

2019

Transitioning to a New View: Coming to See Health Insurance Coverage For Gender Dysphoria in a New Light.

Robert A. Whitney

Follow this and additional works at: <https://opencommons.uconn.edu/cilj>

Recommended Citation

Whitney, Robert A., "Transitioning to a New View: Coming to See Health Insurance Coverage For Gender Dysphoria in a New Light." (2019). *Connecticut Insurance Law Journal*. 20.
<https://opencommons.uconn.edu/cilj/20>

TRANSITIONING TO A NEW VIEW: COMING TO SEE HEALTH INSURANCE COVERAGE FOR GENDER DYSPHORIA IN A NEW LIGHT

ROBERT A. WHITNEY*

TABLE OF CONTENTS

INTRODUCTION	297
I. THE INITIAL REVIEW PROCESS	299
II. MENTAL HEALTH PARITY	305
III. UNFAIR INSURANCE PRACTICE	308
IV. SEXUAL ORIENTATION	313
V. SEX DISCRIMINATION	314
VI. TRANSITIONING TO A NEW VIEW	320
VII. THE AFTERMATH.....	322
CONCLUSION	326

INTRODUCTION

On June 20, 2014, the Massachusetts Division of Insurance (“the Division”) issued Bulletin 2014-03 (“the Bulletin”), entitled “Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services.”¹ As set forth in the Bulletin, the Division concluded that the denial of coverage by health insurance companies for

* Robert A. Whitney is a consultant with over twenty-five years of experience in the insurance and reinsurance industry. He was Deputy Commissioner and General Counsel at the Massachusetts Division of Insurance from September 2011 through October 2015. All the views expressed herein are solely those of the author.

¹ COMMW. OF MASS, OFFICE OF AFF. & BUS. REG, BULLETIN 2014-03 (June 20, 2014), <https://www.mass.gov/files/documents/2017/11/21/bulletin%202014-03%20%28Gender%20Signed%29.pdf>.

gender transition-related medical care including gender assignment surgery, hormone replacement therapy, and other treatments based on an individual's gender identity or gender dysphoria was sex discrimination and prohibited under Massachusetts law.²

In issuing the Bulletin, the Division also concluded that the nearly uniform exclusion of coverage for gender identity or gender dysphoria-related treatment by Massachusetts health plans is considered prohibited sex discrimination because it would be a limitation on coverage based on the sex of the insured. As a result, the Division determined that any health care services that are ordinarily or exclusively available to individuals of one sex may not be denied based on the perceived gender identity of a person when the denial or limitation is due only to the fact that the insured is enrolled as belonging to the other sex, or has undergone, or is in the process of undergoing, gender transition.³

The Division also concluded that although a carrier may exclude coverage for a particular condition or treatment to the extent allowed by law, the insurer may not base such exclusion on gender identity or gender dysphoria. In this regard, the Division concluded that a carrier may not discriminate on the basis of an insured's or prospective insured's actual or perceived gender identity, sex stereotyping, or on the basis that the insured or prospective insured is a transgender person.⁴

On the same day that the Bulletin was issued, the administration of Governor Deval Patrick also announced that MassHealth, the Massachusetts Medicaid program, would cover gender re-assignment surgery as a standard benefit in its government health plan for lower-income persons and persons with disabilities.⁵ As reported by the Boston Globe at the time, the advocacy group Gay & Lesbian Advocates and Defenders ("GLAD") described these

² Gender dysphoria is the official diagnosis of individuals who view themselves as being different from their assigned birth sex. The term is often used to describe persons who experience significant dysphoria with respect to their gender identity, which is described as a feeling of acute hopelessness and discontentment with their own biological sex. See American Psychiatric Association, *Gender Dysphoria* (2013), <http://www.dsm5.org/Pages/Default.aspx>.

³ See *supra* note 1, at 1.

⁴ See *id.*

⁵ See Press Release, "Governor Announces Changes in Health Insurance Access for Transgender Community," MassEquality, June 20, 2014, <http://www.massequality.org/content/governor-announces-changes-health-insurance-access-transgender-community>.

two pronouncements as “historic” because at the time no other state had “announced in one fell swoop and this comprehensively, that medical care for transgender people is essential.”⁶

The determination by the Division that exclusions from health insurance coverage for gender transition-related medical care would no longer be permitted in Massachusetts was the culmination of an almost six-month review process by the Division where, at the time, I was the Deputy Commissioner and General Counsel. This Article explores how the Division reviewed the state of the law at the time, both on the federal and state level, to see if the strong prohibition in Massachusetts against discrimination under law also extended to prohibiting discrimination in healthcare coverage on the basis of gender identity or gender dysphoria.

I. THE INITIAL REVIEW PROCESS

In late 2013 and early 2014, advocacy groups such as GLAD and Health Law Advocates approached the Division asking it to declare that Massachusetts law precluded the exclusion of gender transition-related care from private insurance coverage, and that such exclusion was unlawful discrimination on the basis of gender identity or gender dysphoria. At the time, the majority of health insurers in Massachusetts that were subject to regulation by the Division excluded from their medical plans coverage of medical treatment for persons with gender dysphoria.⁷

In response to the requests from advocacy groups and individuals who were denied coverage under their Massachusetts health plans for gender transition-related medical care, including gender assignment surgery, hormone replacement therapy and other treatments, the Division began to

⁶ See Jeremy Fox, *Mass. to Cover Range of Transgender Medical Care*, BOSTON GLOBE (June 20, 2014), <https://www.bostonglobe.com/metro/2014/06/20/state-cover-gender-reassignment-surgery-and-hormone-treatment-for-transgender-patients/a9OPrvqdUPmRoiAQugVwEO/story.html>.

⁷ Gender dysphoria is the official diagnosis of individuals who view themselves as being different from their assigned birth sex. The term was often used to describe persons who experience significant dysphoria with respect to their gender identity, which is described as a feeling of acute hopelessness and discontentment with their own biological sex. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, GENDER DYSPHORIA (5th ed. 2013).

review Massachusetts' own laws, as well as federal law and the law of other states, to determine whether health insurance carriers should be prohibited from excluding from coverage medical treatment related to gender dysphoria.⁸

As an initial matter, the Division looked to see whether there was any specific law in Massachusetts that would preclude such exclusions from being enforceable because of the insured's gender identity alone. For example, on November 23, 2011, Governor Deval Patrick signed into law Chapter 199 of the Acts of 2011, entitled "An Act Relative to Gender Identity" ("Chapter 199").⁹ This law added "gender identity" as a new protected characteristic under Massachusetts' employment, housing, credit, public education anti-discrimination laws and to Massachusetts' hate crimes law. All of these laws also protected several other characteristics, including sexual orientation, disability, sex, age, race, ancestry and religion. The law went into effect on July 1, 2012.

Chapter 199 defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth."¹⁰ The law allows a person to demonstrate his/her gender identity by providing evidence including: medical history; care or treatment of the gender identity; consistent and uniform assertion of the gender identity; or any other evidence that the gender identity is sincerely held as part of a person's core identity."¹¹

⁸ This was not the first time that the Division had examined whether insurance carriers were acting in a discriminatory manner with respect to coverage under their insurance policies. In 1988, the Commissioner of Insurance had issued regulations prohibiting a life insurer from considering gender-based mortality differences in the underwriting of life insurance, and which provided that "[n]o policy...shall, on the basis of...sex...treat any covered person...differently than it treats or would treat any other covered person...." 211 CODE MASS. REGS. § 35.04 (2) (1987). In *Telles v. Commissioner of Insurance*, the Supreme Judicial Court held that the Commissioner "lacked either express or implied authority to promulgate the regulations," and that "the regulations at issue directly conflict with several of the statutes which regulate insurance practices." The Court concluded that the regulations were "void because the commissioner lacked authority to issue the regulations. *See* 401 Mass. 560, 565-566 (1991).

