

**AmeriHealth Caritas Iowa  
As Agent for the Iowa Department of Human Services**

IN RE: APPEAL OF EERIEANNA GOOD	)	Member's Name: EerieAnna Good
	)	Member's DOB: [REDACTED]
	)	Member's ID Number: [REDACTED]
(Re: Type of Service Appealed: Denial of orchiectomy for gender dysphoria	)	
	)	
Case ID Number: [REDACTED]	)	
Case Provider: Katherine Imborek, MD	)	

**MEMORANDUM OF LAW IN  
SUPPORT OF APPEAL**

EerieAnna Good ("Ms. Good"), by her counsel, submits this memorandum of law in support of her appeal from the denial of her request for pre-approval of expenses related to surgical treatment for gender dysphoria.

**JURISDICTION**

Ms. Good's pre-approval request was denied on February 2, 2017. This appeal to AmeriHealth Caritas Iowa ("AmeriHealth") was timely filed on March 3, 2017. The appeal is authorized by the Iowa Medicaid statute, *see* Iowa Code Ann. § 249A.4(10), and by the AmeriHealth Caritas Iowa Provider Manual. AmeriHealth is a designee of the Iowa Department of Human Services ("DHS") with respect to administering the Iowa Medicaid program.

**INTRODUCTION**

On January 27, 2017, Dr. Bradley A. Erickson ("Dr. Erickson") requested Medicaid pre-approval from AmeriHealth, Ms. Good's managed-care organization, which subcontracts with DHS to administer her Medicaid coverage. On February 2, 2017, AmeriHealth denied the request for pre-approval (the "Decision"). The Decision advised Dr. Erickson that "the request for orchiectomy for gender dysphoria" could not be approved because of Iowa Administrative Code Section 441.78.1(4) (the "Regulation"), which excludes from coverage "[s]urgeries for the

purpose of sex reassignment coverage.” Despite this, Medicaid coverage is available for orchiectomies for other medical conditions affecting non-transgender persons. (*See* 3/15/17 Letter from Dr. Erickson.)<sup>1</sup> The impact of the Decision is that Iowa Medicaid will cover treatment for non-transgender Medicaid participants, but not for the same treatment when performed as part of transition-related care for transgender individuals.

AmeriHealth’s denial of pre-approval for the expenses related to Ms. Good’s surgery to treat her gender dysphoria is unlawful and unconstitutional.<sup>2</sup> First, the denial violates the Iowa Civil Rights Act’s express prohibitions on gender-identity and sex discrimination. Second, it violates the equal-protection clause of the Iowa Constitution. For these reasons, and as set forth in further detail below, AmeriHealth’s decision should be reversed and vacated, and Ms. Good should receive pre-approval for her surgery.

### **ARGUMENT**

#### **A. The Regulation cited as the sole basis for the denial violates the Iowa Civil Rights Act.**

The Iowa Civil Rights Act specifically prohibits discrimination based on gender identity and sex in public accommodations. Iowa Code Ann. § 216.7(1)(a). Units of state government, such as DHS, are public accommodations, as are their agents, such as AmeriHealth. *See* Iowa Code Ann. § 216.2(13)(b). They are prohibited from discriminating on these bases.

The denial of reimbursement for medically necessary services related to surgical treatment of gender dysphoria expressly discriminates against transgender persons, who are the only persons who seek care for “transsexualism” or “gender identity disorders,” thereby violating the Act’s express prohibition on “gender identity” discrimination. Iowa Code Ann. § 217.7(1)(a).

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<sup>1</sup> A copy of Dr. Erickson’s 3/15/17 letter has been submitted with this memorandum.

<sup>2</sup> Ms. Good recognizes that neither AmeriHealth nor DHS has the authority to resolve these claims but asserts them here to ensure that she has preserved them for review.

Such a denial also discriminates on the basis of sex. Many federal courts have recognized that discrimination against transgender persons is sex discrimination. *See Glenn v. Brumby*, 663 F.3d 1312, 1316–20 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–37 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Harford*, 204 F.3d 1187, 1998–1203 (9th Cir. 2000). And Iowa courts look to federal antidiscrimination case law when interpreting Iowa’s state antidiscrimination statutes. *See Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 67 (Iowa 2013). Such discrimination often takes the form of discrimination on the basis of transgender status or failure to comply with gender stereotypes, *see Glenn*, 663 F.3d at 1316 (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”), which is a form of sex discrimination, *see id.* at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination.”). Discrimination based on a person’s transgender status, *see, e.g., Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016), or gender transition, *see, e.g., Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008), also constitutes sex discrimination.

The Regulation discriminates on the basis of sex because it enforces gender stereotypes by preventing transgender persons, and only transgender persons, from obtaining coverage for medically necessary surgical treatment and because it explicitly prohibits “[s]urgeries for the purpose of sex reassignment.” The Regulation also discriminates on the basis of sex because it is directed at transgender persons who are seeking coverage for gender transition, even in the absence of evidence of gender stereotyping.

