

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Insurance, Securities and Banking



Chester A. McPherson
Interim Commissioner

BULLETIN
13-IB-01-30/15
REVISED

TO: ALL INSURANCE COMPANIES, HEALTH MAINTENANCE ORGANIZATIONS AND HOSPITAL AND MEDICAL SERVICE CORPORATIONS AUTHORIZED TO WRITE HEALTH INSURANCE IN THE DISTRICT OF COLUMBIA

FROM: CHESTER A. MCPHERSON, INTERIM COMMISSIONER

SUBJECT: PROHIBITION OF DISCRIMINATION IN HEALTH INSURANCE BASED ON GENDER IDENTITY OR EXPRESSION

DATE: FEBRUARY 27, 2014

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This Bulletin is being reissued with revisions to clarify the Department of Insurance, Securities and Banking's ("Department") position regarding the application of D.C. Official Code § 31-2231.11, Unfair Discrimination, as it pertains to insurance companies writing health insurance in the District of Columbia.¹ On March 15, 2013, the Department first issued this Bulletin announcing that D.C. Official Code § 31-2231.11(c), the Unfair Discrimination provision of the District's Unfair Insurance Trade Practices Act,² prohibits discrimination in health insurance based on gender identity or expression.

Section 31-2231.11(c) states in relevant part:

No person shall refuse to insure, refuse to continue to insure, or limit the amount of coverage available to an individual because of marital status, race, color,

¹ The Department's reference to "writing health insurance in the District of Columbia" would include policies situated, delivered or negotiated in the District of Columbia and subject to its health insurance laws. Such policies would include those commercial policies issued in the individual and small and large group markets, including those issued to associations. Qualified plans under ERISA remain exempt from state health insurance laws.

² Enacted as the Insurance Trade and Economic Development Amendment Act of 2000, effective April 3, 2001 (D.C. Official Code § 31-2231.01 *et seq.*) ("Unfair Insurance Trade Practices Act").

personal appearance, sexual orientation, gender identity or expression, matriculation, political affiliation, or an individual's status as a victim of an intrafamily offense, sexual assault, dating violence, or stalking.

Id. (emphasis added). Section 31-2231.11(c) applies to health insurance policies and the practices of health insurance companies writing individual or group coverage in the District of Columbia. Based on the application of § 31-2231.11(c), the Department further stated that an example of such discriminatory conduct could be exclusionary provisions that had the effect, intended or otherwise, of targeting one or more of the protected classes enumerated in § 31-2231.11(c). Thus, the Department determined, and more fully clarifies here, that examples of such exclusionary clauses that it would likely deem *prima facie* discriminatory, include:

“Any treatment or procedure designed to alter an individual’s physical characteristics to those of the opposite sex.”

“Sex transformations and related services.”

“Sex change: Any treatment, drug, service or supply related to changing sex or sexual characteristics.”

The Department further advised that discriminatory language of this nature should no longer be enforced, and companies employing such language should file updated policy forms within 90 days of the March 15, 2013 original issuance date of this Bulletin.

As further clarification, and to advance the remedial goals of anti-discrimination provisions in the Unfair Insurance Trade Practices Act, the Department offers the following additional guidance. First, it is the position of the Department that “gender dysphoria” (also known as “gender identity disorder”) is a recognized medical condition under health insurance policies covering medical and hospital expenses, regardless of whether explicitly referenced.³ Second, persons diagnosed with gender dysphoria fall squarely within the protected class of “gender identity or expression” as provided in § 31-2231.11(c).

Moreover, the anti-discrimination mandate in § 31-2231.11(c) is bolstered by a second mandate in § 31-2231.11(b), which prohibits companies from discriminating “between individuals of the same class and of essentially the same hazard . . . in the benefits payable under a policy or contract of accident or health insurance; in any of the terms or conditions policy or contract of accident or health insurance; or in any other manner.”

³ The Department’s conclusion is consistent with the Essential Health Benefits standards established in the District. The District adopted a CareFirst, BluePreferred group plan for small employers as the benchmark plan for benefits that must be provided in individual and small group policies written in the District of Columbia. The benchmark plan covers conditions classified on Axes I and II of the DSM, for which gender dysphoria is a listed condition.