⁹ MASS. GEN. LAWS ch. 199 (2011).

¹⁰ *Id.* at § 1.

¹¹ *Id.*

Chapter 199, while formally amending various laws precluding discrimination in employment, housing and other areas on the basis of one's "gender identity," specifically did not amend any laws covering discrimination in the areas of health insurance law. At that time, however, several other states had amended their respective insurance laws to specifically preclude discrimination in health insurance on account of a person's gender identity or because of a person's gender dysphoria.

For example, in California, the regulations governing health insurance companies had been specifically amended to require that an admitted health insurer could not "discriminate on the basis of an insured's or prospective insured's gender identity, or on the basis that the insured or prospective insured is a transgender person."¹²

The discrimination prohibited by California regulation includes "[d]enying, cancelling, limiting or refusing to issue or renew an insurance policy on the basis of an insured's or prospective insured's actual or perceived gender identity, or for the reason that the insured or prospective insured is a transgender person."¹³

In addition, the California regulation prohibits health carriers from:

[d]enying or limiting coverage, or denying a claim, for services...due to an insured's actual or perceived gender identity or for the reason that the insured is a transgender person [including]:
(1) Health care services related to gender transition if coverage is available for those services under the policy when the services are not related to gender transition, including but not limited to hormone therapy, hysterectomy, mastectomy, and vocal training; or (2) Any health care services that are ordinarily or exclusively available to individuals of one sex when the denial or limitation is due only to the fact that the insured is enrolled as belonging to the other sex or has undergone, or is in the process of undergoing, gender transition.¹⁴

¹² See CAL. CODE REGS. tit. 10, § 2561.2 (2012).

¹³ *Id.* at § 2561.2(a)(1).

¹⁴ *Id.* at § 2561.2(a)(4)(A) - (B).

In Oregon, the Insurance Division of the Department of Consumer and Business Services issued Bulletin INS 2012-01 in 2012.¹⁵ This bulletin stated that a health insurer in the state cannot discriminate in providing coverage on the basis of an insured's or prospective insured's gender identity or gender dysphoria.¹⁶ The Oregon Insurance Division stated that the bulletin was designed to provide guidance to health insurers about how to conform to provisions of the Oregon Equality Act of 2007, in which "sexual orientation" is defined to include an individual's actual or perceived gender identity, "regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."¹⁷

The Oregon Insurance Division noted that because the Oregon insurance code already prohibited discrimination in the provision of health insurance coverage on the basis of "sexual orientation," health carriers could not deny or limit coverage or deny a claim for a procedure provided for gender identity or gender dysphoria if the same procedure were allowed in the treatment of another medical condition.¹⁸ Although a health insurer could categorically exclude coverage for a particular condition or treatment, the insurer could not base such exclusion on gender identity.¹⁹

In Vermont, the Department of Financial Regulation, Division of Insurance issued Insurance Bulletin No. 174 in 2013, which provides that notice to insurers that health care plans could not exclude coverage for medically necessary services for transgender people, including gender reassignment surgeries.²⁰ The bulletin rested specifically on the 2007 Vermont law, Act 41, which specifically prohibits discrimination on the basis of "gender identity."²¹ The bulletin noted that the law prohibiting gender identity discrimination applied to insurance companies, and as such, effective January 1, 2014, the Vermont Division of Insurance precluded

¹⁵ See OR. INS. DIVISION, Bulletin INS 2012-01 (Dec. 19, 2012) <https://dfr.oregon.gov/laws-rules/Documents/Bulletins/bulletin2012-01.pdf>, [hereinafter *Bulletin 2012-01*].

¹⁶ *Id.* at 1.

¹⁷ See *id.*, citing OR. REV. STAT. § 174.100.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 3-4.

²⁰ VT. D.F.R., DIVISION OF INS., Ins. Bulletin No. 174 (Apr. 22, 2013), <https://dfr.vermont.gov/sites/finreg/files/regbul/dfr-bulletin-insurance-174.pdf>, [hereinafter *Bulletin No. 174*].

²¹ See VT. STAT. ANN. tit. 1, § 144 (2007).

health insurers from excluding from coverage care related to gender transition.²²

Unlike in these other states, however, the 2011 law in Massachusetts, Chapter 199 only precluded discrimination in employment, housing and other areas on the basis of one's "gender identity;" it did not explicitly extend to precluding the exclusion of gender transition-related medical care from health insurance policies.²³ As such, the Division determined that it needed to look elsewhere to see if there was any other basis in Massachusetts law or court decisions for disallowing such exclusions.

During the time period when the Division was conducting its review, a new decision was handed down by the U.S. District Court for the District of Massachusetts concerning issues related to gender dysphoria. In *Kosilek v. Spencer*,²⁴ the District Court had held that a prisoner's gender identity disorder constituted a serious medical need that triggered Eighth Amendment protection.²⁵ In making its decision, the District Court was presented with testimony from Department of Correction ("DOC") physicians, who testified that "Kosilek is now suffering a degree of mental anguish that itself constitutes a serious harm that requires adequate treatment."²⁶

²² *Bulletin No. 174*, *supra* note 20.

²³ Chapter 199 amended various chapters of the Massachusetts General Laws, but none related to insurance. *See e.g.* MASS. GEN. LAWS ch. 199 § 1.

²⁴ 889 F. Supp.2d 190 (D. Mass. 2012) *aff'd*, 740 F.3d 733 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Feb. 12, 2014), *on reh'g en banc*, 774 F.3d 63 (1st Cir. 2014), and *rev'd*, 774 F.3d 63 (1st Cir. 2014).

²⁵ *Id.* The decision was initially affirmed by the First Circuit, but on February 12, 2014, the First Circuit agreed to hear the case *en banc* and withdrew their initial opinion.

²⁶ *See id.* at 229. While the court in *Kosilek* used the term "gender identity disorder," the American Psychiatric Association changed the term "gender identity disorder" to "gender dysphoria" in the then latest version of the Diagnostic and Statistical Manual of Mental Disorders ("DSM")—DSM V—in December 2012, in order to "respect the individuals identified by offering a diagnostic name that is more appropriate to the symptoms and behaviors they experience without jeopardizing their access to effective treatment options." *See* Am. Psychiatric Ass'n, *Gender Dysphoria* (2013), <https://www.ca1.uscourts.gov/sites/ca1/files/citations/Gender%20Dysphoria%20Fact%20Sheet%202.pdf>. The terms "gender dysphoria," "gender

The District Court in *Kosilek* ordered the DOC to provide the means for Kosilek to undergo gender reassignment surgery. In making its ruling the court relied on the fact that “[a]ll of the doctors who testified at trial, except for [one], provided evidence that sex reassignment surgery for Kosilek is both medically necessary and the only adequate treatment for his severe gender identity disorder.”²⁷ Without such surgery, the court found Kosilek was at a high risk of further attempts at suicide.²⁸

The *Kosilek* court, however, limited its holding to the prison context, and noted that the U.S. Constitution’s Eighth Amendment imposes certain duties on prison officials to provide humane conditions of confinement, adequate food, clothing, shelter, and medical care.²⁹ The District Court cited to the Supreme Court’s view on a state’s duties to prisoners under the Eighth Amendment: “[t]o incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the state for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates may actually produce physical torture or a lingering death.”³⁰

Ultimately, however, the Division did not find that the *Kosilek* court’s determination, which was based on the court’s conclusion that the Department of Corrections had violated the Constitution’s prohibition of cruel and unusual punishment, was instructive in answering the question as

identity disorder,” and “transsexualism” were often used interchangeably by courts. *See e.g.*, *South v. Gomez*, No. CV-95-01070-DFL at *1 (9th Cir. Feb. 25 2000) (Westlaw) (noting that “gender dysphoria [is] more commonly known as transsexualism”); *see also* *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1290 n.5 (N.D. Ga. 2010) *aff’d* 663 F.3d 1312 (11th Cir. 2011) (“[Gender identity disorder (GID)] and transsexualism are closely related and are sometimes used as synonyms....”).

