

RESEARCH THAT MATTERS

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# MEDICAID COVERAGE FOR GENDER-AFFIRMING CARE

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## EXECUTIVE SUMMARY

Medicaid beneficiaries who are transgender face a patchwork of policies across the U.S. that leave many of them without access to coverage for gender-affirming care. Eighteen states and D.C. have chosen to specifically include coverage for gender-affirming care under their Medicaid programs or are in the process of extending coverage, while 12 states exclude coverage for such care and 20 states have not expressly addressed coverage. Gender-affirming care includes a range of services, such as surgical procedures, hormone therapy, and other forms of treatment related to gender transition.

The Williams Institute estimates that:

- 1.4 million adults in the U.S. identify as transgender and approximately 152,000 of them are enrolled in Medicaid.
- Fewer than half (69,000) of transgender Medicaid beneficiaries have affirmative access to coverage for gender-affirming care under express policies in state law.
- For 51,000 transgender Medicaid beneficiaries, coverage is uncertain because they live in states where the laws are silent on coverage for gender-affirming care.
- An estimated 32,000 transgender Medicaid beneficiaries live in states with express bans that deny access to covered gender-affirming care.

Although regulations issued by the U.S. Department of Health & Human Services in 2016 bar Medicaid programs from categorically excluding insurance coverage for all types of gender-affirming care, the Department has recently proposed to eliminate these provisions. Nonetheless, a number of laws and policies continue to support access to gender-affirming care through Medicaid programs, including the Affordable Care Act, the Social Security Act, and the U.S. Constitution. Bans have been successfully challenged in court under these laws in several states, resulting in changes to Medicaid policies that have increased care and coverage for transgender beneficiaries.

Additional policy changes in states that still have bans or lack clear language addressing coverage would ensure that transgender Medicaid beneficiaries have access to coverage for necessary medical care no matter where they live. In addition, more transgender people could benefit from Medicaid covered services if all states adopted Medicaid expansion and if barriers to accessing public benefits, such as requirements pertaining to identity documents, were removed.

# COVERAGE FOR GENDER-AFFIRMING CARE IN STATE MEDICAID PROGRAMS

Medicaid is a federally mandated program, implemented by states, which ensures access to health care for those low-income adults and children who qualify.<sup>1</sup> The program is funded with a combination of federal and state funds.<sup>2</sup> States must implement their Medicaid programs consistent with federal law, though they retain some flexibility in the design and administration of their programs, including setting eligibility criteria.<sup>3</sup>

Federal law does not expressly direct states to either include or exclude coverage for gender-affirming care under their state Medicaid programs.<sup>4</sup> Some states have chosen to specifically include coverage for gender-affirming care under their Medicaid programs, while other states exclude such care or have not expressly addressed coverage, creating a patchwork of policies affecting transgender Medicaid beneficiaries across the U.S.

## AFFIRMATIVE COVERAGE FOR GENDER-AFFIRMING CARE

Eighteen states and D.C. have chosen to specifically include coverage for gender-affirming care under their Medicaid programs or are in the process of extending coverage. The 17 states are: California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. One additional state, Illinois, is currently developing an administrative policy that will expressly state that Medicaid covers gender-affirming care. All of these policies have been adopted within the past six years, with California being the first state to issue this type of policy in 2013. The policies ensure that transgender Medicaid beneficiaries have access to a range of gender-affirming care, including gender-affirming surgery and hormone treatment, though there may be some forms of gender-affirming treatment that are not included in the policies.

**California.** In 2013, the California Department of Health Care Services issued [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>5</sup> The agency re-issued [guidance](#) in 2016 reminding Medicaid health plans that they are required to cover gender-affirming care for beneficiaries and

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<sup>1</sup> Ctr. for Medicare & Medicaid Servs., U.S. Dep't. of Health & Human Servs., *Program History*, MEDICAID.GOV, <https://www.medicaid.gov/about-us/program-history/index.html> (last visited June 19, 2019).

<sup>2</sup> Ctr. for Medicare & Medicaid Servs., U.S. Dep't. of Health & Human Servs., *Financial Management*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/finance/> (last visited June 19, 2019).

<sup>3</sup> See, e.g., Ctr. for Medicare & Medicaid Servs., U.S. Dep't. of Health & Human Servs., *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility/index.html> (last visited July 23, 2019).

<sup>4</sup> For benefits that states are required to provide under federal law, see Ctr. for Medicare & Medicaid Servs., U.S. Dep't. of Health & Human Servs., *Mandatory & Optional Medicaid Benefits*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/benefits/list-of-benefits/index.html> (last visited Aug. 15, 2019).

<sup>5</sup> *All Plan Letter 13-011: Ensuring Access to Transgender Services* from Toby Douglas, Dir., Cal. Dep't. of Health Care Servs., to All Medi-Cal Managed Care Health Plans (Sept. 25, 2013), <https://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPsandPolicyLetters/APL2013/APL13-011.pdf> (superseded by All Plan Letter 16-013).

explaining that federal regulations implementing the Affordable Care Act prohibit discrimination based on gender identity in health care, including in state Medicaid programs.<sup>6</sup>

**Colorado.** In 2017, the Colorado Department of Health Care Policy and Financing issued [regulations](#) expressly stating that Medicaid covers gender-affirming care.<sup>7</sup> The Department most recently revised the rule in 2019 to reduce the burden placed on transgender beneficiaries seeking treatment for hair removal. The [revision](#) was effective as of June 30, 2019.<sup>8</sup>

**Connecticut.** In 2015, the Connecticut Department of Social Services issued [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>9</sup> The guidance has been updated and expanded several times to reduce barriers or burdens for transgender people seeking care. The guidance was updated most recently in March 2019 to provide for coverage of gender-affirmation surgery intended to refine results of a previous surgery that created a functional impairment.

**D.C.** In 2015, the D.C. Department of Health Care Finance issued a [bulletin](#) expressly stating that Medicaid covers gender-affirming care.<sup>10</sup>

**Illinois.** In 2019, the Illinois Department of Healthcare and Family Services announced that it is developing a [regulation](#) that will explicitly state that Medicaid covers gender-affirming care.<sup>11</sup> The Department expects the rule to go into effect following a public comment period.

**Maine.** In 2019, the Maine Department of Health and Human Services issued a [regulation](#) expressly stating that Medicaid covers gender-affirming care.<sup>12</sup>

**Maryland.** In 2015, the Maryland Department of Health issued a [regulation](#) expressly stating that Medicaid covers gender-affirming care.<sup>13</sup>

<sup>6</sup> *All Plan Letter 16-013: Ensuring Access to Medi-Cal Services for Transgender Beneficiaries* from Jennifer Kent, Dir., Cal. Dep't. of Health Care Servs., to All Medi-Cal Managed Care Health Plans (Oct. 6, 2016), <https://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2016/APL16-013.pdf>.

<sup>7</sup> 10 COLO. CODE REGS. § 2505-10 8.735 (LexisNexis 2019); Maximillian Cabrera & Cara Cheevers, *Gender-Affirming Care Covered by Health First Colorado*, ONE COLO. (June 2019), <https://one-colorado.org/wp-content/uploads/2019/06/Colorado-Transgender-Medicaid-benefit.pdf>.

