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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

April 1, 2022

Secretary Dennis Schrader
Maryland Department of Health
201 West Preston Street
Baltimore, MD 21201

Dear Secretary Schrader,

We are contacting you to address the urgent need for the Maryland Department of Health [hereinafter the Department] to update its current policy on gender-affirming care. In particular, the Department's current policy violates the nondiscrimination provisions of Section 1557 of the Affordable Care Act.¹

Yesterday, on March 31st 2022, President Biden unequivocally condemned anti-transgender state policies.² In light of the President's statement, the Department's current policy leaves Maryland vulnerable to a heightened risk of state and federal litigation. In particular, the Department's current policy violates the nondiscrimination provisions of Section 1557 of the Affordable Care Act.³ President Biden declared that the Department of Health and Human Services (HHS) will "interpret and enforce section 1557 of the Affordable Care Act's prohibition on discrimination on the basis of sex in certain health programs to prohibit discrimination on the basis of gender identity and

¹ 42 U.S.C. § 18116(a); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020); see also Exec. Order No. 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>.

² White House, FACT SHEET: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/>.

³ 42 U.S.C. § 18116(a); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020); see also Exec. Order No. 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>.

sexual orientation.”⁴ HHS is encouraging transgender individuals to submit complaints of discrimination so that HHS can investigate and enforce the provisions of Section 1557.⁵ The Department is at risk of incurring legal liability because of its current discriminatory policy.

This policy also fails to address the urgent health needs of Marylanders, and it results in dire, ongoing violence against our transgender community. We know that 3 in 5 transgender Baltimoreans experience violence every year, including verbal abuse, physical attack, and sexual assault.⁶ Every month, one-third of our state’s transgender population experiences serious psychological distress,⁷ leading to lifetime suicidal attempts of up to 64%.⁸ Maryland cannot afford to wait any longer for the Department to update its policy.

The 2016 Managed Care Organizations Transmittal No. 110⁹ [hereinafter the Policy] covers only a small set of gender-affirming procedures, the criteria for which are unnecessarily burdensome and inconsistent with the internationally leading Standards of Care.¹⁰ Additionally, the current Policy contains dozens of categorical exclusions that conflict with medical science.¹¹ These exclusions uniquely target and discriminate

⁴ White House, *FACT SHEET: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans* (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/>.

⁵ U.S. Dep’t of Health & Human Servs. Office of Civil Rights, *Discrimination on the Basis of Sex*, <https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/index.html>.

⁶ Mannat Malik, et. al., City Council Investigative Hearing 20-0199R Wellbeing of the Transgender Community in Baltimore: Harnessing Data from Local Research Studies 11 (2020), <https://baltimore.legistar.com/View.ashx?M=F&ID=8794631&GUID=58A51C8E-2F15-4A58-890E-29EDF2CDB8EC>.

⁷ National Center for Transgender Equality, 2015 U.S. Transgender Survey: Maryland State Report 3 (2017), <https://transequality.org/sites/default/files/USTS%20MD%20State%20Report.pdf>.

⁸ Erin Cooney, et al., *Be the Conversation Study: Access to Gender Affirming Care as a Determinant of Mental Health Outcomes in Transgender Individuals* 10 (2018).

⁹ 2016 Managed Care Organizations Transmittal No. 110, Maryland Medical Assistance Program (Mar. 10, 2016), https://health.maryland.gov/mmcp/MCOupdates/Documents/pt_37_16.pdf.

¹⁰ WPATH, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (7th ed. 2012), <https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20CareV7%20Full%20Book%20English.pdf>.