²⁷ *See Kosilek*, 889 F.Supp. 2d at 233.

²⁸ *Id.*

²⁹ *Id.* at 203. The District Court noted that “a prison official acts with deliberate indifference and violates the Eighth Amendment if, knowing of a real risk of serious harm, she denies adequate treatment for a serious medical need for a reason that is not rooted in the duties to manage a prison safely and to provide the basic necessities of life in a civilized society for the prisoners in her custody.”

³⁰ *See id.* at 198, *citing* *Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011).

to whether a private insurance carrier would violate Massachusetts law when the carrier excluded coverage for gender transition-related treatment.³¹

Therefore, the Division began to explore whether there was any other basis in federal and state law for prohibiting health insurance carriers from excluding from coverage medical treatment for persons with gender dysphoria.

II. MENTAL HEALTH PARITY

One area that the Division examined was whether the exclusion of gender transition-related medical care from health insurance policies in Massachusetts might amount to unlawful discrimination based on a person's mental health under the Massachusetts mental health parity law.³² The Massachusetts mental health parity law required that insurance plans cover mental health benefits on a non-discriminatory basis for the medically necessary treatment of any "mental disorder" listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM").³³ The Massachusetts mental health parity law provides that: "[a]n individual policy of accident and sickness insurance... shall provide mental health benefits on a nondiscriminatory basis to residents of the commonwealth...for the diagnosis and medically necessary and active treatment of any mental disorder, as described in the most recent edition of the DSM, that is approved by the commissioner of mental health."³⁴

The Division looked to the state of Connecticut, where the Connecticut Division of Insurance in 2013 in its Bulletin IC-34, relied upon the state's mental health parity statute as the basis for concluding that the exclusion of gender transition-related medical care from health insurance

³¹ *See id.* at 205. The Kosilek court's finding that a prisoner completely relied on the state for medical care was a key rationale supporting the Court's decision that by *not* treating a prisoner for her gender dysphoria, the state had violated the Constitution. As the District Court noted, it "has long been well-established that it is cruel for prison officials to permit an inmate to suffer unnecessarily from a serious medical need. It is unusual to treat a prisoner suffering severely from a gender identity disorder differently than the numerous inmates suffering from more familiar forms of mental illness."

³² MASS. GEN. LAWS ch. 175 § 47B (a) (2015).

³³ *Id.*

³⁴ *See* MASS. GEN. LAWS ANN. ch. 175, § 47B (a).

policies in Connecticut was impermissible.³⁵ The Connecticut mental health parity statute provides that “[e]ach individual health insurance policy...shall provide benefits for the diagnosis and treatment of mental or nervous conditions.”³⁶ The Connecticut bulletin further stated that the Connecticut mental health parity statute,³⁷ in conjunction with the Connecticut group health insurance statute, together “require health insurers to pay ‘covered expenses’ for treatment provided to individuals with gender dysphoria where treatment is deemed necessary under generally accepted medical standards.”³⁸

The language in the Connecticut mental health parity statute mirrors that in the Massachusetts statute, which prohibits an insurer from “provid[ing] mental health benefits on a discriminatory basis to residents of the commonwealth...for the diagnosis and medically necessary and active treatment of any mental disorder, as described in the most recent edition of the DSM, that is approved by the commissioner of mental health.”³⁹ Therefore, at the time, the Division considered whether perhaps under Massachusetts mental health parity law, as in Connecticut, an argument could be made that if an individual is diagnosed with gender dysphoria, as recognized in the latest DSM as a “mental disorder,” an insurer could be prohibited from limiting or withholding coverage for medically necessary treatment, where the insurer would provide the same treatment to individuals who require it for a different medically necessary reason.

The Division ultimately concluded that it would not rely on the Massachusetts mental health parity laws as the basis for concluding that the exclusion of gender transition-related medical care from health insurance policies in the state was not permissible because of the continued debate within the activist community as to whether being a transgender person was a “mental disorder” at all.

As noted above, in December 2012, the American Psychiatric Association announced that it approved changes in its official manual for classifying mental illnesses, known as DSM-5, formally eliminating the term “gender identity disorder,” and replacing it with the term “gender

³⁵ See CONN. DIV. INS., Bulletin IC-34 (Dec. 19, 2013), <https://portal.ct.gov/-/media/CID/BulletinIC37GenderIdentityNondiscriminationRequirementspdf?la=en>.

³⁶ See CONN. GEN. STAT. § 38a-488a (b) (2013).

³⁷ *Id.*

³⁸ See Bulletin IC-34 at 1.

³⁹ See MASS. GEN. LAWS ch. 175, § 47B(a).

dysphoria.”⁴⁰ The term “gender identity disorder” had been long considered stigmatizing by mental health specialists and lesbian, gay, bisexual and transgender activists.⁴¹ “Gender dysphoria” instead focuses the attention on only those who feel distressed by their gender identity.⁴² At the time of the change in terms in the DSM-5, there had been calls by activists to remove the diagnosis altogether just as homosexuality had been removed from the DSM in 1973, but gender dysphoria was ultimately left as a diagnosis to ensure that a transgender person could still access health care if needed.⁴³

While many transgender activists felt that the gender dysphoria diagnosis remains a “powerful legal tool” when challenging discrimination in health insurance plans and services, other activists disagreed, stating that the new DSM criteria did not go nearly far enough in clarifying that “nonconformity to birth-assigned roles and victimization from societal prejudice do not constitute mental pathology,” and that being a transgender person was not a mental disorder.⁴⁴ The advocacy organization GLAAD noted similar concerns at the time, stating that:

Some transgender advocates see this approved change in the DSM-V as an important step toward removing stigma against transgender people based on false stereotypes about gender identity and expression, as well as the word “disorder.” Transgender people may no longer be subject to a lifelong default diagnosis of their mental health.... However, other transgender advocates note the barriers this change may create to accessing trans-related medical care, which could already be difficult to access and prohibitively expensive even before the change.⁴⁵

⁴⁰ *Supra* note 26.