<sup>8</sup> Med. Servs. Bd., *Revision to the Medical Assistance Benefits Rule Concerning Transgender Services*, COLO. DEP'T. HEALTH CARE POL'Y & FINANCING (May 10, 2019), <https://www.colorado.gov/pacific/sites/default/files/Doc%2012%20MSB%2018-10-23-A%20Transgender%20Initial%20-%20Apr%202019.pdf>.

<sup>9</sup> *Provider Policies & Procedures: Gender Affirmation Surgery*, HUSKY HEALTH CONN. (Mar. 27, 2019), [https://www.huskyhealthct.org/providers/provider\\_postings/policies\\_procedures/Gender\\_Affirmation\\_Surgery.pdf](https://www.huskyhealthct.org/providers/provider_postings/policies_procedures/Gender_Affirmation_Surgery.pdf).

<sup>10</sup> *Non-Discrimination in the District's State Medicaid Program Based on Gender Identity or Expression*, DEP'T. HEALTH CARE FIN. (Feb. 27, 2014), <https://dhcf.dc.gov/publication/MedicaidPolicy-GenderIdentity>.

<sup>11</sup> Press Release, Ill. Dep't. of Healthcare & Family Servs., Fulfilling Gov. Pritzker's Commitment to Healthcare Equity, Medicaid to Provide for Gender Affirming Surgery (Apr. 5, 2019), [https://www2.illinois.gov/IISNews/19893-IDHFS\\_Medicaid\\_to\\_provide\\_for\\_gender\\_affirming\\_surgery.pdf](https://www2.illinois.gov/IISNews/19893-IDHFS_Medicaid_to_provide_for_gender_affirming_surgery.pdf).

<sup>12</sup> *MaineCare Benefits Manual*, Ch. 1 § 90, MAINECARE (Sept. 16, 2019).

<sup>13</sup> MD. CODE REGS. 10.09.67.26-3 (2019).

**Massachusetts.** In 2015, MassHealth issued [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>14</sup> The policy was most recently updated in 2019.<sup>15</sup>

**Minnesota.** In 2016, a state court in Minnesota held that the ban on coverage for gender-affirming surgical care under the state's Medicaid program violated Minnesota's constitution.<sup>16</sup> A few months later, the Minnesota Department of Human Services implemented the court's decision by issuing [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>17</sup>

**Montana.** In 2017, the Montana Department of Health & Human Services issued [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>18</sup> The agency explained that federal regulations implementing the Affordable Care Act prohibit discrimination based on gender identity in health care, including in state Medicaid programs.

**Nevada.** In 2018, the Nevada Department of Health and Human Services [announced](#) that Medicaid covers gender-affirming care.<sup>19</sup>

**New Jersey.** In 2017, the legislature of New Jersey enacted a [statute](#) requiring Medicaid coverage for gender-affirming care.<sup>20</sup>

**New York.** In 2015, the New York State Department of Health issued regulations expressly stating that Medicaid covers gender-affirming care. Several transgender Medicaid beneficiaries [challenged the rule](#) in federal district court, arguing that its denial of coverage for minors and its exclusion for surgeries deemed "cosmetic" violated their rights under the federal Medicaid statute.<sup>21</sup> The court agreed that the categorical ban on cosmetic surgeries violated federal Medicaid laws by foreclosing the availability of treatments that may be medically necessary for some individuals. The court declined to hold that the age restriction violated federal Medicaid laws. In response to the decision, the Department of Health amended its [regulations](#) to remove the exclusion for cosmetic surgery.<sup>22</sup> Because many states exclude coverage for treatment deemed "cosmetic" even if they cover other aspects of gender-affirming care, New York's policy is among the most expansive.

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<sup>14</sup> MassHealth, *Guidelines for Medical Necessity Determination for Gender-Affirming Surgery*, MASS.GOV (July 31, 2019), <https://www.mass.gov/files/documents/2019/08/12/mg-genderaffirmingsurgery.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *OutFront Minnesota v. Piper*, No. 62-CV-15-7501 (Minn. Dist. Ct. Nov. 14, 2016).

<sup>17</sup> *Gender-Confirming Surgery*, MINN. DEP'T. HUM. SERVS. (Feb. 2, 2017), [https://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=DHS-292552](https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=DHS-292552).

<sup>18</sup> *Federal Final Rule, "Nondiscrimination in Health Program and Activities" and Implication for Coverage of Services Related to Gender Transition*, MONT. DEP'T. PUB. HEALTH & HUM. SERVS. (May 26, 2017), <https://medicaidprovider.mt.gov/Portals/68/docs/providernotices/2017/provnoticenondiscriminationgendertransition05252017.pdf>.

<sup>19</sup> *Gender Reassignment Codes 54400 through 54417 and 19318 May be Billed*, NEV. DEP'T. HEALTH & HUM. SERVS. (May 8, 2018), [https://www.medicaid.nv.gov/Downloads/provider/web\\_announcement\\_1532\\_20180223.pdf](https://www.medicaid.nv.gov/Downloads/provider/web_announcement_1532_20180223.pdf).

<sup>20</sup> N.J. STAT. ANN. § 30:4D-9.1 (2017).

<sup>21</sup> *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y. 2016).

<sup>22</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2 (2016).



**Oregon.** In 2015, the Oregon Health Authority issued a [policy](#) expressly stating that Medicaid covers gender-affirming care.<sup>23</sup> The policy was most recently updated in 2018.<sup>24</sup>

**Pennsylvania.** In 2016, the Pennsylvania Department of Human Services issued a [bulletin](#) expressly stating that Medicaid covers gender-affirming care.<sup>25</sup> The agency explained that federal regulations implementing the Affordable Care Act prohibit discrimination based on gender identity in health care, including in state Medicaid programs.

**Rhode Island.** In 2015, the Rhode Island Executive Office of Health and Human Services issued [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>26</sup>

**Vermont.** In 2008, the Vermont Agency of Human Services issued [guidance](#) expressly stating that Medicaid covers gender-affirming care.<sup>27</sup> The guidance has been updated and expanded several times to reduce barriers or burdens for transgender people seeking care. In October 2019, the agency proposed a new [regulation](#) addressing coverage for gender-affirming care.<sup>28</sup> The rule further expands Medicaid coverage, including by providing coverage for gender affirmation surgery to emancipated minors and other minors with parental consent.

**Washington.** In 2015, the Washington State Health Care Authority issued a [regulation](#) expressly stating that Medicaid covers gender-affirming care.<sup>29</sup>

**Wisconsin.** In 1996, the Wisconsin Department of Health Services issued a [regulation](#) expressly excluding gender-affirming care from Medicaid coverage.<sup>30</sup> In 2019, a federal district court in Wisconsin ruled that the ban violated the Affordable Care Act, the Medicaid provisions of the Social Security Act, and the federal constitution.<sup>31</sup> As a result, transgender Medicaid beneficiaries in the state now have access to coverage for gender-affirming care.

<sup>23</sup> *Prioritized List of Health Services (Annotated)*, OR. HEALTH AUTH. (Jan. 1, 2015), <https://www.oregon.gov/oha/HPA/DSI-HERC/PrioritizedList/1-1-2015%20Prioritized%20List%20of%20Health%20Services.pdf>.

