



July 8, 2022

Agency for Health Care Administration  
2727 Mahan Drive  
Tallahassee, Florida 32308

Submitted via email to [MedicaidRuleComments@ahca.myflorida.com](mailto:MedicaidRuleComments@ahca.myflorida.com)

**Re: Proposed Rule, 59G-1.050(7), Banning Gender Affirming Care**

To Whom It May Concern:

The Florida Health Justice Project (FHJP) and the National Health Law Program (NHeLP) submit the following comments in response to the amendment to Fla. Admin. Code R. 59G-1.050(7) proposed by the Agency for Health Care Administration (AHCA), which bans all gender affirming care for Florida Medicaid beneficiaries.

FHJP is a nonprofit health advocacy organization whose mission is expanding access to healthcare with a focus on Florida's most vulnerable populations. Accordingly, we have prioritized work on behalf of Medicaid recipients whose low-income status creates significant barriers to necessary and quality care. At the core of FHJP's mission is to advance health equity and combat discrimination in healthcare.

NHeLP, founded in 1969, protects and advances health rights of low-income and underserved individuals and families. We advocate, educate and litigate at the federal and state levels to advance health and civil rights in the U.S. Our lawyers and policy experts fight every day for the rights of the tens of millions of people struggling to access affordable, quality health care coverage free from discrimination.

**The proposed rule ignores that gender affirming care is medically necessary and evidence-based.**

The GAPMS determination upon which the proposed rule is based wholly misrepresents the medical literature on gender affirming care.<sup>1</sup> The report relies on the assessments of so-called “experts” who have been discredited, misrepresents the findings of various studies, and ignores the significant body of research showing that gender affirming care is safe and effective.

In reality, there is broad consensus within the medical community that gender affirming health services, including puberty blockers, hormone therapy, and surgical care, are medically necessary to treat gender dysphoria. Every major professional medical association in the country, including the American Medical Association, the American Academy of Pediatrics, the Endocrine Society, and the American Psychiatric Association, agrees that gender affirming care is safe and effective.<sup>2</sup> Since 1979, the World Professional Association for Transgender Health (WPATH) has developed and refined standards of care for the health of transgender and gender non-conforming people.<sup>3</sup> The WPATH standards are recognized by the medical community as the leading clinical guidelines for treating gender dysphoria. The WPATH standards make clear that treatment decisions should be made on a case-by-case basis. Specifically, WPATH states that “while many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and

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<sup>1</sup> Meredith McNamara et al., *A Critical Review of the June 2022 Florida Medicaid Report on the Medical Treatment of Gender Dysphoria* (2022) (on file with the National Health Law Program).

<sup>2</sup> American Medical Association, Health insurance coverage for gender-affirming care of transgender patients, 2019, accessible at: [https://www.ama-assn.org/system/files/2019-03/transing\\_care\\_of\\_transgender\\_patients\\_ama-assn.org](https://www.ama-assn.org/system/files/2019-03/transing_care_of_transgender_patients_ama-assn.org); Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology & Metabolism 3869 (2017), <https://academic.oup.com/jcem/article/102/11/3869/4157558?login=false>; Jason Rafferty, Michael Yogman, Rebecca Baum, et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 Pediatrics e20182162 (2018); Am. Psychiatric Ass’n, *A Guide for Working with Transgender and Gender Nonconforming Patients* (2017), <https://www.psychiatry.org/psychiatrists/cultural-competency/education/transgender-and-gender-nonconforming-patients>; see also Am. Psychological Ass’n, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People* (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>; Am. Coll. of Obstetricians and Gynecologists, *Committee Opinion 823, Health Care for Transgender and Gender Diverse Individuals* (2021), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals>.

<sup>3</sup> WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (2011), <https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20>.

some need neither.”<sup>4</sup> In direct conflict with the standards of care, the proposed rule would categorically prohibit coverage of gender affirming services, even when they are medically necessary for a particular individual.

### **The proposed rule is illegal.**

The Equal Protection Clause and Section 1557 of the Affordable Care Act prohibit AHCA from discriminating on the basis of sex, which includes gender identity.<sup>5</sup> Additionally, under federal Medicaid law, the categorical exclusion of a medically necessary healthcare service or benefit is prohibited. The Early, Periodic, Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid Act create an affirmative obligation on states to arrange for care necessary to correct or ameliorate an illness or condition of an individual under age 21.<sup>6</sup> Accordingly, the rule that AHCA seeks to adopt – one that bans all medically necessary gender affirming care for Medicaid recipients – is a violation of federal law.

### **The proposed rule hurts Florida residents with the highest level of need.**

If AHCA adopts this baseless rule, not only will it waste valuable resources defending an illegal proposal, it will impose outsized harm on Florida residents who already face staggering health disparities and discrimination.