⁴¹ See Moni Basu, *Being Transgender No Longer a Mental 'Disorder' in Diagnostic Manual*, CNN (Dec. 27, 2012, 10:46 AM), <http://inamerica.blogs.cnn.com/2012/12/27/being-transgender-no-longer-a-mental-disorder-in-diagnostic-manual/> (“CNN Report”).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Dani Heffernan, *The APA Removes “Gender Identity Disorder” from Updated Mental Health Guide*, GLAAD (Dec. 3, 2012), <https://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health>

Therefore, while the Connecticut Insurance Department relied upon its mental health parity law to establish the principle that excluding coverage treating gender dysphoria would be a parity violation, this conclusion necessitated a finding that gender dysphoria was a major mental disorder subject to a mental health parity analysis. The Division, however, did not believe that it was appropriate to reach a similar conclusion, because there was no strong consensus in favor of this position in the transgender community in Massachusetts, and there were many transgender persons who strongly believed that being transgender was not a mental disorder or pathology. As such, the Division concluded that it could not rely upon Massachusetts mental health parity law to preclude carriers from excluding coverage for treating gender dysphoria.

III. UNFAIR INSURANCE PRACTICE

The Division next looked to whether excluding coverage for gender transition-related medical treatment from people with gender dysphoria violated Massachusetts unfair insurance practices law. In Massachusetts, unfair insurance practices governed under Massachusetts General Law Chapter (“Chapter”) 176D are considered the “making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.”⁴⁶

Thus, the argument for applying this law to the coverage issue at hand was that Chapter 176D, § 3(7)(b) would be applicable to individuals who require treatment for gender dysphoria because they are of the same class and of essentially the same hazard as individuals who require the same treatment for a different medically necessary reason. The first issue that was looked at was whether the two groups were of the “same class.” The Massachusetts statute, however, does not define “class.”

In *Life Insurance Association of Massachusetts v. Commissioner of Insurance*,⁴⁷ the Massachusetts Supreme Judicial Court struck down a Division of Insurance regulation which prohibited underwriting practices of insurers regarding the testing of prospective insureds for exposure to HIV. The Court noted that the “basic principle underlying statutes [like Chapter

h-Guide.

⁴⁶ See MASS. GEN. LAWS ANN. Ch. 176D, § 3(7)(b) (West 2012).

⁴⁷ 530 N.E.2d 168 (1988).

176D § 3]...is that insurers have the right to classify risks and to elect not to insure risks if the discrimination is fair.”⁴⁸

The Court also noted that the intended result of the process is that persons of substantially the same risk will be grouped together, paying the same premiums, and will not be subsidizing insureds who present a significantly greater hazard. The Court found that insurers, under Chapter 176D § 3, have a general right to discriminate fairly. The Court also noted: “[i]t is not seriously denied that persons who have HIV antibodies, as a group, are at greater risk of illness and have shorter life expectancies than those who do not have HIV antibodies.”⁴⁹ The Court’s ruling indicates that it did not consider persons who present greater risks to the insurer (individuals with HIV) to be in the “same class” as those who present lesser risks (individuals without HIV).

The ruling in *Life Ins. Ass’n of Massachusetts* was reinforced by the SJC in *Telles v. Commissioner of Insurance*.⁵⁰ The question in *Telles* was whether the Commissioner of Insurance could “lawfully issue regulations which prohibit life insurers from considering gender-based mortality differences in the underwriting of life insurance.”⁵¹ The Court noted that the Commissioner’s “unisex” regulation required individuals from different risk classes—males and females—to be grouped together.

Relying on *Life Ins. Ass’n of Massachusetts*, the Supreme Judicial Court in *Telles* found that requiring insurers to group men and women together, individuals typically in different risk classes, to be “in direct conflict” with Chapter 176D §3(7). In *Telles*, the Court held that the Commissioner of Insurance was without authority to promulgate regulations prohibiting life insurers from considering gender-based mortality differences in the underwriting of life insurance, insurers had the statutory right to classify risks. Thus, gender-based classifications for the determination of insurance rates were permitted under the statutory scheme.

The *Telles* court read the “same class” language to mean that “insureds must be treated in accordance with their risk classification.”⁵² As such, the *Telles* court would likely interpret the “same class” language to mean “same risk classification,” and if two groups present different risks to

⁴⁸ *See id.* at 171.

⁴⁹ *See id.*

⁵⁰ 574 N.E.2d 359 (1991).

⁵¹ *Id.* at 360.

⁵² 574 N.E.2d at 361.

the insured, the groups would be considered to be in different classes for purposes of Chapter 176D § 3.

At the time, the Division noted that the holdings in *Life Ins. Ass'n of Massachusetts* and *Telles* might be distinguishable from the question of whether an insurer can exclude coverage for medically necessary treatment from individuals solely because they have gender dysphoria. *Life Ins. Ass'n of Massachusetts* and *Telles* dealt with individuals who were in different risk classifications: individuals with and without HIV; and men and women. An individual with gender dysphoria and an individual with cervical cancer may both require a hysterectomy as part of their medically necessary treatment, and as such, could be viewed as being in the same risk classification.

The costs and risks these two groups present to the insurer would be the same—the cost of the hysterectomy, for example—even though the needs for the treatments have different causes. Since an individual with gender dysphoria would not necessarily be costlier than an individual who requires the same treatment for a different medically necessary reason, these two groups would likely be placed in the “same class,” and *Life Ins. Ass'n of Massachusetts* and *Telles* decisions would not necessarily prevent the Division from prohibiting discrimination between the two groups. Therefore, if an insurer denies coverage for a particular treatment only to individuals with gender dysphoria, but not to individuals who need the same medical treatment for a different reason, then the insurer might be in violation of Chapter 176D § 3.

To interpret the term “same class” to include individuals with and without gender dysphoria would have aligned the Division with the approach taken by the state of Colorado. Colorado’s Division of Insurance treated individuals with and without gender dysphoria as belonging to the same class for purposes of the Colorado unfair insurance practices statute. The Colorado Division of Insurance issued a bulletin prohibiting discrimination against individuals with gender dysphoria based, in part, on their counterpart to the Massachusetts unfair insurance practices law.⁵³

⁵³ See COLO. DIV. INS., BULL. NO. B-4.49, INSURANCE UNFAIR PRACTICES ACT PROHIBITIONS ON DISCRIMINATION BASED UPON SEXUAL ORIENTATION (2013), <http://www.one-colorado.org/wp-content/uploads/2013/03/B-4.49.pdf>. As noted in the bulletin, Colorado law defined “sexual orientation” as “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person’s perception thereof” and such definition applied to every statute, including the unfair insurance practices law.

The Colorado unfair insurance practices law prohibits any unfair discrimination “between individuals of the same class...in the amount of premium, policy fees, or rates charged for any policy of sickness and accident insurance, in the benefits payable under such policy, in the terms or conditions of the policy, or in any other manner.”⁵⁴ Although nothing in the Colorado Bulletin expressly states so, it appears likely that Colorado would consider individuals—with and without gender dysphoria—who require the same medically necessary treatment to be individuals of the “same class and of essentially the same hazard.”⁵⁵

Similarly, the D.C.’s Department of Insurance, Securities and Banking issued two bulletins in 2013 and 2014 respectively that prohibited gender identity discrimination. These bulletins were based on the District’s Unfair Insurance Trade Practices Act, which prohibited discrimination in health insurance based on gender identity or expression.⁵⁶ In its bulletin issued on February 27, 2014 (“February 2014 Bulletin”) prohibiting discrimination against individuals with gender dysphoria, the Department of Insurance, Securities and Banking articulated the interpretation of “same class and of essentially the same hazard” language the same way as Colorado’s Division of Insurance.

⁵⁴ See COLO. REV. STAT. 10-3-1104(1)(f)(XIII) (2018).