<sup>24</sup> *Prioritized List of Health Services (Annotated)*, OR. HEALTH AUTHORITY (Oct. 1, 2018), <https://www.oregon.gov/oha/HPA/DSI-HERC/PrioritizedList/10-1-2018%20Prioritized%20List%20of%20Health%20Services.pdf>.

<sup>25</sup> Medical Assistance Bulletin from Leesa M. Allen, Deputy Sec'y Office of Med. Assistance Programs, Penn. Dep't. of Human Servs., to Providers (July 18, 2016), [http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin\\_admin/c\\_233793.pdf](http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin_admin/c_233793.pdf).

<sup>26</sup> *Gender Dysphoria/Gender Nonconformity Coverage Guidelines*, R.I. EXECUTIVE OFF. HEALTH & HUM. SERVS. (Oct. 2015), [http://www.eohhs.ri.gov/Portals/0/Uploads/Documents/MA%20Providers/MA%20Reference%20Guides/Physician/gender\\_dysphoria.pdf](http://www.eohhs.ri.gov/Portals/0/Uploads/Documents/MA%20Providers/MA%20Reference%20Guides/Physician/gender_dysphoria.pdf).

<sup>27</sup> *The Department of Vermont Health Access Medical Policy: Gender Reassignment Surgery*, DEP'T. VT. HEALTH ACCESS (Nov. 16, 2016), <http://dvha.vermont.gov/for-providers/gender-reassignment-surgery-w-icd-10-coded-111616.pdf>.

<sup>28</sup> 12-9 VT. CODE. R. § 4.238 (2019), <https://humanservices.vermont.gov/on-line-rules/health-care-administrative-rules-hcar/hcar-4.238-gender-affirmation-surgery-final-proposed-rule-annotated.pdf> (proposed).

<sup>29</sup> WASH. ADMIN. CODE § 182-531-1675 (2015).

<sup>30</sup> WIS. ADMIN. CODE DHS §§ 107.03(23)–(24) (2019).

<sup>31</sup> *Flack v. Wisc. Dept' of Health Servs.*, No. 18-cv-309-wmc (W.D. Wisc. Aug. 16, 2019).

## LAW IS SILENT ON COVERAGE FOR GENDER-AFFIRMING CARE

Twenty states have no express statute or administrative policy addressing coverage for gender-affirming care under their Medicaid programs. These 20 states are: Alabama, Arkansas, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Virginia. Some of these states previously had policies expressly excluding gender-affirming care, but have removed those exclusions. For example, within the last few years, [New Hampshire](#)<sup>32</sup> amended its regulations to remove the ban on gender-affirming care.

Although these 20 states lack policies clearly stating that gender-affirming care is covered, services may still be approved for coverage. Transgender people in a few of these states have reported being able to access Medicaid coverage for some types of gender-affirming care. But even in these states, transgender beneficiaries report experiencing significant barriers, such as being denied coverage for certain treatments or having different doctors provide different information pertaining to coverage, that likely would not be present if an express policy providing for coverage were in place.<sup>33</sup>

## LAW EXPRESSLY EXCLUDES COVERAGE FOR GENDER-AFFIRMING CARE

Twelve states have express bans that deny access to coverage for gender-affirming care under their Medicaid programs, either by statute or administrative policy. These 12 states are: Alaska, Arizona, Georgia, Hawaii, Iowa, Missouri, Nebraska, Ohio, Tennessee, Texas, West Virginia, and Wyoming. Most of these policies specifically exclude coverage for transition-related surgeries. However, some policies are more broadly written and may also exclude hormone treatment and other types of gender-affirming care.

**Alaska.** In 2010,<sup>34</sup> the Alaska Department of Health and Human Services issued a [regulation](#) expressly excluding “transsexual surgical procedures or secondary consequences” from Medicaid coverage.<sup>35</sup> In 2019, a transgender woman who had been denied care under Alaska’s Medicaid program filed a [lawsuit](#) challenging the regulation.<sup>36</sup> That case is still in litigation.

<sup>32</sup> Final Proposal to Delete He-W 531.06(g) from N.H. Code Admin. R. (Sept. 27, 2017), <https://transequality.org/sites/default/files/docs/NH-trans%20exclusion%20removal%20reg.pdf>.

<sup>33</sup> See, e.g., *Indiana Medicaid and Transgender Healthcare*, IND. TRANSGENDER NETWORK (June 25, 2015), <http://indianatransgendernetwork.com/news/indiana-news/indiana-medicaid-and-transgender-healthcare/>; Leslie Newell Peacock, *The Real Transgender Crisis in Arkansas: Health Care*, ARK. TIMES (May 11, 2017), <https://arktimes.com/news/covers/stories/2017/05/11/the-real-transgender-crisis-in-arkansas-health-care>.

<sup>34</sup> *New Medicaid Coverage and Payment Regulations: 7 AAC 105 - 7 AAC 160*, ALA. DEP’T. HEALTH & SOC. SERVS. (Feb. 1, 2010), [http://manuals.medicaidalaska.com/docs/dnld/Update\\_02012010\\_Medicaid\\_Coverage\\_and\\_Payment\\_Regulations\\_7\\_AAC\\_105-160.pdf](http://manuals.medicaidalaska.com/docs/dnld/Update_02012010_Medicaid_Coverage_and_Payment_Regulations_7_AAC_105-160.pdf).

<sup>35</sup> ALASKA ADMIN. CODE tit. 7 § 110.405(d)(5) (2019).

<sup>36</sup> Renee Gross, *Lawsuit Challenges State’s Medicaid Policy Denying Transgender-Related Health Care Coverage*, KBBI (Mar. 6, 2019), <https://www.kbbi.org/post/lawsuit-challenges-state-s-medicaid-policy-denying-transgender-related-health-care-coverage-0>.

**Arizona.** Since at least [2010](#),<sup>37</sup> the Arizona Health Care Cost Containment System has had a [policy](#) expressly excluding “treatment of gender dysphoria including gender reassignment surgeries” from Medicaid coverage.<sup>38</sup>

**Georgia.** In 1993, the Georgia Department of Community Health issued a [policy](#) expressly excluding “transsexual surgeries” from Medicaid coverage.<sup>39</sup>

**Hawaii.** Since at least [1993](#),<sup>40</sup> the Hawaii Department of Human Services has had a policy excluding gender-affirming care from Medicaid coverage. While the current [policy](#) still generally excludes gender-affirming care from coverage, which includes medical treatments, surgical procedures, hormones, and other medications, it does allow coverage specifically for medication related to gender transition if the beneficiary has a court order affirming his or her gender change.<sup>41</sup>

**Iowa.** In [1994](#),<sup>42</sup> the Iowa Department of Human Services issued a [regulation](#) expressly excluding gender-affirming care from Medicaid coverage.<sup>43</sup> In 2019, the Iowa Supreme Court [held](#) that the exclusion violated the state’s non-discrimination law, which prohibits discrimination based on gender identity in public accommodations, and as such, could not be enforced.<sup>44</sup> The state legislature responded by passing an appropriations [bill](#) that included a provision stating that Iowa’s non-discrimination law does not require Medicaid to cover gender-affirming surgeries or procedures.<sup>45</sup> The new law paves the way for the Department of Health to enforce the ban. The governor signed the bill in May 2019.

