the scope of a provider's license, the provider will deliver it in a non-discriminatory manner. • If a provider declines to answer or states they will not provide those services, is a carrier to note that in the directory? Or is the carrier then obligated to refuse to contract with the provider? • There is a difference between those programs or providers providing a holistic, broad based plan of gender affirming treatment that may include referrals to specialists, and care management coordination for surgical, hormone replacement and counseling services related to gender affirmation, and a provider by provider determination of whether they have expertise in or would perform services that could be part of a gender affirming treatment program. Recommendations: ○ Remove the language in subsection (5)(g): ▪ and, instead, require carriers to provide assistance to any enrollee who is unable to locate a gender affirming treatment provider (we are supportive of sharing as much information as possible with enrollees about accessing in-network care, and many member plans offer this level of support already); or ▪ until there is a reciprocal requirement for providers to communicate this	The Commissioner has removed proposed sub-division (g) and added sub-section (10), which requires directories to indicate that the carrier will identify applicable providers if an enrollee is unable to locate one.

information to their contracted health plans. ○ Delete "If a provider offers gender affirming treatment, identify in the directory that the provider is contracted to deliver gender affirming treatment and what gender affirming health care services the provider offers." ○ Add language that provides a compliance date at least 1 year from the effective date of the adopted regulation to allow time to complete the data collection and programming work. ○ Eliminate the requirement or refine it for clarity. ○ Require that carriers indicate generally, not at the service-level, which providers offer gender affirming services, in addition to the opportunity for further assistance in connecting members to specific providers through case management.	
We request that if the committee removes language from the rules at the behest of carriers who believe that they will be unable to comply with the draft rules' requirement for carriers to identify providers who offer gender affirming treatment, care, or services, and of which type(s), that the committee consider alternative methods for making this information available to the transgender and non-binary persons seeking gender affirming care.	The Commissioner has retained the requirement under WAC 284-170-260(10).
WAC 284-170-260 (3): Both uses of the word "enrollee's" should not be possessive and should not have an apostrophe.	The Commissioner has made these changes.
WAC 284-43-3070(2)(f): • We are concerned use of the word "sufficient" could be interpreted to go beyond the mandatory experience prescribing or delivering gender affirming treatment 2SSB 5313 requires. • "[S]ufficient experience" is a subjective term and could lead to inconsistent enforcement. It is unclear what additional information carriers would provide about the qualifications of reviewers. Gender affirming treatment should follow the same standard as in (8), which already provides a mechanism for carriers to provide such information for reviewers of any medical service. • Some of the language drafted in this subsection may be redundant and should be revised for clarity and to better align with the underlying statutory language in RCW 48.43.01289(3)(c). • The statute does not establish a new notice or "sufficient" experience requirement. • We recommend deleting "and provide information to confirm that the reviewing provider has sufficient experience prescribing or delivering gender affirming treatment."	The Commissioner has replaced "sufficient experience" with "clinically appropriate expertise."
WAC 284-43-3070(2)(g): • Carriers will need additional time to program updates to adverse benefit determination notifications. • We request at least 90 days following the rule's effective date to make these changes.	The Commissioner has extended the effective date for the inclusion of this statement in adverse benefit determination notifications.
WAC 284-43-3070(2)(g): • This appears to add a new requirement to all adverse benefit determinations, not just gender affirming treatment related notifications. SSB 5313 was specific to gender affirming treatment and did not contemplate	The Commissioner has retained this requirement in order to ensure equity in the level of transparency and information provided in notices