⁵⁵ In the case *Cortez v. Progressive County Mut. Ins. Co.*, No. 03-99-00846-CV (Sept. 13, 2001), the Texas Court of Appeals was looking at identical language contained in the Texas unfair insurance practices law, and concluded that the interpretation of “same class and of essentially the same hazard” language meant looking at the “treatment of the plaintiffs in comparison to other similarly situated individuals.” As such, it would be reasonable in Colorado to view individuals who require the same medically necessary treatment to be “similarly situated individuals.”

⁵⁶ See D.C. DEP’T OF INS., SEC. AND BANKING, BULL. NO. 13-IB-01-30/15, PROHIBITION OF DISCRIMINATION IN HEALTH INSURANCE BASED ON GENDER IDENTITY OR EXPRESSION (2013), <https://disb.dc.gov/publication/13-ib-01-3015-prohibition-discrimination-health-insurance-based-gender-identity-or>; see also D.C. DEP’T OF INS., SEC. AND BANKING, BULL. NO. 13-IB-01-30/15 Revised, PROHIBITION OF DISCRIMINATION IN HEALTH INSURANCE BASED ON GENDER IDENTITY OR EXPRESSION (2014), <https://disb.dc.gov/publication/disb-bulletin-13-ib-01-3015-revised-prohibition-discrimination-health-insurance-based>.

The D.C.'s February 2014 Bulletin cites the D.C.'s counterpart to the Massachusetts unfair competition in insurance statute, the District's Code § 31-2231.11.⁵⁷ The February 2014 Bulletin first clarifies that gender dysphoria is "a recognized medical condition under health insurance policies covering medical and hospital expenses, regardless of whether explicitly referenced."⁵⁸ Next, the February 2014 Bulletin noted the unfair competition statute applied to health insurance.⁵⁹

The District of Columbia's unfair competition statute varies slightly from that of Massachusetts' in that the statute expressly prohibits discrimination based on gender identity or expression. The District of Columbia's February 2014 bulletin went on to state that "[t]he only interpretive question that remains... 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.'"⁶⁰

Because both sets of individuals were seeking coverage under the same health insurance policies offering benefits and services for recognized medical conditions, the District of Columbia's Department of Insurance, Securities and Banking in the bulletin concluded that for purposes of § 31-2231.11(b), the individuals were of the "same class" and "essentially the same hazard."⁶¹ To come to the conclusion reached by the District of Columbia, it does not appear necessary to have express language prohibiting discrimination based on gender identity or expression contained within the unfair insurance practices law, but the express language served to bolster the analysis. By concluding that individuals with and without gender dysphoria are of "the same class and essentially the same hazard" the District of Columbia appeared to agree with the state of Colorado.

Thus, the key issue for the Division in 2014 was whether it was reasonable to conclude that Massachusetts, like Colorado and the District of Columbia, would consider individuals with and without gender dysphoria who require medically necessary treatment to be individuals of the "same class and of essentially the same hazard." Only if the two groups were treated as being in the same class and essentially the same hazard, would Chapter 176D § 3 prohibit an insurer from "any unfair discrimination...in any...manner whatever" against individuals with gender dysphoria.

⁵⁷ See D.C. CODE § 31-2231.11 (2012).

⁵⁸ See Bulletin 13-IB-01-30/15, Revised at 2.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ *Id.*

IV. SEXUAL ORIENTATION

In early 2014, the Division also looked at whether health insurers that excluded coverage for people with gender dysphoria violated Massachusetts laws prohibiting discrimination on the basis of sexual orientation. At the time, Massachusetts law generally prohibited sexual orientation discrimination in the areas of employment, housing, public accommodations, credit and services, and education as well as insurance.⁶² In the employment context, Massachusetts law unambiguously defined “sexual orientation” as including only “heterosexuality, bisexuality, or homosexuality.”⁶³ There was no specific Massachusetts statute or regulation, that specifically defined sexual orientation as “gender identity” or gender dysphoria.

Despite the lack of express statutory or regulatory authority to including individuals with gender dysphoria in the “sexual orientation” group, at least one Massachusetts court had issued an opinion that supported a broad interpretation of the meaning of “sexual orientation” discrimination. In 2002, in *Lie v. Sky Publishing Corporation*,⁶⁴ the Massachusetts Superior Court found that those who transgress traditional gender roles and defy stereotypes associated with their biological sex are less likely to be perceived as heterosexual than the general population.⁶⁵

As a result, the court held that the conflation of one’s appearance with one’s sexual orientation might lead to discrimination actionable under Chapter 151B’s definition of sexual orientation discrimination.⁶⁶ It did not appear at the time, however, that this interpretation was generally accepted in Massachusetts. Moreover, the court’s conclusion was at odds with the long-recognized differences between sexual orientation and gender identity,

⁶² See MASS. GEN. LAWS ch. 151B, § 1 (2004).

⁶³ See ch. 151B, § 3(6) (2012).

⁶⁴ No. 013117J (Mass. Super. Ct, Oct. 7, 2002).

⁶⁵ *Id.*

⁶⁶ See *Sky Publishing Corp.*, slip op. at 4, (citing *Rosa v. Park West Bank & Trust*, 214 F.3d 213, 216 (1st Cir. 2000)) (“It is...reasonable to infer...that [the teller] refused to give [the plaintiff] the loan application because she thought he was gay, confusing sexual orientation with cross-dressing”).

which lead to the conclusion that sexual orientation protections would not apply per se to protect individuals who were transgender.⁶⁷

V. SEX DISCRIMINATION

Another argument that the Division considered in early 2014 to preclude health insurers from excluding individuals from coverage for certain medical treatments because they have gender dysphoria, was that such an exclusion violates federal and Massachusetts laws which prohibit discrimination based on sex. In the absence of statutory language that defined the term “sexual discrimination” in health insurance laws as specifically including discrimination based upon “gender identity,” whether the term “sex discrimination” extended to protect individuals with gender dysphoria depended on the scope given to the term. Under a broad interpretation of the term, “sex discrimination” could include discrimination based on gender non-conformance and applies to individuals with gender dysphoria, while a narrow interpretation of sex discrimination would limit the term to include only discrimination based on an individual’s biological sex.

In 1989, the Supreme Court of the United States interpreted the term “sex discrimination” broadly in suits brought under Title VII of the Civil Rights Act. In *Price Waterhouse v. Hopkins*,⁶⁸ a plurality of the Court addressed sex discrimination in a suit brought by a female partnership candidate in an accounting firm who alleged she was discriminated against for appearing too “macho.”⁶⁹ In its ruling, the Court moved away from the traditional, limited view of sex discrimination and stated: “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment

⁶⁷ See *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (defining “gender identity” as the “innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves,” while “sexual orientation” is the “inherent or immutable enduring emotional, romantic or sexual attraction to other people”).

⁶⁸ See 490 U.S. 228 (1989).

⁶⁹ See *id.* at 235.

of men and women resulting from sex stereotypes.”⁷⁰ The Court concluded that the term “sex discrimination” could include discrimination against persons who fail to conform to gender stereotypes.⁷¹

In *Smith v. City of Salem Ohio*,⁷² the Sixth Circuit relied on *Price Waterhouse* to expressly recognize a cause of action for a transgender person claiming protection under Title VII. The *Smith* case involved a city fire department employee, who was born biologically male and was diagnosed with gender identity disorder while working for the city fire department. After the city pressured the employee to submit to multiple psychiatric evaluations by doctors of their choosing, the employee brought a Title VII action alleging sex discrimination.⁷³

The Sixth Circuit noted that pre-*Price Waterhouse* federal courts routinely rejected expanding the definition of “sex” to include gender non-conforming individuals, but that those cases had been “overruled by the logic and language” of *Price Waterhouse*. The court ultimately held that allegations of discrimination based upon the employee’s gender non-conforming behavior and appearances were actionable pursuant to Title VII.⁷⁴ Post *Price Waterhouse* and *Smith*, under Title VII, the term “sex” appeared to encompass both biological sex and the failure to conform to socially prescribed gender expectations.

