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A Quick and Easy Guide to Medicaid and Transition Related Procedures

Medicaid is a government program that generally provides health care to low income people who are: in families with children; 65 or older; and/or, disabled. Medicaid is jointly funded by Federal and State money and administered by individual states, districts, and territories. Generally, Medicaid programs must provide “necessary medical services” to qualified individual in their program. While many state Medicaid programs have historically excluded coverage of transition related procedures through state regulations or practice, such blanket exclusions have often, but not always, been struck down by administrative judges and/or courts.

In a 1998 survey by the State of Iowa 40 other states responded that they did not provide coverage for sex reassignment surgery. Regardless of the fact that Iowa conducted this survey while being sued by a Medicaid recipient in the state for failure to cover transition related surgery (and the results of their survey likely reflect their stance in that case), it is clear that in many states transgender Medicaid recipients must fight for transition related coverage.

Much of the litigation over this issue concerns transition related surgery. However, Medicaid clients have also been known to have trouble securing coverage for hormone therapy and mental health services related to their transition.

I. Key Statutory Provision:

States participating in the Medicaid program must provide "necessary medical services" to qualified state residents. 42 U.S.C. § 1396

II. Supporting Regulation:

In furtherance of a Medicaid Agency's obligation to provide necessary medical services, Section 440.230(c) of Title 42 of the Code of Federal Regulations provides that a Medicaid Agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service to an otherwise eligible recipient solely because of the recipient's diagnosis, type of illness, or condition.

III. Positive case law (this list is illustrative, not exhaustive):

Minnesota

In 1977, Minnesota seems to have, once again, led the pack. In *Doe v. State, Dept. of Public Welfare* (257 N.W.2d 816), the court held: (1) the total exclusion of transsexual surgery from eligibility for medical assistance payments was void; (2) standard of medical necessity requiring applicant for benefits to prove by conclusive evidence that requested medical treatment will

eliminate disability and render applicant self-supporting was invalid; and (3) the Welfare Department's determination to deny medical assistance benefits to adult male transsexual was arbitrary and unreasonable.

California (whose Medicaid program is called MediCal):

As far back as 1978, California courts were slapping around MediCal for denials of transition related surgeries. In *Jane Doe v. Lackner* (80 Cal.App.3d 90), the Court dismissed MediCal's blanket policy of excluding coverage of transgender related procedures on the basis that coverage has to be provided if treatment is medically necessary. In deciding a companion case, *G.B. v. Lackner* (80 Cal. App. 3d 64), the court also found that coverage could not be denied by defining transition related surgery as cosmetic.

Massachusetts

Beger v. Division of Medical Assistance (11 Mass.L.Rptr. 745) In this GLAD case, a Superior Court in Suffolk County ordered the state of Massachusetts to pay for a surgical procedure it had denied to a transsexual woman, but would have provided to a non-transsexual woman.

III. Neutral or negative case law (this list is illustrative, not exhaustive):

5th Circuit (Georgia)

In reversing a lower court's positive ruling, the 5th Circuit Court of Appeals in *Rush v. Parham* (625 F.2d 1150) opened the door for both a determination by the State of Georgia that transition related procedures are experimental (and therefore excludible) and that even if transition related procedures are not experimental, Georgia can refute a doctor's determination of whether a procedure is medically necessary.

8th Circuit (Iowa)

In a disappointing reversal of a lower court decision, the 8th Circuit Court of Appeals in *Smith v. Rasmussen* (249 F.3d 755) found that Iowa's blanket denial of transition related surgery was not unreasonable, arbitrary, or inconsistent with the Medicaid Act. The court reviewed the process that Iowa underwent before excluding coverage (which included the survey mentioned above and some medical testimony) and found it a sufficient basis for blanket denials.

IV. Other interesting and somewhat related cases

Kosilek v. Maloney, 221 F.Supp.2d 156, (D. Mass 2002)

Prison sought relief under the Eighth Amendment for a denial of access to transition related procedures. Court found that failure to provide hormone therapy (and possibly surgery) to Kosilek resulted in Kosilek being denied adequate care for a serious medical need.

Mario v. P & C Food Markets, Inc., 313 F.3d 758, (C.A.2, 2002)

A female-to-male transsexual sued his employer for wrongfully denying insurance coverage for sex-reassignment surgeries under a plan governed by the Employee Retirement Income and Security Act of 1974 (ERISA). The 2nd Circuit Court of Appeals held the employer met its burden of showing that gender reassignment surgeries were not "medically necessary."