Thus, in order to achieve the remedial goals of the anti-discrimination provisions, the Department is obliged to construe and apply the provisions broadly.⁴

As for interpreting the provisions, § 31-2231.11(c) makes clear that “[n]o person shall . . . limit the amount of coverage available to an individual because of . . . gender identity or expression . . .” Nothing in § 31-2231.11(c) suggests that it should not apply to health insurance. Further, § 31-2231.11(b) makes unambiguous its application to health insurance policies while implicitly incorporating the protected class from § 31-2231.11(c) through its reference to “unfair discrimination.” The only interpretive question that remains for § 31-2231.11(c) is whether gender dysphoria diagnosed individuals and non-gender dysphoria diagnosed individuals seeking health insurance are “of the same class and essentially the same hazard.” Because both sets of individuals are seeking coverage under the same health insurance policies offering benefits and services for recognized medical conditions, generally, it is the Department’s position that for purposes of § 31-2231.11(b), the individuals are “of the same class and essentially the same hazard.”

Therefore, in applying the statutes and adhering to the intent of the Council, the Department, upon further consideration, not only concludes that exclusionary clauses that discriminate on the basis of “gender identity or expression” are *prima facie* prohibited, but also would view attempts by companies to limit or deny medically necessary treatments for gender dysphoria, including gender reassignment surgeries, to be discriminatory. Accordingly, it is the position of the Department that treatment for gender dysphoria, including gender reassignment surgeries, is a covered benefit, and individuals diagnosed with gender dysphoria are entitled to receive medically necessary benefits and services under individual and group health insurance policies covering medical and hospital expenses.⁵

In determining the medical necessity of services and benefits provided to such patients, insurance companies should refer to the recognized professional standard of medical care for transgender individuals requiring treatment for gender dysphoria, which is enumerated in the most recent edition of the World Professional Association for

⁴ The Unfair Trade Practices Act was amended to include the terms “gender identity or expression” by the Prohibition of Discrimination on the Basis of Gender Identity and Expression Amendment Act of 2008, effective June 25, 2008 (D.C. Law 17-177; D.C. Official Code § 31-2231.11(c)). D.C. Law 17-177 was expressly enacted to address the discriminatory practices of companies writing health insurance in the District. See Report on Bill 17-330, the Prohibition on Discrimination on the Basis of Gender Identity and Expression Amendment Act of 2008 (January 31, 2008). D.C. Law 177 was enacted to mirror the protected classes in the District’s Human Rights Act, see Human Rights Act Clarification Amendment Act of 2005, effective March 8, 2006 (D.C. Law 16-58; D.C. Official Code § 2-1402.31(a)), and using the same principles, to remediate the same harms occasioned by such discriminatory practices in the insurance field. See D.C. Official Code § 31-2231.-01(3A) incorporating by reference the same definition for “gender identity or expression” as provided in § 2-1402.02(12A).

⁵ For example, the District’s mandated coverage for medical and psychological treatment of drug abuse, alcohol abuse, and mental illness includes services the “treatment of clinically significant mental illnesses identified in the most recent edition of the . . . Diagnostic and Statistical Manual of the American Psychiatric Association.” See D.C. Official Code § 31-3104(a).

Transgender Health Standards of Care (“WPATH Standards”).⁶ Inasmuch as the WPATH Standards indicate that the appropriate course of treatment for individuals diagnosed with gender dysphoria may vary between patients, determinations of medical necessity for coverage purposes must also be guided by providers in communication with individual patients.

Finally, the benefits afforded to individuals seeking treatment for gender dysphoria, including gender reassignment surgeries, should not be construed as newly mandated benefits. Rather, the Department is merely enforcing District law to ensure that individuals diagnosed with gender dysphoria are afforded the same right to obtain the full measure of benefits under health insurance policies as individuals seeking medically necessary treatment for non-gender identity or expression related conditions.

Based on the authorities cited above and the guidance provided in this Bulletin, the Department directs companies writing individual and group health insurance policies in the District to:

- (1) Evaluate their practices, including benefit design and coverage determination procedures, to ensure that they neither discriminate against insured individuals in any protected class, including those diagnosed with gender dysphoria, nor deny access to medically necessary care because of an individual’s gender identity or expression;
- (2) Review all current relevant health policy documents to ensure that they are compliant with the guidance provided in this Bulletin, including policies that have been previously approved by the Department; and
- (3) File any appropriate amendments or endorsements to health plan documents to ensure compliance with the guidance in this Bulletin.

Any riders that charge an additional premium for the benefits that are determined under this Bulletin to be covered by an individual or group insurance policy should be eliminated no later than the next renewal period.

Should you have any questions regarding this Bulletin, please contact Philip Barlow, Associate Commissioner of Insurance, at (202) 442-7823 or philip.barlow@dc.gov.

⁶ The most recent version of the WPATH *Standards of Care* was released on September 25, 2011.