The First Circuit had similarly interpreted “sex discrimination” as being broad in scope. This is evident in the *Rosa v. Park West Bank & Trust Co.*,⁷⁵ decision. In that case, the court found that discrimination based on an individual’s habit of cross dressing may be considered sex discrimination. In *Rosa*, the First Circuit concluded that a biological male who presented and lived as a female may be able to establish a cause of action for sex discrimination under the Equal Credit Opportunity Act (“ECOA”), which prohibits discrimination with respect to any aspect of a credit transaction on the basis of sex, where she was denied a loan application from a bank because of her feminine attire.⁷⁶

⁷⁰ See *id.* at 251 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

⁷¹ 490 U.S. at 251.

⁷² 378 F.3d 566 (6th Cir. 2004).

⁷³ *Id.* at 568–70.

⁷⁴ *Id.* at 573–75, 578.

⁷⁵ 214 F.3d 213 (1st Cir. 2000).

⁷⁶ *Id.* at 215–16.

The court found it reasonable to infer that the Bank told “Rosa to go home and change because [the bank] thought that Rosa’s attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application.”⁷⁷ The court cited the Supreme Court in *Price Waterhouse* to support the conclusion that “stereotyped remarks [including statements about dressing more ‘femininely’] can certainly be evidence that gender played a part” in the discrimination.⁷⁸

The broad interpretation of “sex discrimination” had also been extended to cases where the discrimination was based on an employee’s perceived homosexuality. In *Centola v. Potter*,⁷⁹ the U.S. District Court in Massachusetts held an employee’s Title VII sex discrimination claim could survive a motion for summary judgment where the employee was subject to “constant” harassment which focused on his being homosexual.⁸⁰ The district court found that the employee’s “[c]o-workers and supervisors discriminated against him because he failed to meet their gender stereotypes of what a man should look like, or act like.

In so doing, they created an objectively hostile and abusive work environment in violation of Title VII.”⁸¹ The district court relied on *Price Waterhouse* and *Rosa* when it held that: “If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII’s prohibition of discrimination on the basis of sex.”⁸²

The broad interpretation of sex had been accepted at the time by the Massachusetts Superior Court in *Doe ex rel. Doe v. Yunits*,⁸³ which addressed whether a school policy which prevented a male student from dressing in attire typically associated with females was illegal sex discrimination. Also citing *Price Waterhouse*, the court held that the school’s policy constituted sex discrimination under Chapter 76, § 5 (the school attendance discrimination statute), because the school prevented the student

⁷⁷ *Id.* at 215.

⁷⁸ *Id.* at 216 (citations omitted).

⁷⁹ *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

⁸⁰ 183 F. Supp. 2d at 407.

⁸¹ *Id.* at 409.

⁸² *Id.*

⁸³ *See Doe ex rel. Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000).

from attending school in clothing associated with the female gender solely because the student was male.⁸⁴

Similarly, at the administrative level, the Massachusetts Commission Against Discrimination (“MCAD”) found that discrimination based on an individual’s transgender status was actionable under the Massachusetts unfair discrimination in employment statute, Chapter 151B, as “sex discrimination.”⁸⁵ In proceedings before the MCAD, the employee, a transgender woman, alleged that her supervisor discriminated against her because of her sex. The employee alleged the supervisor had issued pretextual written warnings for insubordination and threatened her with termination after the employee complained about her supervisor’s harassing behavior towards her.⁸⁶

The MCAD, also citing *Price Waterhouse*, found that “[s]ex discrimination is a concept that is read broadly; in other words, illegal “sex discrimination” takes into account non-anatomical concepts, like gender.”⁸⁷ The MCAD ultimately held that “sex discrimination, as prohibited by chapter 151B, includes a prohibition against discrimination against transgender individuals.”⁸⁸

When applying the above analysis to the insurance context, the Division looked at whether excluding individuals with gender dysphoria from coverage for certain medical treatments would constitute discrimination based on stereotyped notions of appropriate gender behavior. Based on the reasoning in the above-referenced authority, the Division concluded that Massachusetts courts would follow the majority of courts that had found that a broad interpretation should be given to “sex discrimination.”

Therefore, the Division determined that if an insurer refused to cover gender assignment-related medical treatment because the insured failed to conform to the insurer’s idea of how a man or woman should look and behave, then the insured would have been discriminated against based on their sex. Thus, if a health insurer denied to provide coverage for medically

⁸⁴ *Id.* at *7

⁸⁵ *See* Millet v. Lutco, MCAD Docket No. 98 BEM 3695, 23 M.D.L.R. 231 (Oct. 10, 2001), <https://www.mass.gov/files/documents/2017/10/25/milletvlutco-2001.pdf>.

⁸⁶ *See id.* at 1.

⁸⁷ *See id.* at 2.

⁸⁸ *See id.* at 5.

necessary treatment based on an individual's gender dysphoria then this would be considered prohibited sex discrimination under Massachusetts law.

On the other hand, it's possible that people with gender dysphoria would be excluded from coverage not because the insurer had antiquated notions of what is appropriate behavior, but because the insurer believed the medical treatment being sought by the insured was experimental. Hypothetically, an insurer could exclude experimental surgeries from coverage, to a male or female, and not base the exclusion on the individual's sex. Such an explanation may constitute a valid reason for denying treatment. However, in this scenario the issue would be between the parties to address the legitimacy of the treatment, and not, as it is here, on whether a blanket exclusion of coverage relating to gender transition health care—where the same treatment is covered for other medically necessary reasons—would be a form of prohibited sex discrimination.

Further support for the broad interpretation of sex discrimination was found at the time with two federal agencies which had addressed the issue. In 2012, the U.S. Department of Health and Human Services' Office for Civil Rights ("OCR") had determined that "sex discrimination" is extended to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.⁸⁹ Likewise, in 2012, the U.S. Equal Employment Opportunity Commission had issued a formal ruling that gender identity discrimination is per se "sex discrimination."⁹⁰ In addressing the scope of sex discrimination, these two federal agencies both adopted a broad interpretation of "sex discrimination" and extended it to provide protection from discrimination to those individuals with gender dysphoria.

The letter from Leon Rodriguez, Director of the OCR, to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights, dated July 12, 2012 (the "Rodriguez Letter"), stated that under Federal law, gender identity was viewed as a protected class with respect to health care plans

⁸⁹ See *Letter from Leon Rodriguez, Director of Office of Civil Rights, Department of Health and Human Services ("HHS"), to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights, dated July 12, 2012*, <http://www.washingtonblade.com/content/files/2012/08/101981113-Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services.pdf> [hereinafter *Rodriguez Letter*].