**Missouri.** Missouri’s [Physician Manual](#) for Medicaid providers, last issued by the Missouri Department of Social Services in 2019, expressly excludes “surgical procedures for gender change” from Medicaid coverage.<sup>46</sup>

**Nebraska.** In 1990, the Nebraska Department of Health and Human Services issued a [regulation](#) expressly excluding “sex change procedures” from Medicaid coverage.<sup>47</sup>

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<sup>37</sup> Notice of Proposed Rulemaking, 20 Ariz. Admin. Reg. 709 (Mar. 21, 2014).

<sup>38</sup> ARIZ. ADMIN. CODE § R9-22-205(B)(4)(a) (2019).

<sup>39</sup> Georgia Medicaid State Plan Attachment 3.1-A, GA. DEP’T COMMUNITY HEALTH, AT 1c (Nov. 4, 1993), [https://dch.georgia.gov/sites/dch.georgia.gov/files/related\\_files/document/State\\_Plan\\_Attachment\\_3.pdf](https://dch.georgia.gov/sites/dch.georgia.gov/files/related_files/document/State_Plan_Attachment_3.pdf).

<sup>40</sup> Lawrence Miike, *Health Insurance: The Hawaii Experience*, U.S. Congress Off. Tech. Assessment (June 1993), <https://ota.fas.org/reports/9327.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> See *Good v. Iowa Dep’t. of Human Servs.*, 924 N.W.2d 853 (Iowa 2019).

<sup>43</sup> IOWA ADMIN. CODE r. 441-78.1(4)(b)(2) (2019).

<sup>44</sup> *Good*, 924 N.W. 2d 853.

<sup>45</sup> 2019 Iowa Acts Ch. 85, at 45 (*amending* IOWA CODE § 216.7 (2019)).

<sup>46</sup> *State of Missouri Physician Manual*, MO HEALTHNET, at § 13.38 (Aug. 28, 2019) [http://manuals.momed.com/collections/collection\\_phy/print.pdf](http://manuals.momed.com/collections/collection_phy/print.pdf).

<sup>47</sup> 471 NEB. ADMIN. CODE § 18-003.01(30) (2019).



**Ohio.** In 2015, the Ohio Department of Medicaid issued a [regulation](#) expressly excluding “gender transformation” from Medicaid coverage.<sup>48</sup>

**Tennessee.** In 2006,<sup>49</sup> the Tennessee Department of Finance and Administration issued a [regulation](#) expressly excluding “transsexual surgery” from Medicaid coverage.<sup>50</sup>

**Texas.** Texas’s Medicaid [Providers Manual](#), last issued in 2019, expressly excludes “sex change operations” from Medicaid coverage.<sup>51</sup>

**West Virginia.** West Virginia’s Medicaid [Provider Manual](#), last issued by the West Virginia Bureau of Medical Services in 2005, expressly excludes “transsexual surgery” from Medicaid coverage.<sup>52</sup>

**Wyoming.** Since at least 1992,<sup>53</sup> the Wyoming Department of Health has had a [regulation](#) expressly excluding “transsexual surgery” from Medicaid coverage.<sup>54</sup>

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<sup>48</sup> OHIO ADMIN. CODE 5160-2-03(A)(2)(e) (2019).

<sup>49</sup> TENN. COMP. R. & REGS. 1200-13-13.10(3)(b)(81) (2006).

<sup>50</sup> TENN. COMP. R. & REGS. 1200-13-13.10(3)(b)(86) (2019).

<sup>51</sup> *Texas Medicaid Provider Procedures Manual – September 2019*, TEX. MEDICAID & HEALTHCARE PARTNERSHIP, at § 1.11 (2019), [http://www.tmhp.com/Manuals\\_HTML1/TMPPM/Current/index.html#t=TMPPM%2F1\\_01\\_Provider\\_Enrollment%2F1\\_01\\_Provider\\_Enrollment.htm%23TOC\\_1\\_11\\_Texas\\_Medicaidbc-93&rhtocid=1\\_10](http://www.tmhp.com/Manuals_HTML1/TMPPM/Current/index.html#t=TMPPM%2F1_01_Provider_Enrollment%2F1_01_Provider_Enrollment.htm%23TOC_1_11_Texas_Medicaidbc-93&rhtocid=1_10).

<sup>52</sup> *West Virginia Medicaid Provider Manual*, W. VA. DEP’T. HEALTH & HUM. RESOURCES, at § 161 (Jan. 1, 2005), [https://dhhr.wv.gov/bms/Provider/Documents/Manuals/bms\\_manuals\\_Chapter\\_100.pdf](https://dhhr.wv.gov/bms/Provider/Documents/Manuals/bms_manuals_Chapter_100.pdf).

<sup>53</sup> 048-0037-26 Wyo. Code R. § 5(j)(vii) (LexisNexis 1992).

<sup>54</sup> 048-0037-26 Wyo. Code R. § 5(x) (LexisNexis 2019); Medicaid Handbook, Wyo. Dep’t Health, at 17 (Oct. 2016), <https://health.wyo.gov/wp-content/uploads/2016/02/Medicaid-Handbook-10.01.2016.pdf>.

# IMPACT OF LAWS ADDRESSING MEDICAID COVERAGE

## NUMBER OF TRANSGENDER ADULTS ENROLLED IN MEDICAID

Using the best available data, we estimate that 152,000 transgender adults in the U.S. are enrolled in Medicaid. Fewer than half of transgender Medicaid beneficiaries (69,000) have guaranteed access to coverage for gender-affirming care under express policies in state law. For around 51,000 transgender Medicaid beneficiaries, coverage is uncertain because they live in states where the laws are silent on Medicaid coverage for gender-affirming care. An estimated 32,000 transgender Medicaid beneficiaries live in states with express bans that deny access to covered gender-affirming care.

Table 1. Medicaid enrollment of transgender adults, by state

STATE	NUMBER OF TRANSGENDER ADULTS	TRANSGENDER ADULTS ENROLLED IN MEDICAID		
		GENDER-AFFIRMING CARE COVERED	GENDER-AFFIRMING CARE NOT COVERED	NO POLICY ON GENDER-AFFIRMING CARE
Alabama	22,500			2,000
Alaska	2,700		< 1,000	
Arizona	30,550		3,000	
Arkansas	13,400			2,000
California	218,400	16,000		
Colorado	20,850	3,000		
Connecticut	12,400	1,000		
Delaware	4,550			1,000
DC	14,550	2,000		
Florida	100,300			9,000
Georgia	55,650		5,000	
Hawaii	8,450		1,000	
Idaho	4,750			< 1,000
Illinois	49,750	6,000		
Indiana	27,600			6,000
Iowa	7,400		1,000	
Kansas	9,300			1,000
Kentucky	17,700			4,000
Louisiana	20,900			4,000
Maine	5,350	< 1,000		
Maryland	22,300	2,000		
Massachusetts	29,900	2,000		
Michigan	32,900			7,000
Minnesota	24,250	2,000		
Mississippi	13,650			2,000
Missouri	25,050		1,000	
Montana	2,700	< 1,000		
Nebraska	5,400		< 1,000	