changes to the entire adverse benefit determination process. • We request that subsection (2)(g) be removed.	regarding all types of services.
WAC 284-43-3070 (2)(g): There is already an existing requirement in WAC 284-43-3070(7) that provides enrollees the right to request information regarding the qualifications of the individuals whose advice was obtained in connection with the adverse benefit determination.	The existing language in WAC 284-43-3070(7) provides enrollees the right to request this information. The new language requires that a statement regarding this right be included in the notice.
• WAC 284-43-5151 and WAC 284-43-7080: These sections restate the statute but do not provide any implementation direction. We suggest deleting these changes unnecessarily duplicative of the existing requirement set forth in RCW 48.43.0128. • The draft regulation incorporates and restates many portions of the underlying law rather than stating a simple requirement that carriers must comply with the provisions of RCW 48.XX. Reconsider how much of the statute needs to be restated in the regulation. By using the citation approach, the regulation is simplified and provides an additional layer of detail about how carriers comply with the requirement. This approach also reduces the need for rulemaking if the statute changes in the future.	The Commissioner appreciates the comments but has elected to leave the language, in order to help ensure clarity within the rules and compliance with these requirements.
WAC 284-43-5940: • RCW 48.43.0128(3) places gender affirming treatment nondiscrimination requirements on any health plan issued or renewed on or after January 1, 2022. The definition of "health plan" in RCW 48.43.005 excludes short-term limited duration (STLD) medical plans and student-only health plans. The proposed wording of this WAC section may unintentionally expand the requirement to include those types of plans. ○ We recommend clarifying the language in this section or placing the requirements in a different section to avoid broadening the applicability beyond that of 2SSB 5313. ○ If the OIC intends to keep the gender affirming treatment requirements within this section of WAC and apply them to STLD medical plans, we ask for clarification regarding how 2SSB 5313 applies to STLD medical plans and recommend additional language clarifying that 2SSB 5313's prohibitions do not restrict a STLD medical plans' ability to exclude coverage for pre-existing conditions. We are concerned the language as currently drafted could be interpreted to mean STLD medical plans could not consider a diagnosis related to gender affirming treatment as a pre-existing condition.	The Commissioner declines the request to revise the proposed rules as suggested. The existing rules already more generally address nondiscrimination for all of these types of plans. The added language is intended to clarify the requirements and help avoid noncompliance. Nothing in the proposed rules indicates that the rules regarding pre-existing condition exclusions for STLD have changed.
WAC 284-43-5940: • The amendment references RCW 49.60.040 for the definition of "gender expression or identify." However, that statute does not define gender expression or identify, but instead provides a description of it as part of the definition of sexual orientation. • We suggest adding (27) after the reference to RCW 49.60.040 or, in the alternative, use the language from RCW 49.60.040 (27) itself in the WAC and delete the non-specific reference to RCW 49.60.040.	Under RCW 49.60.040, "gender expression or identify" is defined within the definition of "sexual orientation." In order to avoid further rulemaking due to future changes in the wording or numbering under RCW 49.60.040, the Commissioner has elected to retain the reference as proposed.
• The proposed rules may create confusion about the coverage requirements	The Commissioner notes that the

for many non-surgical treatments such as hair removal, including laser hair removal, which is different than electrolysis. We suggest replacing "(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" with: "(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 graphs, 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." • 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. • 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 respectfully request that the committee expand the language used in the rules to be as gender inclusive as possible (e.g.: changing "facial feminization surgery" to "gender affirming facial surgery") so as to provide clear coverage for all genders of persons seeking affirming care in a variety of manners. • We seek for the committee to explicitly emphasize that the examples given of gender affirming care within the rules is a non-exhaustive list, and that known or new gender affirming care options which are not specifically stated in the rules must likewise be subject to the same processes as those listed.	proposed rules already indicate that these requirements apply to gender affirming treatment as defined in RCW 48.43.0128. That definition is quite broad and encompasses all of the types of services specified in the comments. In the interest of keeping the references to services inclusive and as broad as possible, the Commissioner will remove the term "facial feminization surgeries," while leaving "facial gender affirming treatment (such as tracheal shaves)," and replace "hair electrolysis" with "hair removal procedures."
We believe it is important to explicitly include coverage of all facial gender affirming surgeries and revisions of all gender-affirming surgeries as services that cannot be categorically excluded.	The Commissioner notes that the proposed rules already specify that gender affirming treatment, as defined in RCW 48.43.0128, cannot have categorical exclusions applied. That definition is quite broad and encompasses all of these types of

