

To: Silver State Health Insurance Exchange and Plan Certification and Management Advisory Committee

RE: Preventing Discrimination in Nevada's Essential Health Benefits

Date: September 20, 2012

We are pleased to have the opportunity to comment on the design of Nevada's essential health benefits (EHB) package. We wish to draw the Exchange's attention to the need for an EHB standard that does not promote arbitrary discrimination against any condition or class of insured individuals and that ensures parity in coverage for medically necessary essential benefits across the ten statutory categories of EHB coverage. In particular, we encourage the Exchange to ensure Nevada's EHB benchmark does not discriminate against transgender Nevadans by incorporating arbitrary coverage exclusions specifically targeting the transgender population.

Transgender people face significant health and health care access disparities

Sources such as the Institute of Medicine,ⁱ Healthy People 2020,ⁱⁱ and the *National Healthcare Disparities Report* from the Agency for Healthcare Research and Quality (AHRQ)ⁱⁱⁱ report that transgender people, particularly transgender people of color, are more likely than the general U.S. population to be uninsured and face significant health and health care access disparities. These disparities include higher rates of conditions such as HIV/AIDS, substance use, and mental health concerns such as depression, anxiety, and suicide, as well as obstructed access to urgent and routine medical care. According to the AHRQ report, which cites data from a national study of more than 6,400 transgender individuals, approximately half of transgender respondents had postponed medically necessary care for financial reasons.^{iv} Insurance played a significant role in postponement of care: 86 percent of those with no insurance postponed care when sick or injured because of inability to afford it, compared to 46 percent of those with public coverage and 37 percent of those with private insurance.^v

Insurance discrimination against transgender people is rampant

These gaps in insurance coverage and financial resources for accessing care are linked to a range of discriminatory practices that insurance carriers routinely employ against transgender consumers. These practices include but are not limited to:

- refusing to cover medically necessary treatments, including gender-specific treatments such as pap smears or prostate examinations, that are routinely covered for nontransgender people; and
- refusing to cover treatments related to gender transition even when the same treatments are covered for other conditions.

Insurance discrimination against transgender people is captured most clearly in transgender-specific exclusions: Many health insurance plans specifically target the transgender population for denial of coverage provided to other consumers. In some instances these exclusions apply only to surgical treatments while permitting coverage of mental health services and hormone therapy. In the majority of cases, however, the exclusions are sweeping—excluding, for example, coverage of any “services, drugs, or supplies related to sex transformation.”^{vi}

Insurers frequently expand such exclusions in practice to deny transgender people coverage for basic services that clearly fall within the EHB categories outlined in Section 1302 of the Affordable Care Act (ACA), such as prescription drugs, mental health services, and preventive and wellness services. For example, a transgender woman in New Jersey was denied coverage for a mammogram on the basis that it fell under her plan's sweeping exclusion for all treatments "related to changing sex." After a two-year appeal process and intervention from the Transgender Legal Defense & Education Fund, the carrier reversed its position and agreed that the exclusion had unfairly prevented her from receiving medically necessary care.^{vii}

The trend of reversing insurance discrimination against transgender people is growing. An increasing number of insurers are offering plans to large employers that do not include discriminatory exclusions targeting transgender individuals, and these employers have experienced minimal or no premium increases as a result.^{viii} Currently, over 200 Fortune 1000 employers offer equal coverage for their transgender employees.^{ix}

Mirroring the experience of these employers, the California Department of Insurance released an economic impact assessment in April 2012 comparing the costs and benefits of a California law expressly prohibiting discrimination in coverage for transgender people. Based on a research review and actuarial study, the department concluded, "The benefits of eliminating discrimination far exceed the insignificant costs." The assessment found an "immaterial" impact on premium costs, coupled with improved outcomes for some of the most significant health disparities facing the transgender population, including reduced suicide risk, lower rates of substance abuse, improved mental health outcomes, and increased adherence to HIV treatment regimens.^x

Despite these advances, a review of the proposed benchmark plans for Nevada indicates that all of the potential benchmark plans include transgender-specific exclusions.^{xi} As part of ensuring that all Nevadans have equal access to the essential health benefits they need to stay healthy, the Exchange must affirm that the EHB standard incorporates a fundamental principle of nondiscriminatory access to essential benefits for every eligible individual, including transgender people.

There are numerous sources of legal authority for instituting nondiscrimination protections for transgender people in the post-ACA insurance market, and specifically with regard to Nevada's EHB standard. As we discuss in detail below, the Exchange should draw on these sources to recommend a prohibition on arbitrary condition-based exclusions, including transgender-specific exclusions, in the EHB benchmark and plans based on the EHB standard. Otherwise, these plans will continue to unfairly discriminate against transgender consumers and will likely be found to violate federal and state laws establishing protections from discrimination on bases such as sex, gender identity, and disability.