STATE	NUMBER OF TRANSGENDER ADULTS	TRANSGENDER ADULTS ENROLLED IN MEDICAID		
		GENDER-AFFIRMING CARE COVERED	GENDER-AFFIRMING CARE NOT COVERED	NO POLICY ON GENDER-AFFIRMING CARE
Nevada	12,700	2,000		
New Hampshire	4,500			1,000
New Jersey	30,100	3,000		
New Mexico	11,750			3,000
New York	78,600	15,000		
North Carolina	44,750			4,000
North Dakota	1,650			< 1,000
Ohio	39,950		8,000	
Oklahoma	18,350			1,000
Oregon	19,750	2,000		
Pennsylvania	43,800	5,000		
Rhode Island	4,250	< 1,000		
South Carolina	21,000			2,000
South Dakota	2,150			< 1,000
Tennessee	31,200		2,000	
Texas	125,350		9,000	
Utah	7,200			< 1,000
Vermont	3,000	< 1,000		
Virginia	34,500			2,000
Washington	32,850	4,000		
West Virginia	6,100		2,000	
Wisconsin	19,150	2,000		
Wyoming	1,400		< 1,000	
<b>TOTAL</b>	<b>1,397,250</b>	<b>69,000</b>	<b>32,000</b>	<b>51,000</b>

We reached these estimates using recent data from several sources. We relied on the Gallup Daily Tracking Poll, a national population-based survey, to estimate the percentage of transgender people enrolled in Medicaid by state. Gallup does not allow disaggregation of transgender respondents from the broader group of LGBT respondents, so we assume that transgender people are enrolled in Medicaid at the same rate as the LGBT population as a whole in each state. We then applied these state-level enrollment percentages to the number of transgender adults in each state from a prior Williams Institute study, *Age of Individuals Who Identify as Transgender in the United States*, to reach estimates of the number of transgender Medicaid enrollees by state. Estimates were rounded to the nearest 1,000. For more details on the methodology used to calculate estimates, see page 20.

## LIMITATIONS

Our calculations may underestimate the number of transgender adults enrolled in Medicaid due to limited available data specifically on transgender people and their experiences. We relied on data collected through the Gallup Daily Tracking Survey to estimate the number of enrollees by state because it is a large, national probability survey that collects information about LGBT status

and insurance coverage. However, we are unable to separate out transgender respondents from LGBT respondents as a whole due to the survey design. As a result, our calculations assume that transgender adults enroll in Medicaid at the same rate as the broader LGBT population. Transgender people may actually be enrolled in Medicaid at higher rates than cisgender LGB people because they are more likely to live in poverty and have disabilities than cisgender people.<sup>55</sup>

In addition, we do not consider the number of transgender adults who are currently eligible for Medicaid but not enrolled, or the number of transgender adults who would be newly eligible and enroll if their state adopted Medicaid expansion. Transgender adults who are currently eligible for Medicaid may not be enrolled for various reasons. For example, they may not enroll because gender-affirming services are not covered or because their identity documents do not accurately reflect their name and gender identity, making it difficult to access public benefits.<sup>56</sup> At least some of these adults may be more likely to enroll if their state Medicaid programs reduce barriers to access and affirmatively offer coverage for a range of gender-affirming medical services.

Further adoption of Medicaid expansion by the states would also likely increase enrollment of transgender adults. To date, 33 states have adopted and implemented Medicaid expansion and 17 have not.<sup>57</sup> Medicaid expansion is particularly important for low income adults without children, who typically are not eligible under traditional Medicaid rules.<sup>58</sup> Gallup data suggest that, in general, lower percentages of LGBT adults are enrolled in Medicaid in states that have not adopted expansion compared to states that have adopted expansion.<sup>59</sup> It is likely that more transgender adults in the non-expansion states would enroll if these adopted expansion.

Due to these limitations, our calculations likely underestimate the number of transgender adults who are currently or could be impacted by state Medicaid policies. The report also does not consider the number of transgender youth who are enrolled in Medicaid and are impacted by state Medicaid policies.

In addition, these estimates do not consider the number of transgender adults who may have difficulty finding providers who accept Medicaid and are able to provide competent gender-affirming care, even if their state's Medicaid program provides coverage for this care. Health care providers, in

<sup>55</sup> Janelle M. Downing & Julia M. Przedworski, *Health of Transgender Adults in the U.S., 2014–2016*, 55 AM. J. PREVENTATIVE MED. 336 (2018); M.V. LEE BADGETT, BIANCA D.M. WILSON & SOON KYU CHOI, WILLIAMS INSTITUTE, LGBT POVERTY IN THE U.S. (forthcoming 2019).

<sup>56</sup> KELLAN E. BAKER ET AL., CTR. FOR AM. PROGRESS, THE MEDICAID PROGRAM AND LGBT COMMUNITIES: OVERVIEW AND POLICY RECOMMENDATIONS 10 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/08/08125221/2LGBTMedicaidExpansion-brief.pdf>; *Affordable Care Act Enrollment Assistance for LGBT Communities: A Resource for Behavioral Health Providers*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., AT 11 (2014), <https://store.samhsa.gov/system/files/pep14-lgbtacaenrolla.pdf>.

<sup>57</sup> *Status of State Medicaid Expansion Decisions: Interactive Map*, HENRY J. KAISER FAM. FOUND. (Aug. 1, 2019), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/>.

<sup>58</sup> See, e.g., BAKER ET AL., *supra* note 56.

<sup>59</sup> Shoshana Goldberg & Kerith J. Conron, *Analysis of Gallup Daily Tracking Poll Data* (on file with authors). For methodology, see page 21, *infra*.

general, are less likely to accept Medicaid than other forms of insurance, which may make it difficult for all Medicaid beneficiaries, including transgender people, to find doctors.<sup>60</sup> Additionally, many transgender people report that they have experienced or fear discrimination and other barriers to receiving competent medical care related to their gender transition.<sup>61</sup> For example, the 2015 U.S. Transgender Survey, the largest survey of transgender people in the U.S. to date, found that 33% of respondents who had seen a health care provider in the past year reported that they had a negative experience with a provider.<sup>62</sup> The estimates consider only access to coverage for gender-affirming care under current state Medicaid policies, and not whether people are actually able to receive competent care.

Finally, the report provides estimates of transgender people who have access to coverage for gender-affirming care under their state Medicaid programs and those who are denied access to coverage under express bans. We are not able to estimate the number of transgender people who would seek such treatment, were coverage for it to be available.

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<sup>60</sup> MEDICAID AND CHIP PAYMENT AND ACCESS COMM., PHYSICIAN ACCEPTANCE OF NEW MEDICAID PATIENTS 6 (2019), <http://www.macpac.gov/wp-content/uploads/2019/01/Physician-Acceptance-of-New-Medicaid-Patients.pdf>.

<sup>61</sup> Jae A. Puckett et al., *Barriers to Gender Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 *Sex. Res. Social Policy* 48 (2018); Deirdre A. Shires et al., *Primary Care Providers' Willingness to Continue Gender-Affirming Hormone Therapy for Transgender Patients*, 35 *Fam. Practice* 576 (2018); Gilbert Gonzalez & Carrie Henning-Smith, *Barriers to Care among Transgender and Gender Nonconforming Adults*, 95 *MILBANK Q.* 726 (2017); SANDY JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 94-95 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>62</sup> JAMES ET AL., *supra* note 61 at 97.



