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REPORT ON REPEALING THE MEDICAID EXCLUSION OF MEDICALLY NECESSARY HEALTH SERVICES FOR TRANSGENDER NEW YORKERS

COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS

New York State's regulatory exclusion of state Medicaid insurance coverage for any care, services, drugs, or supplies for the purpose of gender reassignment threatens the lives of transgender New Yorkers and should be repealed.[1] It is time for New York to adopt the recommendations of multiple medical and social welfare organizations and follow the lead of states, municipalities and private employers who have already made this much-needed change — a change that will have minimal impact in terms of cost but will make an enormous difference in the lives of transgender individuals seeking medically necessary transition-related health services.

Since the adoption of New York's exclusion in 1997,[2] the medical community has established that transition-related medical services are medically necessary and effective for some transgender individuals. Gender Identity Disorder ("GID") is a serious medical condition recognized as such in both the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th Ed. Text Revision 2000) (DSM-IV-TR) and the World Health Organization's International Classification of Diseases (10th Revision 2007).[3] In 2008, the American Medical Association ("AMA"), the largest professional association of physicians, residents, and medical students in the United States, passed resolutions to affirm that, without medical treatment, GID can result in clinically significant psychological distress, debilitating depression, and even suicide.[4] The AMA recommends a combination of mental health care,

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1 N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(*l*) ("the exclusion").

2 New York's Medicaid exclusion of medical services for gender reassignment was adopted in 1997, based on the assumption that such treatment was "not medically necessary" and "experimental." Dep't of Health, Notice of Adoption: Gender Reassignment, 20 N.Y. Reg. 5 (Mar. 25, 1998). As described below, this assumption has been invalidated by several medical authorities and organizations, including the American Medical Association.

3 The ICD recognizes "transsexualism" – defined as "[a] desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex" – as one of a number of "gender identity disorders." WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF DISEASES F64 (10th Revision 2007).

4 American Medical Association House of Delegates, Resolution 122 (A-08): Removing Financial Barriers to Care for Transgender Patients, *available at* http://www.tgender.net/taw/ama_resolutions.pdf.

hormone therapy, and sex reassignment surgery, determined on an individual basis.[5] Other medical and professional associations have followed suit, including the American Academy of Family Physicians, the American Psychological Association, the National Association of Social Workers, and the World Professional Association for Transgender Health.[6] These organizations have recognized the efficacy and medical necessity of transition-related health care and have called upon both public and private insurance companies to remove discriminatory exclusions to care.[7] The consensus is clear that these treatments *must be covered* as medically necessary health care.[8]

A lack access to appropriate health care services has drastic consequences for transgender individuals.[9] Transgender people without access to transition-related care are up to thirty (30) times more likely to attempt suicide than those who have successfully accessed care.[10] Depression, anxiety, and substance use increase dramatically among transgender people who are denied access to medically necessary care.[11] Some turn to illegal providers to obtain hormones or silicone injections, risking illness, disfigurement, and death.[12] Repealing the exclusion would

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[5] *Id*.

[6] American Academy Family Physicians, Summary of Actions, 2009 National Conference of Special Constituencies, 2009 Resolutions, *available at* http://www.aafp.org/online/en/home/cme/aafpcourses/conferences/leader/ncsc/elections/resolution.html; American Psychological Association, Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination (Aug. 2008), *available at* http://www.apa.org/about/governance/council/policy/transgender.aspx; National Association of Social Workers, Transgender and Gender Identity Issues, *available at* http://www.socialworkers.org/da/da2008/finalvoting/ documents/Transgender%202nd%20round%20-%20Clean.pdf; World Professional Association for Transgender Health, Clarification on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (June 17, 2008), *available at* http://www.tgender.net/taw/WPATHMedNecofSRS.pdf.

[7] *See, e.g.*, World Professional Association for Transgender Health, Clarification on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A., *supra* note 6.

[8] *Id*.

[9] Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL'Y 7, 12-15 (2007), *available at* http://www.srlp.org/files/SRLPmedicaidarticle.pdf.

[10] SYLVIA RIVERA LAW PROJECT, ELIMINATING THE MEDICAID EXCLUSION FOR TRANSITION-RELATED CARE IN NYS 2 (2011), *available at* http://srlp.org/files/Health%20Costs%20Final%20Memo.pdf.

[11] JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, THE NAT'L GAY & LESBIAN TASK FORCE & THE NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 81 (2011), *available at* http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf ; Mohammad Hassan Murad et al., *Hormonal Therapy and Sex Reassignment: A Systematic Review and Meta-analysis of Quality of Life and Psychosocial Outcomes*, 72 CLINICAL ENDOCRINOLOGY 214 (2010) (meta-analysis of 28 studies found 78% of individuals with Gender Identity Disorder reported significant improvements in psychological symptoms following treatment, including hormone therapy and gender-affirming surgery).

[12] Gehi & Arkles, *supra* note 9, at 14; *see also* Laura Rena Murray, *The High Price of Looking Like a Woman*, N.Y. TIMES, Aug. 21, 2011, at MB1.

likely reduce transgender people's reliance on unsafe and unregulated black market services, thus decreasing the need for care for complications from these procedures. Moreover, providing access to transition-related services would ameliorate mental health and substance abuse issues, and thus reduce the costs of that care.