Transgender individuals with untreated gender dysphoria face significant risk of depression, suicide and self harm.<sup>7</sup> Low-income transgender individuals, *i.e.*, those who qualify financially for Medicaid, have particularly high, and intersecting, needs. Due to their poverty, they already experience significant barriers to care, including a limited network of treating professionals.<sup>8</sup> By foreclosing medically necessary, gender affirming care to low-income Medicaid recipients who have limited or no means of otherwise accessing that care, AHCA would create a group of second class citizens; ones who will face negative health outcomes for no other reason than their income status. Given that low-income transgender and gender diverse individuals are disproportionately people of color, this ban would result in a disparate racial impact as well.<sup>9</sup> AHCA, the state agency

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<sup>4</sup> *Id.* at 8.

<sup>5</sup> U.S. Const. Amend. XIV, § 1, 42 U.S.C. §18116(a). See also *Bostock v. Clayton Cnty., Ga.*, 149 S.Ct. 1731, 1741 (2020) (holding that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex”).

<sup>6</sup> 42 U.S.C. §1396a(a)(10)(A), §1396a(a)(43), §1396d(a)(4)(B), §1396d(r)

<sup>7</sup> Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 AM. J. PUB. HEALTH 31, 33 (2014).

<sup>8</sup> Christy Mallory and William Tentindo, *Medicaid Coverage for Gender Affirming Care*, UCLA School of Law, Williams Institute, October 2019, 12-13, accessible at:

<https://williamsinstitute.law.ucla.edu/wp-content/uploads>.

<sup>9</sup> Bianca D.M. Wilson, Lauren Bouton, and Christy Mallory, *Racial Differences Among LGBT Adults in the U.S.: LGBT Well-Being at the Intersection of Race*, UCLA School of

charged with the responsibility of administering healthcare to low-income Floridians, should be focused on reducing health inequities and disparities, not creating them.

Bans on necessary gender affirming care, like the one proposed here, also perpetuate transphobia. The LGBTQ community, and especially its transgender and gender diverse members, already experiences increased violence.<sup>10</sup> Bans, particularly state-sanctioned bans, on medically necessary healthcare for transgender individuals lend credence to these ideologies, increasing the likelihood of hate crimes committed against transgender and gender diverse individuals. These bans also drive the prevalence of “minority stress” among those who are transgender which, in turn, results in poor mental health outcomes for those targeted, in the most severe cases resulting in suicide.<sup>11</sup>

### **The proposed rule interferes with the doctor/patient relationship.**

Finally, treating medical professionals must be allowed to play the primary role in determining the treatment and services necessary to address their individual patients’ health concerns.<sup>12</sup> AHCA’s proposed ban on coverage of gender affirming care removes this role from the treating professional entirely and, contrary to federal Medicaid law, places it within the sole control of the State. AHCA’s rule also fails to acknowledge the fundamental right under Florida constitutional law to choose or refuse medical treatment.<sup>13</sup>

Based on the foregoing, we urge AHCA to withdraw this discriminatory, damaging, and illegal rule and, instead, draft, with the cooperation and input of the requisite medical experts, a coverage policy for gender affirming care that recognizes the well-established principle that gender affirming services, including puberty blockers, hormone treatment, and surgery are treatments and services that, when determined medically necessary by

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Law, Williams Institute, January 2022, 4, accessible at:

<https://williamsinstitute.law.ucla.edu/wp-content/uploads>.

<sup>10</sup> Usha Ranji, Adara Beamesderfer, Jen Kates, and Alina Salganicoff, *Health and Access to Care and Coverage for Lesbian, Bisexual, Gay, and Transgender Individuals in the U.S.*, Kaiser Family Foundation, April 2015, 8-9, accessible at:

<https://files.kff.org/attachment/issue-brief-health-and-access-to-c>; Henry Parr, *Fixing Medicaid to "Fix Society": Extending Medicaid Coverage of Gender-Affirming Healthcare to Transgender Youth*, 43 Fordham Urb. L.J. 71 (2016). Accessible at: <https://ir.lawnet.fordham.edu/ulj/vol43/iss1/3>.

<sup>11</sup> WPATH *supra* n.3, at 4; Aivadyan C, Slavin MN, Wu E, *Inclusive State Legislation and Reduced Risk of Past Year Suicide Attempts Among Lesbian, Gay, Bisexual, and Questioning Adolescents in the United States*, Arch Suicide Res, 2021 Aug 24:1-17, accessible at: [https://pubmed.ncbi.nlm.nih.gov/34427167/sbian, Gay, Bisexual, and Questioning Adolescents in the United States - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/34427167/sbian, Gay, Bisexual, and Questioning Adolescents in the United States - PubMed (nih.gov)).

<sup>12</sup> *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (“[t]he Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.”).

<sup>13</sup> *In re Guardianship of Browning*, 568 So.2d 4, 11 (Fla. 1990).

their treating professionals, are essential to the health and well being of transgender and gender diverse Floridians.

Sincerely,

Katy DeBriere & Alison Yager  
Florida Health Justice Project  
[www.floridahealthjustice.org](http://www.floridahealthjustice.org)

Catherine McKee & Abbi Coursolle  
National Health Law Program  
[www.healthlaw.org](http://www.healthlaw.org)