

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES
Before the Director of Insurance and Financial Services

In the matter of:

██████████
Petitioner

v

Priority Health HMO
Respondent

File No. 147555-001

Issued and entered
this 19th day of May 2015
by Randall S. Gregg
Special Deputy Director

ORDER

I. PROCEDURAL BACKGROUND

On April 27, 2015, ██████████, authorized representative of ██████████ (Petitioner), filed a request with the Director of Insurance and Financial Services for an external review under the Patient's Right to Independent Review Act, MCL 550.1901 *et seq.*

The Petitioner receives individual health care benefits through Priority Health, a health maintenance organization. The benefits are defined in Priority Health's *MyPriority HMO Agreement*. The Director notified Priority Health of the external review request and asked for the information used to make its final adverse determination. Priority Health submitted material on April 28 and May 4, 2015. After a preliminary review of the material submitted, the Director accepted the request on May 4, 2015.

The issue in this external review can be decided by a contractual analysis. The Director reviews contractual issues under MCL 500.1911(7). This matter does not require a medical opinion from an independent review organization.

II. FACTUAL BACKGROUND

The Petitioner has been diagnosed with gender dysphoria. She has been undergoing gender transition for several years and desires to continue her transition with a surgical procedure known as "penile inversion vaginoplasty." On February 10, 2015, her physician requested coverage from Priority Health for the proposed surgery.

Priority Health denied the request. The Petitioner appealed the denial through Priority Health's internal grievance process. At the conclusion of that process, Priority Health affirmed its denial and issued a final adverse determination on April 9, 2015. The Petitioner now requests that the Director review Priority Health's adverse determination.

III. ISSUE

May Priority Health deny coverage for the Petitioner's requested surgery?

IV. ANALYSIS

In its final adverse determination to the Petitioner, Priority Health wrote:

Any procedure or treatment designed to change your physical characteristics from your biologically determined sex to those of the opposite sex is not covered in accordance with the *MyPriority HMO Agreement* and "Priority Health Medical Policy 91535-R3 for Cosmetic and Reconstructive Surgery Procedures."

The *MyPriority HMO Agreement* has this provision on page 21, describing "Covered and Non-Covered Services":

Sex Change or Transformation

Non-Covered Services

Any procedure or treatment, including hormone therapy, designed to change your physical characteristics from your biologically determined sex to those of the opposite sex. This exclusion applies despite any diagnosis of gender role or psychosexual orientation problems.

In its final adverse determination, Priority Health cited this exclusion and its medical policy titled, "Cosmetic and Reconstructive Surgery Procedures" which states, "coverage is not provided for the following conditions and/or procedures...transsexualism procedures."

The Petitioner argues that these coverage exclusions violate the Affordable Care Act, a federal statute, and the regulations promulgated under that law. In the request for review, her authorized representative wrote:

[Petitioner] has provided Priority Health Insurance with medical information which documents that she has been diagnosed with gender dysphoria and that her physician...has determined that it is medically necessary that she undergo genital reassignment surgery.

Priority Health Insurance has denied this request because its policies exclude any covered services for gender dysphoria conditions....

Through its participation in Michigan's insurance marketplace, Priority Health is subject to federal regulations promulgated under the Affordable Care Act and may not discriminate in the benefit design plan on the basis of health conditions such as gender dysphoria. 45 CFR §156.125(a).

Priority Health has been selected by the State of Michigan as its base benchmark insurance plan. The benchmark plan is viewed as a floor for the "Essential Health Benefits" (EHB) standard for all insurance programs participating in the insurance marketplace. The Affordable Care Act regulations require that all participating Michigan plans, in order to meet the (EHB) coverage standard, have to provide coverage in a variety of categories of benefits, including hospitalization, mental health services, prescription drugs and well ness services. 45 CFR §156.110.