¹¹ *Id.*; see also Tiffany Ainsworth & Jeffrey Spiegel, *Quality of life of individuals with and without facial feminization surgery or gender reassignment surgery*, 19 *Quality of Life Res.* 7, 1019 (2010), <https://pubmed.ncbi.nlm.nih.gov/20461468/>; Nova J. Bradford et al., *Hair Removal and Psychological Well-Being in Transfeminine Adults: Associations with Gender Dysphoria and Gender Euphoria*, *J. Dermatological Treatment* (2019), <https://www.tandfonline.com/doi/abs/10.1080/09546634.2019.1687823>; Charlotte Bultynck, *Thyroplasty Type III to Lower the Vocal Pitch in Trans Men*, 164 *Otolaryngology – Head & Neck Surgery* 1, 157 (2021), <https://pubmed.ncbi.nlm.nih.gov/32600117/>; Rachel Butler, et al., *Social Anxiety Among Transgender and Gender Nonconforming Individuals: The Role of Gender-Affirming Medical Interventions*, 128 *J. Abnormal Psychol.* 1 (2019), <https://pubmed.ncbi.nlm.nih.gov/30489112/>; Alex Dubov & Liana Fraenkel, *Facial Feminization Surgery: The Ethics of Gatekeeping in Transgender Health*, 18 *Am. J. Bioethics* 12, 3 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6549509/>; Michelle Lee et al., *Association Between Gender-Affirming Hair Removal and Mental Health Outcomes*, 157 *JAMA Dermatology* 9, 1120 (2021), <https://pubmed.ncbi.nlm.nih.gov/34287625/>; Dustin H. Marks et al., *Excess Hair, Hair Removal Methods, and Barriers to Care in Gender Minority Patients: A Survey Study*, 19 *J. Cosmetic Dermatology* 6, 1494 (2020), <https://pubmed.ncbi.nlm.nih.gov/31553137/>; Natnita Mattawanon et al., *Fertility Preservation*

against transgender individuals. As such, the Policy fails to comply with state and federal law.

Moreover, the Department is at risk of lawsuits from private citizens. In addition to violating federal antidiscrimination provisions, the Policy contravenes Maryland's prohibition against discrimination on the basis of sex and gender identity.¹² As courts have found, failing to provide necessary medical care for transgender individuals is discrimination on the basis of sex and gender identity.¹³ Thus, it is clear that in order for Maryland to comply with state and federal law, the Department must adopt a new policy that provides comprehensive coverage for gender-affirming care and does not include categorical exclusions.

Beyond its discriminatory nature, the Policy also violates federal Medicaid law. Medicaid programs must provide covered treatment in "sufficient . . . amount, duration, and scope to reasonably achieve its purpose."¹⁴ Where a Medicaid program creates categorical exclusions to gender-affirming care, that program fails to provide sufficient treatment.¹⁵ Indeed, "a state cannot say 'never' when it comes to medically necessary treatments, because there are no such reasons justifying categorical bans on medically necessary treatment. A categorical ban on medically necessary treatment for a specific

Options in Transgender People: A Review, 19 Rev. Endocrine & Metabolic Disorders 3, 231 (2018), <https://pubmed.ncbi.nlm.nih.gov/30219984/>; Matthew Mills et al., *Toward a Protocol for Transmasculine Voice: A Service Evaluation of the Voice and Communication Therapy Group Program, Including Long-Term Follow-Up for Trans Men at the London Gender Identity Clinic*, 4 Transgender Health 1, 143 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6528553/>; Shane D. Morrison et al., *Prospective Quality-of-Life Outcomes after Facial Feminization Surgery: An International Multicenter Study*, 145 Plastic & Reconstructive Surgery 6, 1499 (2020), <https://pubmed.ncbi.nlm.nih.gov/32459779/>; Shane Morrison et al., *Breast and Body Contouring for Transgender and Gender Nonconforming Individuals*, 45 Clinics in Plastic Surgery, 3 (2018), <https://pubmed.ncbi.nlm.nih.gov/29908621/>; Brian Nuyen, et al., *Feminization Laryngoplasty: 17-Year Review on Long-Term Outcomes, Safety, and Technique*, Otolaryngology—Head & Neck Surgery (2021), <https://pubmed.ncbi.nlm.nih.gov/34399638/>; Brian Nuyen et al., *The Health Burden of Transfeminine Facial Gender Dysphoria: An Analysis of Public Perception*, 23 Facial Plastic Surgery & Aesthetic Medicine 5 (2020), https://www.researchgate.net/publication/346242502_The_Health_Burden_of_Transfeminine_Facial_Gender_Dysphoria_An_Analysis_of_Public_Perception; Ian T. Nolan et al., *The Role of Voice Therapy and Phonosurgery in Transgender Vocal Feminization*, 30 J. Craniofacial Surgery 5, 1368 (2019), <https://pubmed.ncbi.nlm.nih.gov/31299724/>; Chris Park et al., *Trans Woman Voice Questionnaire Scores Highlight Specific Benefits of Adjunctive Glottoplasty With Voice Therapy in Treating Voice Feminization*, SO892-1997 J. Voice 21 (2021), <https://pubmed.ncbi.nlm.nih.gov/34565626/>; S. A. Reza Nouraei et al., *The Role of Nasal Feminization Rhinoplasty in Male-to-Female Gender Reassignment*, 9 Facial Plastic Surgery 5, 318 (2007), <https://pubmed.ncbi.nlm.nih.gov/17875823/>; Farah Sayegh, et al., *Facial Masculinization Surgery and its Role in the Treatment of Gender Dysphoria*, 30 J. Craniofacial Surgery 5, 1339 (2019), <https://pubmed.ncbi.nlm.nih.gov/31299718/>; Nicolette V. Siringo et al., *Techniques and Trends of Facial Feminization Surgery: A Systematic Review and Representative Case Report*, Annals of Plastic Surgery (2021), <https://pubmed.ncbi.nlm.nih.gov/34270469/>; Cirley Novais Valente Jr. & Adriane Mesquita de Medeiros, *Voice And Gender Incongruence: Relationship Between Vocal Self-Perception And Mental Health Of Trans Women*, J. Voice (2020), [https://www.jvoice.org/article/So892-1997\(20\)30376-3/fulltext](https://www.jvoice.org/article/So892-1997(20)30376-3/fulltext).