## STATE AND FEDERAL LAWS THAT SUPPORT ACCESS TO COVERAGE FOR GENDER-AFFIRMING CARE

Medicaid exclusions for gender-affirming care have been challenged in court in several states. Plaintiffs in these cases have asserted that denial of coverage violates federal and state non-discrimination laws and constitutional provisions. In a number of these cases, courts have agreed with the plaintiffs, resulting in increased access to coverage for transgender beneficiaries. Several more cases that raise the same issues are currently being litigated. If these cases are decided in the beneficiaries' favor, more transgender people will have access to coverage for gender-affirming care through Medicaid.

### FEDERAL STATUTES

#### Affordable Care Act

Transgender Medicaid beneficiaries can argue that Section 1557 of the Patient Protection and Affordable Care Act (ACA) supports their access to coverage for gender-affirming care. Section 1557 of the ACA prohibits discrimination in health programs and activities based on sex, among other personal characteristics.<sup>63</sup> In 2016, the Office for Civil Rights in the U.S. Department of Health and Human Services (OCR) issued a regulation interpreting Section 1557's sex non-discrimination provisions to prohibit discrimination based on gender identity and sex stereotypes and explicitly barring covered insurers from categorically excluding all types of gender-affirming care from coverage.<sup>64</sup> In prohibiting discrimination based on sex stereotyping and gender identity, the rule is consistent with established case law interpreting Section 1557 and similar sex non-discrimination requirements in other federal laws, including Title VII of the Civil Rights Act and Title IX of the Education Amendments.<sup>65</sup> The 2016 rule was written broadly to apply to all health programs and activities that receive federal financial assistance, including state Medicaid programs, and all health programs administered by an executive agency or any entity established under the ACA.<sup>66</sup>

In 2019, under a new administration, OCR and CMS issued a proposed rule that would remove express protections from discrimination based on gender identity and sex stereotyping in health care and health coverage under Section 1557.<sup>67</sup>

<sup>63</sup> 42 U.S.C. § 18116(a) (2018).

<sup>64</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,467 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

<sup>65</sup> E.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dep't. of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

<sup>66</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,467 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

<sup>67</sup> Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,856 (June 14, 2019) (to be codified at 45 C.F.R. pt. 92).

Under the new regulation, OCR would not enforce Section 1557 against health care providers charged with discriminating on the bases of gender identity and sex stereotyping.

Nonetheless, even if the regulation is finalized, individuals may be able to find relief in court under the sex non-discrimination provisions of the statute itself.<sup>68</sup> Some courts have held that the statutory language of Section 1557 prohibits discrimination based on gender identity as a form of sex discrimination. For example, in 2019, a federal district court in Wisconsin held that the state's ban on Medicaid coverage for gender-affirming care violated Section 1557.<sup>69</sup> The court held in favor of the Medicaid beneficiaries for several reasons. First, the court found that the state discriminated against Medicaid beneficiaries based on sex by covering certain procedures for people whose sex matched their gender identity, but not for those whose sex and gender identity did not match.<sup>70</sup> The court said that this treatment amounts to discrimination based on natal sex—"a straight forward case of sex discrimination."<sup>71</sup> Second, the court relied on a growing body of case law to find that discrimination against transgender individuals is by its nature discrimination based on sex and sex stereotypes.<sup>72</sup> Similarly, in 2018, a district court in Minnesota found that Section 1557 prohibits discrimination based on gender identity.<sup>73</sup> The court adopted the reasoning of several other courts that have held that the sex non-discrimination provisions of Title VII and Title IX encompass discrimination based on gender identity.<sup>74</sup> And, in 2017, a federal district court in California found that the parents of a transgender boy who died by suicide after his doctors misgendered him had established a valid claim of sex discrimination under Section 1557 on behalf of their son.<sup>75</sup> In these cases, the courts were interpreting the statutory language and did not rely on any rules or regulations interpreting the law.<sup>76</sup>

A number of courts have agreed that other civil rights laws that prohibit discrimination based on sex, such as Title VII of the Civil Rights Act and Title IX of the Education Amendments, also prohibit discrimination based on gender identity.<sup>77</sup> However, the U.S. Supreme Court is set to decide this issue in 2020 in *R.G. & G.R. Harris Funeral Homes v. EEOC*.<sup>78</sup> In *Harris Funeral Homes*, a transgender employee

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<sup>68</sup> The ACA provides a private right of action. 42 U.S.C. § 18116 (2018).

<sup>69</sup> *Flack v. Wis. Dep't. of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018).

<sup>70</sup> *Id.* at 947-48.

<sup>71</sup> *Id.* at 948.

<sup>72</sup> *Id.* at 948-51.

<sup>73</sup> *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018).

<sup>74</sup> *Id.* at 952-53.

<sup>75</sup> *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).

<sup>76</sup> However, some courts have held the opposite—that discrimination based on gender identity is not a form of sex discrimination prohibited by Section 1557 of the ACA. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016); Office for Civil Rights, *Fact Sheet: HHS Proposes to Revise ACA Section 1557 Rule*, U.S. DEP'T HEALTH & HUM. SERVS. (MAY 24, 2019), <https://www.hhs.gov/sites/default/files/factsheet-section-1557.pdf> (noting the District Court of North Dakota enjoined the application of the Final Rule to two plaintiffs because the court concluded *Franciscan Alliance* was persuasive).

<sup>77</sup> E.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dep't. of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

<sup>78</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

is arguing that her employer discriminated against her based on sex in violation of Title VII of the Civil Rights Act of 1964.<sup>79</sup> The outcome of this case will likely influence how courts interpret the sex non-discrimination provision of the ACA.

Even if the proposed regulation issued by OCR in 2019 were adopted, courts may still interpret the statutory language of Section 1557 to prohibit state Medicaid programs from discriminating against transgender beneficiaries, including in access to gender-affirming care. However, the outcome of such cases will likely depend on the U.S. Supreme Court's upcoming decision in *Harris Funeral Homes*.

## Social Security Act

Transgender Medicaid beneficiaries can also argue that the statutory language of the Social Security Act, along with administrative regulations interpreting the statute, support access to coverage for gender-affirming care. The Social Security Act provides broad parameters for state Medicaid programs.<sup>80</sup> Among these parameters are requirements that states provide medical assistance to all categorically needy individuals (referred to as the Availability Provision) and that such assistance be provided equally among individuals within beneficiary groups (referred to as the Comparability Provision).<sup>81</sup> The U.S. Supreme Court has implied that Availability Provision requires state Medicaid programs to provide medically necessary care to all qualified beneficiaries.<sup>82</sup> Some courts have interpreted these provisions and Supreme Court precedent to require that states provide gender-affirming care to transgender Medicaid beneficiaries. For example, in 2016, a federal district court in New York held that the state's blanket ban on cosmetic surgeries related to gender transition violated the Availability Provision by barring coverage for treatments that could be medically necessary for transgender beneficiaries, and also violated the Comparability Provision of the statute by providing coverage for cosmetic treatments for conditions unrelated to gender transition.<sup>83</sup> Similarly, in 2019, a federal district court in Wisconsin held that the state's ban on gender-affirming care violated the Availability and Comparability Provisions.<sup>84</sup>

The Social Security Act also authorizes the Secretary of Health and Human Services, among other officials, to further define and implement the elements of state Medicaid programs through regulations.<sup>85</sup> In 2016, the Department of Health and Human Services issued four regulatory provisions that expressly prohibit discrimination based on gender identity in state Medicaid programs pursuant to this grant of power. Two separate provisions require that state Medicaid plans and Managed Care Organizations participating in Medicaid programs "promote access and delivery" of services regardless of sexual orientation and gender identity.<sup>86</sup> A third provision prohibits Managed

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<sup>79</sup> *Id.*

<sup>80</sup> 42 U.S.C. § 1396 (2018).