Both the Affordable Care Act and Nevada state law support equal treatment for transgender people

To promote equitable access to comprehensive, affordable coverage, the Affordable Care Act builds on Nevada law in establishing certain requirements regarding the development of the EHB package.

i. Consideration of diverse populations: Affordable Care Act §1302

ACA §1302 requires consideration of "diverse segments of the population" in the design of the EHB standard. This provision is intended to help fulfill the Affordable Care Act's goals of reducing health disparities and expanding access to adequate insurance coverage, especially for populations that prevailing practices in insurance markets frequently marginalize. The Exchange's Plan Certification & Management Advisory Committee has also identified protecting vulnerable and underserved populations from harmful barriers to coverage as one of the proposed decision-making criteria to guide recommendations as they are being developed. As discussed above,

transgender people experience significant health disparities and have documented difficulties in accessing both insurance coverage and health care services and should thus be considered along with other diverse segments of the population.

ii. Nondiscrimination on the basis of sex and gender identity: ACA §1557 and federal regulations regarding the establishment of exchanges and standards for eligibility and enrollment in qualified health plans

ACA §1557(a) prohibits discrimination in any health program receiving federal funds or by any entity established under Title I of the Affordable Care Act, including the exchanges. This provision references the protections of several federal civil rights laws, including Title IX of the Education Amendments of 1972. Through this law, §1557 incorporates nondiscrimination protections on the basis of sex. Recent interpretations by federal courts and executive agencies indicate that such sex-based protections cover transgender people through an interpretation of the term “sex” that includes gender identity and nonconformity with sex stereotypes.^{xii} In particular, the U.S. Equal Employment Opportunity Commission recently issued a formal ruling that gender identity discrimination is *per se* sex discrimination.^{xiii}

Further, regulations issued by the Department of Health and Human Services in March 2012 explicitly prohibit discrimination on the basis of gender identity in all activities of the exchange,^{xiv} as well as the activities of qualified health plan (QHP) issuers with regard to their QHPs.^{xv} Accordingly, QHP issuers are prohibited from offering QHPs that discriminate on the basis of gender identity by denying transgender consumers coverage for services that are covered for nontransgender consumers. To guard against adverse selection against QHPs and the exchange itself, the state should apply these nondiscrimination protections to any plan required to cover the essential benefits, including those in the individual and small group markets outside the exchange. A key first step in effectuating these protections and avoiding potential liability for discrimination on the basis of sex or gender identity is ensuring that Nevada’s EHB benchmark does not contain transgender-specific exclusions.

iii. Prohibition on arbitrary sex-based discrimination in insurance: NAC 686A.130

Nevada insurance regulations prohibit insurers from making arbitrary distinctions based on sex in the availability of insurance or in the “amount of benefits payable, conditions or types of coverage.” As discussed above, recent interpretations of sex nondiscrimination laws have concluded that such protections likewise prohibit discrimination on the basis of gender identity. Accordingly, this rule prohibits discrimination in coverage and benefits on the basis of gender identity, including transgender-specific exclusions of benefits covered for nontransgender enrollees.

iv. Prohibition on gender identity discrimination in public accommodations, including insurance: Nev. Rev. Stat. Ann. §651.070

Nevada law prohibits discrimination on the basis of gender identity in access to publicly offered goods and services.^{xvi} Insurers fall under this statute because they sell to the larger Nevada public, as well as provide a product all Nevadans will be required to have as of 2014, under the Affordable Care Act. Similar statutes in other states have been interpreted as prohibiting insurers from using coverage exclusions targeting transgender enrollees where the excluded services are provided to nontransgender people.^{xvii} Likewise, Nevada’s prohibition on refusing to provide equal enjoyment of goods and services on the basis of gender identity requires banning the use of transgender-specific exclusions in EHB-based plans, including those sold through the Exchange.

v. Nondiscrimination on the basis of disability: Affordable Care Act §1302

ACA §1302 prohibits EHB package designs that discriminate against individuals on the basis of factors such as disability. Though the statute directs this requirement at the Secretary of Health and Human Services, any scope

and duration limits included in state-designated essential benefits packages will be subject to review by the Department of Health and Human Services, which effectively extends this requirement to the states as well.^{xviii}

Neither the Affordable Care Act nor any Nevada law excludes Gender Identity Disorder (GID) or related conditions from the term “disability.” Courts in other states with statutes that likewise do not contain an exception or exclusion clause have held that GID and related conditions fall under statutory bans on discrimination on the basis of disability.^{xix}