Priority Health, because of its blanket exclusion of coverage for gender dysphoria... fails to meet the EHB standard required under the Affordable Care Act. 45 CFR §156.110(b). When a state benchmark plan does not meet the EHB standards it is required to supplement its insurance plan to provide essential benefits coverage. 24 CFR §156.110(b). This supplementation involves correcting the discriminatory benefit design that contravenes the non-discrimination standards required under the federal regulations. 24 CFR §156.110(d).

Furthermore, the Department of Health and Human Services (HHS) provides guidance to issuers where a state benchmark plan contains a discriminatory design. In its preamble to regulations establishing standards tor EHB, HHS states, "to the extent that a state benchmark plan includes a discriminatory benefit design, non-discrimination regulations at §156.110(d) and §156.125 require issuers to meet the benchmark requirements in a non-discriminatory manner." 78 FR 12846-7 (February 25, 2013).

Furthermore, in a June 12, 2012 letter to the National Center for Transgender for Transgender Equality from Leon Rodriguez, the director of HHS's Office for Civil Rights, HHS considers discrimination based on "gender identity or failure to conform to stereotypical notions of masculinity or femininity" in federal health programs or activities receiving funding under Affordable Care Act-covered programs to be illegal and in violation of federal civil rights protections on the basis of sex.

In sum we believe Priority Health's decision to deny coverage for [Petitioner's] sexual reassignment surgery, along with its refusal to pay for her hormone

therapy, based on Priority Health's coverage policies are both discriminatory and in violation [of] the Affordable Care Act regulations.

The Petitioner's argument is based on the assertion that Priority Health does not include coverage for one of the required categories of medical care – surgery. This is an inaccurate representation of the coverage provided under the *MyPriority HMO Agreement*.

The certificate excludes coverage for a particular type of surgery. There is no requirement in the ACA or in Michigan law that all forms of surgery must be covered in order for a benefit plan to be nondiscriminatory. For example, cosmetic surgery may be surgery but it is not a required benefit. In some circumstances, even medically necessary surgery may be excluded. (Examples include multiple bariatric surgeries, TMJ surgery, paniclectomy, cochlear implants, and orthognathic surgery.) The Petitioner has not cited, and the Director is not aware of, any insurer that offers coverage for the surgery requested by the Petitioner. Ten state benchmark plans specifically exclude gender transformation surgery from coverage: Delaware, Georgia, Indiana, Kentucky, Louisiana, Maine, Missouri, New Hampshire, Ohio, and Virginia.

The Director finds that Priority Health may deny coverage for the requested surgery.

Note: In the request for review, the Petitioner's representative makes the following argument:

By having a blanket exclusion for hormone therapy for transgender persons, while at the same time providing the same female hormone therapy to non-transgender women who are undergoing menopause, Priority Health is discriminating against [Petitioner] in violation of Michigan prohibitions on sex discrimination in public accommodations. MCL §37.2302.

Hormone therapy for the Petitioner is not a part of this review. The Petitioner appealed Priority Health's denial of coverage for surgery. The records submitted by the parties for this review show that hormone therapy was not requested and was not discussed at the managerial level conference and was not addressed in Priority Health's final adverse determination. In order to be considered in an external review, a request for coverage must pass through an insurer's internal grievance process and be the subject of a final adverse determination. See MCL 550.1911. Because the prerequisites for an external review have not been met in this case with respect to coverage for hormone therapy, the Petitioner's assertions and arguments regarding hormone therapy and Priority Health's alleged discriminatory practices are not addressed in this order.

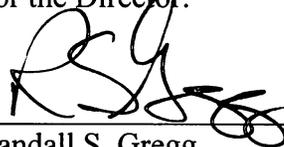
V. ORDER

The Director upholds Priority Health's April 9, 2015 final adverse determination.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this order may seek judicial review no later than 60 days from the date of this order in the circuit court for the county where the covered person resides or in the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Department of Insurance and Financial Services, Office of General Counsel, Post Office Box 30220, Lansing, MI 48909-7720.

Patrick M. McPharlin
Director

For the Director:



Randall S. Gregg
Special Deputy Director