<sup>81</sup> 42 U.S.C. §§ 1396a(a)(10)(A)–(B) (2018). The beneficiary groups are the "categorically needy" and "covered medically needy group[s]." 42 C.F.R. § 440.240 (2018).

<sup>82</sup> *Cruz v. Zucker*, 195 F. Supp. 3d 554, 570 (S.D.N.Y. 2016) (citing *Beal v. Doe*, 432 U.S. 438, 444 (1977)).

<sup>83</sup> *Id.* at 570, 576.

<sup>84</sup> *Flack v. Wisc. Dept' of Health Servs.*, No. 18-cv-309-wmc (W.D. Wisc. Aug. 16, 2019).

<sup>85</sup> 42 U.S.C. § 1302(a) (2018).

<sup>86</sup> 42 C.F.R. §§ 440.262, 438.206(c)(2) (2018).

Care Organizations from using “any policy or practice” that discriminates based on sexual orientation or gender identity, among other characteristics.<sup>87</sup>

The proposed regulation issued by OCR in 2019 would eliminate express protections from discrimination based on gender identity in the regulations.<sup>88</sup> However, beneficiaries could still argue, independent of a discrimination analysis, that the statutory provisions in the Social Security Act create a right to gender-affirming care as a form of medically necessary care that must be provided to qualified beneficiaries.<sup>89</sup>

## State Statutes

Some state’s non-discrimination statutes also support transgender Medicaid beneficiaries’ access to coverage for gender-affirming care. Non-discrimination statutes in 20 states and D.C. prohibit discrimination based on gender identity in public accommodations.<sup>90</sup> Although the definition of “public accommodation” differs by state, when the term is broadly defined it likely includes state government programs, such as Medicaid. If Medicaid is considered a public accommodation in states that include protections from gender identity discrimination, courts are likely to find that denial of coverage for gender-affirming care violates the law. Transgender Medicaid beneficiaries in four states where Medicaid policies either bar coverage for gender-affirming care or are silent as to coverage—Delaware, Hawaii, New Hampshire, and New Mexico—can argue that these states’ nondiscrimination laws thus independently support a claim for coverage.

The Iowa Supreme Court addressed this issue in March 2019. In *Good v. Iowa Department of Human Services*, the court held that Iowa’s administrative policy barring Medicaid coverage for gender-affirming care violated state law prohibiting gender identity discrimination in public accommodations.<sup>91</sup> The state department had argued that Medicaid was not a public accommodation within the meaning of the statute.<sup>92</sup> The court disagreed, finding that the statute’s broad definition of “public accommodation”—which includes “each state and local government unit or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants, or goods to the public, gratuitously or otherwise”—encompassed the Medicaid program.<sup>93</sup> The policy was unenforceable as a result of the court’s decision until the legislature responded by amending the public accommodation non-discrimination law to specifically state that the law does not require Medicaid to cover gender-affirming care.

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<sup>87</sup> 42 C.F.R. § 438.3(d)(4) (2018).

<sup>88</sup> Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,871 (June 14, 2019) (to be codified at 45 C.F.R. pt. 92).

<sup>89</sup> The Availability and Comparability provisions would still provide support for access to care even if the non-discrimination requirements are eliminated in the final OCR rule.

<sup>90</sup> *Non-Discrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws/public-accommodations](http://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations) (last visited July 5, 2019).

<sup>91</sup> *Good v. Iowa Dep’t. of Human Servs.*, No. 18-1158, 2019 Iowa Sup. LEXIS 19 (Iowa Mar. 8, 2019).

<sup>92</sup> *Id.* at \*14.

<sup>93</sup> *Id.* at \*14–16.

In light of the legislative change in Iowa, the state's Department of Human Services may enforce its exclusion for gender-affirming care without violating the non-discrimination law. Hawaii is the only state with a policy expressly banning Medicaid coverage for gender-affirming care that also has a non-discrimination law that prohibits gender identity discrimination in public accommodations.<sup>94</sup> In addition, three other states—Delaware, New Hampshire, and New Mexico—that do not address coverage for gender-affirming care under their Medicaid programs have statutes that prohibit discrimination based on gender identity in public accommodations.<sup>95</sup> Like Iowa's law, two of these state laws, Delaware and New Mexico define "public accommodations" broadly, and Delaware's definition specifically includes state agencies.<sup>96</sup> If courts in any of these states interpret the non-discrimination statutes to apply to Medicaid programs, they will likely decide that denials of coverage for gender-affirming care violate the law.

## U.S. Constitution

Transgender Medicaid beneficiaries can argue that the Equal Protection Clause of the 14th Amendment to the U.S. Constitution requires access to coverage for gender-affirming care. The Equal Protection Clause requires state governments to provide equal treatment to similarly situated individuals.<sup>97</sup> In cases brought under the Equal Protection Clause, courts review the challenged state action (such as a statute or policy) under different standards, depending on the nature of the classification at issue. The most lenient standard, known as "rational basis" review, applies to most classifications and requires only that the challenged government action is rationally related to a legitimate government interest.<sup>98</sup> The ordinary form of rational basis review is highly deferential to the legislature or other government entity that created the challenged state action.<sup>99</sup>

Some classifications trigger a more searching form of review and courts will be less deferential to the state in these cases. For example, government actions that classify individuals based on "suspect or "quasi-suspect" characteristics, such as race or sex, receive heightened scrutiny and are more likely to fail than actions that are subject to rational basis review.<sup>100</sup> More specifically, in cases involving state action that draws lines based on a "suspect" characteristic, such as race, courts apply strict scrutiny and will find that the action violates the Equal Protection Clause unless it is narrowly tailored to serve a compelling government interest.<sup>101</sup> When a state action that classifies based on sex (a "quasi-suspect" characteristic) is at issue, courts apply a similarly searching level of review, requiring that the

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<sup>94</sup> HAW. REV. STAT. §§ 489-1, 489-3 (2018). Hawaii also has a statute that prohibits health insurers in the state from discriminating against beneficiaries based on gender identity, but the law does not apply to insurers offering insurance "under a federally funded program under the Social Security Act." Because Medicaid is a federally funded program under the Social Security Act, the state law would not protect transgender Medicaid beneficiaries from discrimination. HAW. REV. STAT. § 431:10A-118.3 (2018).

<sup>95</sup> DEL. CODE ANN. tit 6, § 4501 (2018); N.H. REV. STAT. ANN. § 354-A:1 (2018); N.M. STAT. ANN. § 28-1-7 (2019).