Moreover, arbitrary condition-based exclusions such as those targeting transgender people represent exactly the kind of discriminatory barriers to coverage and care that the ACA was designed to eliminate. The 2011 Institute of Medicine report on the essential benefits clarifies that Congress intended “to ensure that insurers do not make arbitrary and discriminatory decisions based on certain characteristics of people rather than assessing the individuality of each case when making medical necessity decisions and applying clinical policies.”^{xx} Fully implementing the law’s nondiscrimination mandates thus requires reasonable restrictions on condition-based exclusions in the context of the essential benefits. Accordingly, the Exchange should not only remove transgender-specific exclusions from Nevada’s selected EHB benchmark, but should also recommend a prohibition on any such arbitrary condition-based exclusions in plans subsequently based on that benchmark, including those sold through the exchange and those in the individual and small-group markets.

Removing transgender exclusions from Nevada’s EHB benchmark and prohibiting the use of these exclusions in plans based on the EHB standard does not mandate coverage for a certain set of procedures. Rather, it requires that coverage decisions be based on medically and actuarially sound principles instead of unfair and arbitrary bias against transgender individuals as a class. Moreover, prohibiting arbitrary condition-based exclusions, including transgender exclusions, in EHB standards still permits insurers to impose limitations on coverage for specific services on the basis of criteria such as medical necessity and cost-effectiveness.

Summary of recommendations

To fulfill the coverage and equity aims of the Affordable Care Act, to ensure compliance with federal and state nondiscrimination mandates, and to provide all Nevadans with a minimum standard of comprehensive, affordable coverage, the Exchange should take the following actions:

1. Apply the federally mandated exchange nondiscrimination protections to any plan required to cover the essential benefits, including those in the individual and small group markets outside the exchange;
2. Eliminate condition-based exclusions that lack a sound clinical basis, including exclusions targeting the transgender population, from the state’s selected EHB benchmark plan; and
3. Prohibit any such arbitrary condition-based exclusions, including those that unfairly discriminate against transgender people, in plans based on the EHB benchmark. The rule that we propose could be drafted along these lines:

Limitation on condition-based exclusions.

A health plan required to cover the essential health benefits may not arbitrarily deny or reduce the amount, duration, or scope of an essential health benefit solely because of the diagnosis, type of illness, or condition for which such benefit is sought. This section shall not be construed to prohibit a limitation

or exclusion of coverage based on criteria of medical necessity, appropriateness, or comparative cost effectiveness.^{xxi}

We thank the Exchange for the opportunity to comment on the EHB selection process. If you have questions regarding these comments or other opportunities for ensuring health equity for LGBT Nevadans, please do not hesitate to contact Michael Ginsburg at 702-791-1965 mginsburg@planevada.org. Thank you for your consideration and your work to make possible the highest achievable standard of health for all Nevadans.

Sincerely,
The Progressive Leadership Alliance of Nevada
American Civil Liberties Union – Nevada
The Gay and Lesbian Community Center of Southern Nevada
PLAN Action Fund
Nevada Advocates for Planned Parenthood Affiliates
Nevada Immigrant Coalition
Gender Justice Nevada
Nevada Lawyers for Progressive Policy
Lydia Ball (Clean Energy Works)
Stonewall Democrats of Southern Nevada
DREAM Big Vegas
Transgender Alliance
Gay Lesbian Straight Education Network of Southern Nevada
Northern Nevada HOPES

ⁱ Institute of Medicine. 2011. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*, available at <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>

ⁱⁱ Department of Health and Human Services. 2010. *Lesbian, Gay, Bisexual, and Transgender Health*, available at <http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=25>

ⁱⁱⁱ Agency for Healthcare Research and Quality. 2012. *National Healthcare Disparities Report*, available at <http://www.ahrq.gov/qual/nhdr11/nhdr11.pdf>

^{iv} *Id.* (citing Grant, JM, Mottet LA, Tanis J, et al. 2011. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, available at http://www.thetaskforce.org/reports_and_research/ntds

^v *Id.*

^{vi} Government Employees Health Association, Inc. 2012. “Benefit Plan,” available at <http://wwdoptw.opm.gov/insure/health/planinfo/2012/brochures/71-006.pdf>

^{vii} Transgender Legal Defense & Education Fund. April 30, 2012. “Victory! Transgender Woman Wins Health Insurance Coverage for Mammogram,” available at: http://transgenderlegal.org/headline_show.php?id=382

^{viii} Human Rights Campaign Foundation. 2012. *Corporate Equality Index 2012* at 24.