	services.
Most of the medical procedures that transgender people have to go through fall under these 3 categories. 1. Hormone Replacement Therapy, 2. Surgery of Primary Sex Characteristics, 3. Secondary Sex Characteristics. Most of these procedures, insurance companies consider to be cosmetic. These are not only medically necessary, but also life-saving, as they help make it possible for transgender people to not have to go through society as second class citizens, which can result in major mental, physical and societal harm.	The Commissioner appreciates the comments.
We would like to see OIC define these terms in a definition section. "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 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.	The Commissioner appreciates the suggestion but declines this request. These terms apply to other sections of the WAC, so defining them is outside the scope of this rulemaking, which is focused specifically on gender affirming treatment.
• 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). 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); • It should be up to such patients to decide and consent in such circumstances. It should not be up to the provider.	The Commissioner notes that the proposed rules already indicate that coverage of gender affirming treatment cannot be denied or limited if it is deemed medically necessary and prescribed in accordance with accepted standards of care. The Commissioner does not have authority over providers.
To what does the April 1, 2022, effective date apply?	The April 1, 2022, effective date applies only to WAC 284-43-3070(2)(f), which is the only place it is referenced.
Gender affirming care is denied as frequently as possible by my insurance as "cosmetic." Having these procedures covered under insurance would be world changing for me.	The Commissioner appreciates the comments.
The burden on the transgender and non-binary community to self-educate, find resources, and to invest in the understanding of complex laws is a taxing and endless endeavor. We seek that the committee allocate resources to the education of the community regarding the final rules so as to ease this burden.	The OIC's Consumer Advocacy Program (CAP) will be creating consumer education information that will be posted on the OIC's website. CAP may also be contacted at (800) 562-6900 for assistance.
Transgender and gender nonconforming individuals deserve gender affirming care. They are less likely to be able to afford it, which put people at risk of sub-par care and potentially dangerous health practices.	The Commissioner appreciates the comments.
Gender affirming care is life saving and so vital for transgender people who	The Commissioner appreciates the

want it. I fully support insurance coverage of gender affirming care.	comments.
As much clarity as possible would be appreciated. How can people bring issues of inappropriate denials, etc. to the Insurance Commissioner's attention?	Inappropriate denials and similar issues should first go through an appeal process with the carrier. If the issue is not appropriately resolved through that process, individuals can request review by an Independent Review Organization. And the Commissioner can be made aware of such unresolved issues via complaints submitted through the OIC's Consumer Advocacy Program, via (800) 562-6900 or https://www.insurance.wa.gov/file-complaint-or-check-your-complaint-status.

Section 6: Implementation Plan

A. Implementation and enforcement of the rule.

The OIC intends to implement the rule through the Rates, Forms and Provider Networks Division and enforce the rule through the Legal Affairs Division. OIC staff will continue to work with the carriers and interested parties with the requirements of the rule.

B. How the Agency intends to inform and educate affected persons about the rule.

After the agency files the permanent rule and adopts it with the Office of the Code Reviser:

- Policy and Legislation Division staff will distribute the final rule and the Concise Explanatory Statement (CES) to all interested parties by posting and sharing the documents through the OIC's standard rule making listserv.
- The Rules Coordinator will post the CR-103 documents on the OIC's website.
- OIC staff will address questions as follows:

Type of Inquiry	Division
Consumer assistance	Consumer Protection
Rule content	Policy and Legislation
Authority for rules	Policy and Legislation
Enforcement of rule	Legal Affairs

Market Compliance	Rates, Forms and Provider Networks; Company Supervision

C. How the Agency intends to promote and assist voluntary compliance for this rule.

- Policy and Legislation Division staff will distribute the final rule and the Concise Explanatory Statement (CES) to all interested parties by posting and sharing the documents through the OIC's standard rule making listserv.
- The Rules Coordinator will post the CR-103 documents on the OIC's website.

D. How the Agency intends to evaluate whether the rule achieves the purpose for which it was adopted.

The Rates, Forms and Provider Networks Division will solicit and monitor carrier submissions to ensure all carriers have met the reporting and provider directory requirements as applicable.

Appendix A

CR-102 Hearing Summary

Summarizing Memorandum

To: Mike Kreidler
Insurance Commissioner

From: Shari Maier
Presiding Official, Hearing on Rule-making

Matter No. R 2021-14

Topic of Rule-making: Health Insurance Discrimination and Gender Affirming Treatment

This memorandum summarizes the hearing on the above-named rule making, held on November 9, 2021, in Olympia, Washington via a virtual meeting over which I presided in your stead.