⁹⁰ See *Macy v. Eric Holder, Atty General, U.S. Dept. of Justice, EEOC Appeal No. 0120120821 (April 24, 2012)*, http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/macy-v-holder_edited.pdf.

under the Affordable Care Act (“ACA”). For example, Director Rodriguez noted that Section 1557 of the ACA specifically prohibited discrimination in health care programs on the basis of gender identity, race, color, national origin, sex, sex stereotypes, age or disability.⁹¹ As such, health insurers, hospitals, the health insurance exchanges, and any other entities that received federal funds are covered by this law.⁹²

As noted in the Rodriguez Letter, discrimination against transgender people in federal health programs or health programs that receive federal funds is prohibited under the ACA. The letter also notes that the Obama Administration had interpreted existing non-discrimination law — including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 — to mean that the sex-discrimination protections under the ACA also applied to transgender people:

We agree that Section 1577’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and will accept such complaints for investigation.... Section 1557 also prohibits sexual harassment and discrimination regardless of actual or perceived sexual orientation or gender identity of the individuals involved.⁹³

In the U.S. Equal Employment Opportunity Commission (“EEOC”) ruling in 2012 in *Macy v. Eric Holder*, the complainant, a transgender police detective in Phoenix, Arizona, had alleged employment discrimination in violation of Title VII of the Civil Rights Act of 1964. The EEOC found that gender identity and transgender discrimination was per se “sex discrimination” under Title VII.⁹⁴ The agency found that:

Title VII’s prohibition on sex discrimination proscribing gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman,

⁹¹ *Rodriguez Letter* at 1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See Macy*, EEOC Appeal No. 0120120821 at 14.

or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.⁹⁵

The EEOC concluded its opinion by stating that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on...sex" and such discrimination therefore violates Title VII."⁹⁶

If the Division were to find persuasive the reasoning in *Price Waterhouse, Smith, Rosa, Centola, Yunits, Macy* and the Rodriguez Letter, then there were several Massachusetts statutes which prohibited sex discrimination in the business of insurance that might be found broad enough to encompass discrimination in health insurance coverage against persons with gender dysphoria. For example, Chapter 175, § 24A provides:

No company authorized to issue policies of accident or sickness insurance, policies providing coverage against disability from injury or disease, or policies of life or endowment insurance shall refuse to issue such a policy or limit the coverages normally contained therein with respect to the risk of such loss solely because of the sex of the insured.⁹⁷

Therefore, excluding health insurance coverage for gender dysphoria-related treatment could be considered prohibited sex discrimination under existing Massachusetts law because it would be a limitation on coverage based "solely because of the sex of the insured."⁹⁸

VI. TRANSITIONING TO A NEW VIEW

As discussed above, at the beginning of 2014, the Division began to review Massachusetts' laws, as well as federal law and the law of other states, to determine whether health insurance carriers should be prohibited from excluding from coverage appropriate medical treatment for persons with gender dysphoria. We learned that while there was no Massachusetts statute or regulation that specifically prohibited health insurance carriers

⁹⁵ *Id.* at 6-7.

⁹⁶ *Id.* at 14

⁹⁷ MASS. GEN. LAWS ch. 175, § 24A (2018).

⁹⁸ *Id.*

from formally excluding coverage for persons with gender dysphoria for gender transition-related medical care including gender assignment surgery, hormone replacement therapy and other treatments, the Division did conclude that there were at least two possible bases for proscribing health insurers from excluding such coverage under their health plans.

One such possible basis was that excluding coverage for medically-necessary treatment for gender dysphoria would violate the Massachusetts unfair insurance practices law Chapter 176D. Making such a finding, however, would have required coming to the conclusion that individuals with gender dysphoria are of the “same class and of essentially the same hazard” as those without gender dysphoria. The Colorado Division of Insurance and the District of Columbia’s Department of Insurance, Securities and Banking had both come to this conclusion based upon their own unfair insurance practices laws.

But in the case of Colorado, Colorado law defined “sexual orientation” as “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person’s perception thereof” and this definition applied to the state’s unfair insurance practices law. With respect of the District of Columbia, the district’s unfair competition statute was different from that of Massachusetts’ statute in that the district’s statute expressly prohibited discrimination based on gender identity or expression, something that the Massachusetts unfair insurance practice statute did not do. As a result, the Division concluded that there wasn’t nearly as strong a case to be made in Massachusetts as in Colorado or the District of Columbia, because of the lack of any statutory law directly applying any protection for gender identity to the state’s unfair insurance practices law.

Nevertheless, the Division did determine that there was a very strong argument to be made for precluding health insurers from excluding individuals with gender dysphoria from coverage for certain medically necessary treatments would be the state’s existing prohibition on “sex discrimination” in the provision of health insurance, based on stereotyped notions of appropriate gender behavior. In this regard, the Division would be following the lead of the majority of courts which had concluded that a broad interpretation should be given to the term “sex discrimination.”

Under this analysis, if an insurer refused to cover medically necessary treatment because the insured failed to conform to the insurer’s idea of how a man or woman should look and behave, then the insured has been discriminated against based on his or her “sex.” Thus, the Division

concluded that denying medically necessary treatment based on an individual's gender dysphoria, and formally excluding from coverage for persons with gender dysphoria, gender transition-related medical care including gender assignment surgery, hormone replacement therapy and other treatments, must be considered prohibited sex discrimination under Massachusetts law.

In early June 2014, the Division came to the final conclusion that the denial of coverage by health insurance companies for gender transition-related medical care including gender assignment surgery, hormone replacement therapy and other treatments based on an individual's gender identity or gender dysphoria must be declared to be sex discrimination that was prohibited under Massachusetts law. As a result, Division issued its Bulletin 2014-03 on June 20, 2014.⁹⁹

VII. THE AFTERMATH

As a result of the issuance of the Bulletin, the previous nearly uniform exclusion from coverage of gender identity or gender dysphoria-related treatment by Massachusetts health plans became no longer permissible in the Commonwealth, as the Division determined that exclusions from coverage for gender transition-related medical care would no longer be allowed.¹⁰⁰ Once the Bulletin was issued, the health plans in the state immediately complied with its directives, and began to work with advocacy groups and state agencies to ensure that not only would coverage be available for gender transition-related medical treatment, but also that guidelines were developed to determine medical necessity for gender reassignment surgery.¹⁰¹

Since the issuance of the Division's issuance of the Bulletin in Massachusetts in 2014, the insurance departments of several other states issued insurance bulletins or guidance on the application of anti-discrimination laws to health insurance coverage for the treatment of gender dysphoria.¹⁰² The federal government was also moving ahead on the issue of protecting the rights of persons with gender dysphoria under federal law.

⁹⁹ See Bulletin 2014-03.

¹⁰⁰ *Id.* at 3.

¹⁰¹ See, e.g., MassHealth, *Guidelines for Medical Necessity Determination for Gender Reassignment Surgery* (Jan. 2, 2015), <https://www.mass.gov/files/documents/2017/10/18/mg-genderreassignment.pdf>.

¹⁰² See generally HEALTH INS. COMM'R, BULL. No. 2015-3, at 3 n.9 (2015) (noting that the Commissioner's analysis was "similar, in part, to that

On December 18, 2014, following the lead of the EEOC in Macy and the Office of Civil Rights opinions as set forth in the Rodriguez Letter, United States Attorney General Eric Holder announced that the Department of Justice (“DOJ”) would be taking the position in litigation that the protection of Title VII of the Civil Rights Act of 1964 extended to claims of discrimination based on an individual’s gender identity, including transgender status.¹⁰³ Attorney General Holder issued a memorandum that informed all DOJ heads and United States Attorneys that the DOJ would no longer assert that Title VII’s prohibition against discrimination based on sex excludes discrimination based on gender identity per se, including transgender discrimination, reversing a previous DOJ position.¹⁰⁴

Title VII makes it unlawful for employers to discriminate in the employment of an individual “because of such individual’s...sex,” among other protected characteristics.” This important shift will ensure that the protections of the Civil Rights Act of 1964 are extended to those who suffer discrimination based on gender identity, including transgender status,” said Attorney General Holder. “This will help to foster fair and consistent treatment for all claimants. And it reaffirms the Justice Department’s commitment to protecting the civil rights of all Americans.”