<sup>96</sup> DEL. CODE ANN. tit 6, § 4502(14) (2018); N.M. STAT. ANN. § 28-1-2(H) (2019).

<sup>97</sup> U.S. Const. amend. XIV, § 1.

<sup>98</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993).

<sup>99</sup> *Id.*

<sup>100</sup> See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–56 (2011).

<sup>101</sup> See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).



state action substantially further an important government interest in order to survive.<sup>102</sup>

Judges and legal scholars have also identified a group of cases where courts have applied a more rigorous form of rational basis review—something between ordinary rational basis review and intermediate scrutiny—despite articulating the test as a rational basis one. This standard is often referred to as “rational basis with bite.”<sup>103</sup> In these cases, the government action does not classify based on a “suspect” or “quasi-suspect” characteristic, but there is evidence that the action was motivated by the government’s animus toward a politically unpopular group. For example, in *United States v. Windsor*, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act, which limited the federal government’s definition of marriage to opposite-sex couples, finding that Congress enacted the law out of animus toward LGB people and same-sex couples and could not provide a strong enough benign justification for doing so.<sup>104</sup>

Several courts have held that discrimination against transgender people violates the Equal Protection Clause, usually under a heightened form of review. Most of these cases have involved discrimination in employment or education,<sup>105</sup> but some have also involved denials of access to gender-affirming care in state health programs.<sup>106</sup> One case, *Flack v. Wisconsin Department of Health Services*, specifically addressed a ban on Medicaid coverage for gender-affirming care and held that the policy violated the Equal Protection Clause.<sup>107</sup> The court found that classifications that discriminate against transgender people should be subjected to heightened scrutiny both because gender identity discrimination is a form of sex discrimination and because transgender people should be considered a “suspect” or “quasi-suspect” class independently.<sup>108</sup> The court held that the ban did not pass constitutional muster under that standard.<sup>109</sup> Other cases that are currently in litigation have also raised equal protection challenges to state bans on Medicaid coverage for gender-affirming care.<sup>110</sup> If courts continue to interpret the Equal Protection Clause to bar states from excluding gender-affirming care from Medicaid coverage, more transgender beneficiaries will gain access to coverage for these services.

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<sup>102</sup> See *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>103</sup> Yoshino, *supra* note 97, at 759.

<sup>104</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>105</sup> E.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. U.S. Dep’t. of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018).

<sup>106</sup> E.g., *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Flack v. Wis. Dep’t. of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018); *Brown v. Dep’t. of Health & Human Servs.*, No. 8:16CV569, 2017 U.S. Dist. LEXIS 84518 (D. Neb. June 2, 2017).

<sup>107</sup> *Flack*, 328 F. Supp. 3d at 951.

<sup>108</sup> *Id.* at 952–53.

<sup>109</sup> *Flack v. Wisc. Dept’ of Health Servs.*, No. 18-cv-309-wmc (W.D. Wisc. Aug. 16, 2019).

<sup>110</sup> David Pitt, *Iowa Sued over Prohibition on Medicaid for Gender Surgery*, AP (May 31, 2019), <https://www.apnews.com/251830e3e4aa499dbe3054481dea38da>.

## CONCLUSION

An estimated 1.4 million adults in the U.S. identify as transgender and approximately 152,000 of them are enrolled in Medicaid. Transgender Medicaid beneficiaries in the U.S. face a patchwork of policies that make coverage for gender-affirming care uncertain. Fewer than half of transgender Medicaid beneficiaries (69,000) have guaranteed access to coverage for gender affirming care under express policies in 18 states. An estimated 51,000 transgender Medicaid beneficiaries live in the 20 states that have not expressly addressed coverage for gender-affirming care in their Medicaid programs. An estimated 32,000 transgender Medicaid beneficiaries live in states with express bans that deny access to covered gender-affirming care. Although many transgender Medicaid beneficiaries are still denied access to gender-affirming care, and many others face additional barriers to accessing such care, recent litigation and administrative policy changes have resulted in the extension of coverage in several states. Additional policy changes in states that still have bans or lack clear language addressing coverage would ensure that transgender Medicaid beneficiaries have access to coverage for necessary medical care no matter where they live.

## METHODOLOGY

To determine the percentage and number of transgender people who are enrolled in Medicaid, by state, we relied upon the [Gallup Daily Tracking Survey](#), a population based survey, for information on Medicaid insurance rates in the transgender population. The Gallup Daily Tracking survey is an annual list-assisted random digit dial (70% cell phone, 30% landline) survey, conducted in English and Spanish, of approximately 350,000 U.S. adults ages 18 and older who reside in the 50 states and the District of Columbia. Respondents are randomly assigned to one of two surveys within the Daily Tracking survey—the Gallup-Sharecare Well-Being Index or the Gallup Politics and Economy survey. In 2017, Politics and Economy survey respondents were recruited daily; those assigned to the Well-Being Index were recruited daily for the first half of 2017 and then weekly starting in July 2017, resulting in a slightly smaller sample for 2017 (approximately 341,000). Aggregated data from 2015-2017 are presented for most states. Additional data collected from January 1, 2013 through December 31, 2017 were aggregated for 13 states with smaller samples (200 LGBT respondents in the 2015-2017 aggregated dataset): Alaska, Delaware, Hawaii, Idaho, Mississippi, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

Gallup does not allow for disaggregation of LGBT respondents into transgender vs. LGB respondents, so we used estimates of the percentage of all LGBT people enrolled in Medicaid, by state, in our calculations, and assumed that rates of Medicaid coverage for transgender adults are at the same rate as the broader LGBT population.

LGBT identity is based on response to the question, *“Do you, personally, identify as lesbian, gay, bisexual, or transgender?”* Estimates derived from other measures of sexual orientation and gender identity will yield different results. Respondents who answered “yes” were classified as LGBT. The percentage of LGBT adults in each state with Medicaid insurance reflects the survey-weighted percentage of Gallup respondents, by state, who were categorized as LGBT, and listed Medicaid as their source of *“primary health insurance coverage.”* Proportions are weighted using sampling weight from the Gallup-Sharecare Well-Being Index only for 2013 through 2016, and from both Gallup surveys in 2017. Analyses were limited to those who provided a valid response to this question (e.g. those who refuse to answer or reported they didn’t know their source, were excluded).

To determine the number of transgender adults enrolled in Medicaid, we then multiplied the percentage of Medicaid-insured LGBT adults, by estimates of the number of adults living in each state who are transgender, as reported in [Herman et al., Williams Institute, Age of Individuals Who Identify as Transgender in the United States \(2017\)](#), and rounded to the nearest 1,000. Counts reported here may not sum to totals, due to rounding and/or survey weighting. The national total number of Medicaid-insured transgender adults estimated here (n=152,000, or approximately 11%) is similar to estimate derived from the 2015 US Transgender Survey, which found that 13% of transgender adults nationwide were on Medicaid, translating to approximately 182,000 Medicaid-insured transgender adults (see James et al, National Center for Transgender Equality, [The Report of the 2015 U.S. Transgender Survey](#) (2016)).

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## ABOUT THE WILLIAMS INSTITUTE

The Williams Institute is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A think tank at UCLA Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public. These studies can be accessed at the Williams Institute website.

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