The hearing began at 3:04 p.m.

The following agency personnel were also present: Jeanette Plitt, Jennifer Kreitler, Sharon Daniel, Timothy Ascher, Kara Klotz, Ariele Page Landstrom, and Jesse Wolff

In attendance:
Catherine West
EJ Dusic
Barbara Evans
Amy Hochhalter
Michelle Baird
Jennifer Kaczor
Chris Kunka
Elizabeth Abekah
Merlene Converse
William Hogland
Jane Douthit
Sarah Pettey
Amy Do
Billie Dickinson
Frankie Kaiser
Katherine Therrien
Laurel Silveri

Adrienne Joyce
Jay Conrad
Danni Askini
Melanie Anderson
Tonne Hanna
Jennifer Kaczor
Thalia Cronin
Meg Jones
Mario Villanueva
Colton Erickson
Lei Villanueva
Arielle Howell
Mary Tedders-Young
Jordan Pritzker
Jennifer Perkins
Sean Johnson
Corinne Heinen
Shelby Wiedmann
Lannette Sargent

Contents of the presentations made at hearing:

Dani Askini, representing the Gender Justice League, testified that they are in favor of the rules with recommendations and will submit written comments jointly with the Trans Women of Color Solidarity Network, Legal Voice and QLaw Bar Association of Washington. Their suggestions include: 1) breaking out the services into three bullet points in two different WACs, to help avoid confusion regarding coverage; 2) explain what blanket exclusions and automatic denials are, since consumers are not clear what those mean; 3) clarify that the legislature intended to ban cosmetic exclusions for a wide variety of services, not just the examples listed in the bill, since the OIC has investigated previous issues of narrow interpretations when examples are given; and 4) clarify carriers can't exclude coverage for these services based solely on arbitrary BMI limits, since this is not addressed in the medical literature or standards of care. They also requested clarification regarding which parts of the proposed rules have an implementation date of 1/1/22 versus 4/1/22.

Jay Conrad testified on behalf of themselves that they are in favor of the rules. They suggested that the language of the rules be made more inclusive for non-binary individuals, such as using "gender affirming facial surgery" instead of "facial feminization." They shared that they have Apple Health coverage, which initially blocked their prescription request since it did not align with the standard amount, so it took an extra 3.5 weeks for them to get their prescription. They also noted that the services listed in the proposed rules is not exhaustive, so they suggested clarifying that known or new gender affirming care services not listed

would be covered under these rules. They also noted there is a low coverage amount for chest reconstruction under Apple Health and advocated for the OIC to consider "the impact of low-income trans persons by raising the bar of what is covered."

Catherine West, representing Legal Voice, testified that they feel the rules are very good but could be even better with a few changes. They noted that barriers to gender affirming care can lead to lost lives. They stated they would like to see a couple of terms explicitly defined, since those are the crux of the issues. For "blanket exclusions," they suggested that the definition indicates this means any categorical policy that does not offer an individualized consideration of coverage based on the medical necessity of the patient. For "automatic denials," they suggested those could be defined as any process that does not review individual's need for care, that may be automated, unsupervised or done in a manner that does not meet WAC 284-43-3070. And they suggested requiring that all coverage requests be reviewed on a case-by-case basis by a qualified medical professional. They stated that it is important to clarify that all cosmetic exclusions are banned, not just those specified in the statute. They also stated that, if the patient's body mass index (BMI) exceeds what may be considered appropriate for a certain surgery, that is a decision the patient should make via informed consent, not that the provider should dictate.

Corinne Heinen, MD, testified that their clinic is seeing more people seeking facial feminization and would appreciate as much clarity as possible regarding the latitude for insurance companies to cover services. They shared examples of issues they have experienced with insurance companies and Apple Health refusing to cover services, even if they are standard. They stated that they would love a clear-cut mechanism for directly sending such issues to the OIC to make sure the insurance companies know they can't do such things without immediate attention for such activities.

The hearing was adjourned.

SIGNED this 24th day of November 2021

s/
Shari Maier, Presiding Official