Transgender people without access to appropriate health care face crises in all aspects of their lives and work, resulting in disproportionately large human costs. Transgender individuals who cannot avail themselves of medically necessary transition-related health care may not be able to present themselves in a manner consistent with their gender identity, making them more vulnerable to acts of violence, discrimination and harassment. For example, without access to transition-related health care, a transgender person may not be able to obtain gender-matched identification.[13] Transgender people who do not have identification matching their gender identity or expression report very high levels of harassment (40% of respondents in a 2011 survey), violence, and discrimination when presenting identification documents.[14] Similarly, transgender and gender non-conforming employees report that they are often forced to present in the wrong gender to keep their jobs (32% of respondents in the same 2011 survey).[15] Access to health insurance coverage for transition-related care may change these results, reduce the risk of violence, and increase employment rates in the transgender community.[16]

Transgender individuals particularly suffer due to the limitations on coverage provided by Medicaid because a disproportionate number of transgender people are low-income and thus are more likely to rely on public health insurance programs.[17] A September 2009 survey by the

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[13] Most government-issued identification permits a change in gender, but not without proof of medical treatment of some kind. For example, the U.S. Department of State recently changed its policies, allowing transgender individuals to obtain a new passport with a corrected gender identity based on a certification from an attending physician that the applicant has undergone appropriate clinical treatment for gender transition. Proof of sex reassignment surgery, however, is no longer required. Press Release, U.S. Dep't of State, New Policy on Gender Change in Passports Announced (June 9, 2010), *available at* http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm. This policy is helpful, but a passport change would be out of reach for anyone who cannot afford the clinical treatment and is otherwise Medicaid-eligible.

[14] GRANT, MOTTET & TANIS, *supra* note 11, at 5 (40% of survey participants who presented ID when it was required in the ordinary course of life that did not match their gender identity/expression reported being harassed, 3% reported being attacked or assaulted, and 15% reported being asked to leave), 132 (41% of survey respondents whose driver's licenses did not reflect the gender they have transitioned to reported denial of equal treatment or service and 48% reported harassment/disrespect in retail stores).

[15] *Id*. at 60.

[16] *See id*. at 118 (reporting that 42% of transgender and gender non-conforming respondents were forced to present in the wrong gender to access shelter and those who had had surgery had slightly lower rates (35%) of forced gender coercion), 126-28 (reporting that survey respondents who are visual non-conformers reported higher rates of physical attack or assault in places of public accommodation (10%) than those who are visual conformers (6%)).

[17] *See* SOMJEN FRAZER, EMPIRE STATE PRIDE AGENDA FOUND., LGBT HEALTH AND HUMAN SERVICES NEEDS IN NEW YORK STATE 12 (2009), *available at* http://www.prideagenda.org/Portals/0/pdfs/LGBT%20Health%20and%20Human%20Services%20Needs%20in%20New%20York%20State.pdf ("[P]reliminary research suggests that transgender people are . . . more likely to be unemployed and very low income.").

National Center for Transgender Equality and the National Gay and Lesbian Task Force found that fifteen percent (15%) of transgender people surveyed lived on $10,000 per year or less, a rate double that of the general population, and that twenty-seven percent (27%) had incomes of $20,000 or less.[18] Those surveyed were also unemployed at a rate nearly double the national average at the time of the survey – 13%.[19]

Transgender people are the only group of New Yorkers who are currently denied Medicaid coverage for services based on their identity. Providing full coverage for transgender health services will put transgender patients in the same position as all other patients in that only medically necessary services will be covered. New York's Medicaid program should follow the increasing number of states, municipalities and private employers providing coverage for all of the mental health, medical, and surgical treatments necessary to provide adequate health care to transgender people.[20] New York law must address the health crisis facing transgender New Yorkers by providing full coverage for medically necessary health services through the state's Medicaid plan.

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[18] NAT'L CTR. FOR TRANSGENDER EQUALITY & THE NAT'L GAY & LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2009), *available at* http://www.thetaskforce.org/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf.

[19] *Id.* at 1.

[20] The Human Rights Campaign's Corporate Equality Index lists eighty-five employers - including eight of the top twenty Fortune 500 companies and twenty-six of the *American Lawyer* top 200 law firms - that provide insurance coverage for transgender-related treatment, including surgical procedures, for employees and covered dependents. HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2011, http://www.hrc.org/files/assets/resources/CorporateEqualityIndex_2011.pdf. The City of San Francisco began covering transition-related care for its employees in 2001. SYLVIA RIVERA LAW PROJECT, *surpa* note 10, at 1. Medicaid programs in Minnesota and California also cover transition-related care, including gender affirming surgery. *See* TRANSGENDER LAW CTR., MEDI-CAL AND GENDER REASSIGNMENT PROCEDURES (2002), *available at* http://www.transgenderlawcenter.org/pdf/MediCal%20Fact%20Sheet.pdf; Dean Spade, *Medicaid Policy & Gender-Confirming Healthcare for Trans People*, 8 TRANSGENDER ISSUES & L. 497, 504 (2010), *available at* http://www.law.seattleu.edu/Documents/sjsj/2010spring/Spade_Advocates.pdf.