Close to 35 years ago, the Iowa Supreme Court rejected the sex-discrimination argument in *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470, 473–74 (Iowa 1983). However, *Sommers* preceded the U.S. Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and relied on older federal decisions predicated on a narrow definition of what constitutes “sex.” *Sommers*, 337 N.W.2d at 474 (citing *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir.1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir.1977)). Subsequent federal decisions have clarified that “the approach in *Holloway* [and] *Sommers* . . . has been eviscerated by *Price Waterhouse*.” *Smith*, 378 F.3d at 573.

Whether one characterizes the Decision as an act of discrimination on the basis of gender identity or sex, the Decision clearly contravenes the Iowa Civil Rights Act.

**B. The Regulation cited as the sole basis for the denial violates the equal-protection clause of the Iowa Constitution.**

The Iowa Constitution guarantees that “[a]ll men are, by nature, free and equal,” Iowa Const. art. I, §1, and that “[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens,” Iowa Const. art. I, § 6. The Iowa Supreme Court in general deems the federal and state equal-protection clauses to be identical in scope, import, and purpose. *Exira Comm. Sch. Dist. v. State*, 512 N.W.2d 787, 792–93 (Iowa 1994); *see also Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009). That said, Iowa courts jealously reserve the right to develop an independent framework for examining equal-protection challenges under the Iowa Constitution “as well as to independently apply the federally

formulated principles.” *Varnum*, 763 N.W.2d at 879 (citing *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 4–7 (Iowa 2004) (hereinafter, “*RACP*”)).<sup>3</sup>

Iowa’s constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike under the law. *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). More precisely, the equal-protection guarantee requires that a law treat alike all those who are similarly situated with respect to the purpose of the law. *Varnum*, 763 N.W.2d at 882.

Medicaid is a “cooperative federal–state program through which the federal government provides financial assistance to states so that they may furnish medical care to needy individuals.” *TLC Home Health Care, LLC v. Iowa Dep’t of Human Servs.*, 638 N.W.2d 708, 711 (Iowa 2002) (quoting *Madrid Home for the Aging v. Iowa Dep’t of Human Servs.*, 557 N.W.2d 507, 511 (Iowa 1996)). With respect to the need to obtain financial assistance for medical care, transgender persons in need of surgical treatment for gender dysphoria, such as Ms. Good, are situated similarly to non-transgender persons who need medical treatment for other conditions.

The Iowa Supreme Court has not decided the level of scrutiny applicable to classifications that disfavor transgender persons. However, a heightened level of review should apply because transgender people have faced a history of discrimination, their status as transgender is unrelated to their ability to contribute to society, their gender identity and transgender status are central to their personal identity and may be changed only by causing them significant harm, and they are politically powerless. See *Varnum*, 763 N.W.2d at 889–896 (applying same four factors to conclude that sexual-orientation classifications are entitled to

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<sup>3</sup> Even in cases where a party has not suggested that the approach under the Iowa Constitution should be different from that under the federal Constitution, Iowa courts reserve the right to apply the standard in a fashion at variance with federal cases under the Iowa Constitution. See, e.g., *State v. Pals*, 805 N.W.2d 767, 771–72 (Iowa 2011); *Varnum*, 763 N.W.2d at 896 n.23.

heightened scrutiny).<sup>4</sup> The Regulation on which AmeriHealth based its denial of Medicaid coverage to Good should be reviewed under heightened scrutiny because it discriminates against her on the basis of her status as transgender. It also discriminates on the basis of sex and should be reviewed under heightened scrutiny for that additional reason. *Id.* at 880.

Of the two forms of heightened scrutiny, “classifications subject to strict scrutiny . . . are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest.” *Id.* 880. Intermediate scrutiny requires that a party seeking to uphold a classification demonstrate that the challenged classification is substantially related to the achievement of an important government objective. *Id.*

Neither AmeriHealth nor DHS can meet either of these standards. Nor can they meet rational-basis review, which requires (i) a “plausible policy reason for the classification” and (ii) that “the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker” and (iii) that “the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 879 (quoting *RACI*, 675 N.W.2d at 7).

There simply is no legitimate government objective or plausible policy reason that is advanced by, or rationally related to, the exclusion of transgender individuals from Medicaid reimbursement for medically necessary procedures. Surgical treatment for gender dysphoria is medically necessary and effective treatment, so the denial of coverage cannot be justified on that basis. Moreover, the exclusion cannot be justified as a measure to save money under either heightened review, *id.* (cost savings could not justify exclusion of same-sex couples from

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<sup>4</sup> In *Varnum* the court did not decide whether sexual-orientation classifications were entitled to strict scrutiny since Iowa’s marriage law failed even intermediate scrutiny. 763 N.W.2d 896.

marriage), or rational-basis review, *RACI*, 675 N.W.2d at 12–15 (even under rational-basis review, there must be some reasonable distinction between the group burdened with higher taxes as compared to the favored group to justify the higher costs).

**CONCLUSION**

For the reasons stated above, the AmeriHealth decision denying expense reimbursement for EerieAnna Good’s gender-reassignment surgery violates the Iowa Civil Rights Act and the Iowa Constitution. It should be vacated.

Dated: March 17, 2017

Respectfully submitted,

EERIEANNA GOOD

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