^{ix} *Id.*

^x State of California Department of Insurance. 2012. *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance (File Number: REG-2011-00023)*.

^{xi} The Nevada benchmark plans identified by the Advisory Committee are as follows:

Category 1: The largest small group insurance products in Nevada:

- Health Plan of Nevada, Inc., POS C-XV
Excludes “transsexualism, psychosexual identity disorder, psychosexual dysfunction of gender dysphoria” from the

definition of mental illness. This makes it likely that treatments provided for these conditions fall under the plan's benefits exclusion for "services or supplies for which coverage is not specifically provided in [the EOC]"

- Aetna PPO \$500 80%

Excludes coverage for "any treatment, drug, service or supply related to changing sex or sexual characteristics, including: surgical procedures to alter the appearance or function of the body; hormones and hormone therapy; prosthetic devices; and medical or psychological counseling."

- Anthem EmployeeElect PPO Plan

Exclusion for "sex change operations, preparation for a sex change operation, or complications arising from a sex change operation," as well as for "services or supplies, or medications related to sex change operations, reversals of such procedures, complications of such procedures, or services received prior to any such operation."

Category 2: Any of the largest three state employee health benefit plans by enrollment.

- State of Nevada Public Employees' Benefit Program, Self Funded Consumer Driven High Deductible PPO Plan
Excludes behavioral health care related to "transsexual counseling"

Excludes "Sex Change Counseling, Therapy and Surgery: Expenses for medical, surgical or prescription drug treatment related to transsexual (sex change) procedures, the preparation for such procedures, or any complications resulting from such procedures."

- Health Plan of Nevada, State of Nevada HPN 15-0 Medical Plan

Excludes "transsexualism, psychosexual identity disorder, psychosexual dysfunction of gender dysphoria" from the definition of mental illness. This makes it likely that treatments provided for these conditions fall under the plan's benefits exclusion for "services or supplies for which coverage is not specifically provided in [the EOC]"

- Hometown Health Plan, State of Nevada 25-1500 Benefit Plan

Excludes "any procedure or treatment designed to alter physical characteristics of the member to those of the opposite sex; and any other services, treatments, drugs, or diagnostic procedures or studies related to sex transformations."

Category 3: Any of the largest three FEHBP plan options by enrollment

- Blue Cross Services Benefit Plan Standard Option

Excludes "surgeries related to sex transformation," "drugs and supplies related to sex transformation," and "services, drugs, or supplies related to sex transformation"

- Blue Basic Option

Excludes "surgeries related to sex transformation," "drugs and supplies related to sex transformation," and "services, drugs, or supplies related to sex transformation"

- GEHA Standard Option

Excludes "surgeries related to sex transformation," and "services, drugs, or supplies related to sex transformations"

Category 4: The largest insured commercial non-Medicaid HMO operating in the state:

- Health Plan of Nevada, Inc., Clark County School District, HPN 10-0 Medical Plan HCR

Excludes "transsexualism, psychosexual identity disorder, psychosexual dysfunction of gender dysphoria" from the definition of mental illness. This makes it likely that treatments provided for these conditions fall under the plan's benefits exclusion for "services or supplies for which coverage is not specifically provided in [the EOC]"

^{xii} 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)

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- ^{xiii} *Macy v. Eric Holder, Atty. General, U.S. Dept. of Justice*, EEOC Appeal No. 0120120821 (April 24, 2012).
- ^{xiv} 45 CFR 155.120
- ^{xv} 45 CFR 156.200
- ^{xvi} Nev. Rev. Stat. Ann. § 651.070
- ^{xvii} Memorandum from Teresa Miller and Jeannette Holman to Lou Savage. March 3, 2009. “Health Insurance Coverage of Transgender Related Treatment.” Oregon Department of Consumer and Business Services, Insurance Division. Available upon request.
- ^{xviii} Centers for Medicare & Medicaid Services. 2012. “Frequently Asked Questions on Essential Health Benefits Bulletin,” available at <http://cciio.cms.gov/resources/files/Files2/02172012/ehb-faq-508.pdf>
- ^{xix} *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501 (App.Div. 2001); *Lie v. Sky Publ’g Corp.*, 15 Mass. L. Rep. 412 (Mass. Super. Ct. 2002).
- ^{xx} Institute of Medicine. 2011. *Essential Health Benefits: Balancing Coverage and Cost*, 5-20.
- ^{xxi} Adapted with permission from a letter from the Leadership Conference on Civil and Human Rights to Secretary Sebelius. November 2, 2011. Available upon request.