¹² Md. Code, State Government § 20-901.

¹³ See, e.g., *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1015 (W.D. Wis. 2019); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016).

¹⁴ 42 C.F.R. 440.230(b); see also 42 U.S.C. § 1396(a)(10)(A).

¹⁵ *Flack*, 395 F. Supp. 3d at 1019; *Brashar v. Health Share of Oregon*, Nat'l Center for Lesbian Rights, <https://www.nclrights.org/our-work/cases/brashar-v-health-share-of-oregon/>.

diagnosis would not ‘adequately meet the needs of the Medicaid population of the state.’¹⁶ The current Policy fails to abide by federal Medicaid requirements.

Additionally, in Maryland, “An MCO shall provide access to health care services and information in a manner that addresses the *individualized needs of its enrollees, regardless of gender, sexual orientation, or gender identity.*”¹⁷ The limitations and exclusions contained within the Policy prevent MCOs from providing individualized care, and therefore prevent the MCOs from obeying the law. The limitations and exclusions also contravene the requirement that an MCO “provide medically necessary gender reassignment surgery and other somatic specialty care for members with gender identity disorder.”¹⁸ It is clear that the Policy explicitly prevents MCOs from providing medically necessary care, and thus fails to abide by Maryland’s own regulations.

The current Policy, as stated in Managed Care Organizations Transmittal No. 110, sets Maryland up for myriad lawsuits and violations of state and federal law. These lawsuits and enforcement actions would come at a high cost to the State, including potential loss of federal funding for Maryland Medicaid.¹⁹ The Policy compromises the integrity of our Medicaid plan, and it jeopardizes the ability of the State to continue providing care to low-income vulnerable Maryland residents. We strongly urge the Department to develop a new policy in line with legal requirements and defined by clinical best-practices in providing gender-affirming healthcare to our transgender population. We would be happy to work with the Department to help create this policy, bringing in regional experts in the delivery of this care.

We look forward to your swift response.

In Partnership,



Senator Mary Washington, PhD
Baltimore City, 43rd District



Delegate Anne R. Kaiser
Montgomery County, 14th District

¹⁶ *Cruz*, 195 F. Supp. 3d at 571 (quoting *DeSario v. Thomas*, 139 F.3d 80, 96 (2d Cir. 1998) (cleaned up)).

¹⁷ COMAR 10.67.05.01.A (emphasis added).

¹⁸ COMAR 10.67.06.26-3.

¹⁹ 42 CFR § 430.35.

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