Under the Trump Administration, the federal government adopted a new position with respect to the application of the country’s discrimination laws to gender identity. On October 7, 2017, Attorney General Jeff Sessions issued a memorandum to all United States Attorneys and Heads of Department Components, entitled “Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act

conducted by the Division of Insurance for the Commonwealth of Massachusetts in their Bulletin 2014-03”); N.Y. State Dep’t of Fin. Serv., Ins. Circular Letter No. 7 (Dec. 11, 2014); MINN. DEP’T OF COM. & MINN. DEP’T OF HEALTH, ADMIN. BULL. No. 2015-5 (2015); NEV. DEP’T OF BUS. & INDUSTRY, DIVISION OF INS., BULL. No. 15-002, 2015 (2015); Wash. Office of the Ins. Comm’r, Letter (June 25, 2014); PENN. DEP’T OF INS., BULL. No. 16-762, (2016); MICH. DEP’T OF INS. & FIN. SERVS., BULL. No. 2016-10-INS (2016); and MD. INS. ADMIN. BULL. No. 15-33 (2015).

¹⁰³ See Press Release No. 14-1429, United States Department of Justice, Office of Press Affairs (Dec. 18, 2014) <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>.

¹⁰⁴ *Id.*

of 1964.”¹⁰⁵ The Attorney General stated that “[a]lthough federal law, including Title VII, provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se*.”¹⁰⁶ In so stating, Attorney General Sessions further noted that in a December 15, 2014, memorandum, former Attorney General Holder came to the opposite conclusion, namely, that Title VII does encompass such discrimination, based on his view that Title VII prohibits employers from taking into account “sex-based considerations.”¹⁰⁷

Attorney General Sessions further stated that, upon his review of the pertinent statutory and case law, he concluded that “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.”¹⁰⁸ Because of his conclusion, he formally withdrew Attorney General Holder’s December 15, 2014, memorandum, and stated that the DOJ would henceforth adopt his conclusion in all pending and future matters.¹⁰⁹

Similarly, on February 22, 2017, the U.S. Departments of Education and Justice (the “Departments”) issued a “Dear Colleague Letter” that stated that the Departments were withdrawing the statements of policy and guidance reflected in two previously-issued guidance documents: the Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and the “Dear Colleague Letter” on transgender students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.¹¹⁰

¹⁰⁵ See Office of the Attorney General Memorandum, *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, (Oct. 4, 2017) <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁰⁶ *Id.* at 1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler II, Acting Assistant Attorney General for Civil Rights, U.S. Dep’t of Just., Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

The Departments noted that these guidance documents took the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 et seq., and its implementing regulations, 34 C.F.R. § 106.33, required access to sex-segregated facilities based on gender identity.¹¹¹ In the February 22, 2017 Dear Colleague letter, the Departments stated that they had decided to withdraw and rescind the above-referenced guidance documents “in order to further and more completely consider the legal issues involved,” and that “the Departments thus will not rely on the views expressed within them.”¹¹²

On October 21, 2018, the New York Times reported that the U.S. Department of Health and Human Services (“HHS”) had revealed in an internal memorandum the agency’s intention to narrow the legal definition of “sex” under Title IX.¹¹³ In the leaked memorandum that had been obtained by the New York Times, HHS urged government agencies enforcing Title IX - including the DOJ - to adopt a single, uniform definition of gender based “on a biological basis that is clear, grounded in science, objective and administrable, where “sex” meant only “a person’s status as male or female based on immutable biological traits identifiable by or before birth.” The HHS memorandum further stated that the sex “listed on a person’s birth certificate, as originally issued, shall constitute definitive proof of a person’s sex unless rebutted by reliable genetic evidence.”

On March 7, 2018, the United States Court of Appeals for the Sixth Circuit, in the case *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, held that discrimination against transgender people was barred by Title VII.¹¹⁴ The Court of Appeals stated that “[i]t is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex,” and “discrimination ‘because of sex’ inherently includes discrimination against employees because of a change in their sex.”¹¹⁵

¹¹¹ See *id.*, at 1.

¹¹² See *id.* at 2.

¹¹³ See Erica L. Green, Katie Benner & Robert Pear, ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, N.Y. TIMES, (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

¹¹⁴ *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018).

¹¹⁵ *Id.* at 575.

R.G. & G.R. Harris Funeral Homes petitioned the United States Supreme Court for a writ of certiorari from the Third Circuit’s decision.¹¹⁶ On April 22, 2019, the Supreme Court granted the petition for certiorari, limited to the following question: “Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989).”¹¹⁷ Oral argument before the Supreme Court is scheduled for October 8, 2019.¹¹⁸

CONCLUSION

As noted previously in this Article, the Division, in determining that the denial of coverage by health insurance companies for gender transition-related medical care including gender assignment surgery, hormone replacement therapy and other treatments based on an individual’s gender identity or gender dysphoria, was sex-based discrimination prohibited under Massachusetts law. The Division had relied in part upon the Obama Administration’s interpretation of existing non-discrimination law—including Title VII and Title IX—to mean that the sex-discrimination protections under the ACA also applied to transgender people. The Trump Administration has upended this interpretation and stated that it no longer views existing laws as extending “sex-discrimination” protections to transgender people. The Division’s conclusions nevertheless remain intact and persuasive.

The Division, in transitioning to a new view as to what was considered to be prohibited sex discrimination in the provision of benefits under health insurance policies to transgender persons, also relied also upon the long-standing lead of the majority of federal and state courts here in Massachusetts in concluding that the term “sex discrimination” must be given a broad interpretation. This conclusion is supported by the recent action of the Massachusetts Legislature in extending additional protections to transgender persons, including the passage of legislation in 2016 to extend protections against discrimination for gender identity to any place of public

¹¹⁶ See *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>. (last visited July 19, 2019).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

accommodation,¹¹⁹ and the actions of the people of Massachusetts in voting on November 6, 2018, in a ballot initiative to uphold this state law forbidding discrimination based on gender identity in public places.¹²⁰

To the extent that the Supreme Court does ultimately rule that the term “sex discrimination” under Title VII, and by extension, Title IX, does not include discrimination because of gender identity, in order to fully ensure that benefits under health insurance policies are not denied to transgender persons on account of their gender identity, the Massachusetts Legislature should consider amending Chapter 134 of the Acts of 2016¹²¹ to include specific protection for transgender persons with respect to health coverage.

More work needs to be done to protect the rights of transgender persons in seeking their rightful benefits under health insurance policies. But a good start has been made here in the Commonwealth of Massachusetts in making sure that carriers will no longer be able to discriminate against transgender individuals as they seek coverage for gender transition-related medical care.

¹¹⁹ 2016 Mass Acts. Ch. 134.

¹²⁰ See Faith Karimi & Emanuella Grinberg, *Massachusetts Voters Uphold Transgender Rights Protections*, CNN POLITICS, <https://www.cnn.com/2018/11/07/politics/massachusetts-upholds-transgender-protections/index.html> (last updated Nov. 7, 2018, 9:38 AM).

¹²¹ 2016 Mass Acts. Ch. 134.

