

# Q&A:

## ENSTAD V. PEACEHEALTH

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### **Why did Cheryl Enstad and her son Pax challenge PeaceHealth's Medical Benefits Plan?**

Pax is a boy who is transgender. Pax's doctor prescribed chest reconstruction surgery for him, in accordance with the widely accepted standards of care for treating gender dysphoria. Leading medical organizations, including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, all recognize that chest reconstruction surgery can be medically necessary to treat gender dysphoria and clinically significant distress.

Despite this medical necessity, PeaceHealth denied coverage for Pax's surgery, telling the family that there was "no coverage for any transgender services" under the PeaceHealth Medical Benefits Plan. The Enstads, represented by the national ACLU and the ACLU of Washington, challenged the plan's denial of coverage as discriminatory.

### **Health insurance plans exclude all kinds of things. How is this different?**

Like most health plans, PeaceHealth Medical Benefits Plan ("PeaceHealth's Plan") covers only treatments that qualify as medically necessary. But that was not the basis for the Plan's exclusion of care for "transgender services." PeaceHealth's Plan categorically denies all coverage for gender dysphoria even when the treatment is medically necessary. That is exactly what happened to Pax.

Under federal and state law, health insurance plans cannot refuse coverage for a discriminatory reason. In this case, even though PeaceHealth's Plan will cover medically necessary surgery for other medical conditions, it will not cover the same surgery when it is used to treat gender dysphoria. That exclusion violates Section 1557 of The Patient Protection and Affordable Care Act (ACA), which prohibits discrimination in health services on the basis of sex, and the Washington Law Against Discrimination (WLAD), which prohibits discrimination on the basis of sex and gender identity.

### **How do the ACA and WLAD prohibit discrimination against transgender individuals?**

Section 1557 of the ACA (42 U.S.C. § 18116) provides that an individual shall not, on the basis of sex or certain other grounds, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." PeaceHealth's Plan is subject to Section 1557. Discrimination on the basis of transgender status or gender nonconformity is discrimination on the basis of sex. So, by excluding coverage for "transgender services," PeaceHealth's Plan is discriminating on the basis of sex.

The Washington Law Against Discrimination also prohibits discrimination on the basis of sex, as well as on the basis of sexual orientation, which is defined in the statute to include gender and gender identity. WASH. REV. CODE § 49.60.040(25)-(26). By categorically excluding all medically necessary "transgender services" or services related to "gender change," PeaceHealth's Plan discriminates based on sex and gender identity.

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## **Is PeaceHealth's Plan subject to the Washington Office of the Insurance Commissioner or ERISA?**

In June 2014, Washington's Office of the Insurance Commissioner (OIC) stated that transgender discrimination in private health insurance plans is illegal under the WLAD and the ACA. As a result, most private health insurance plans sold in Washington state must provide health care coverage to transgender policyholders on terms equal to coverage provided to non-transgender policyholders.

Private health plans that are "self-funded" like PeaceHealth's are not subject to the OIC's directive requiring equality in health insurance coverage for transgender individuals. Such plans are generally governed exclusively by the federal Employee Retirement Income Security Act (ERISA), but because PeaceHealth's Plan is considered a "church plan," it is also exempt from ERISA. The WLAD and ACA's prohibitions on sex discrimination apply to PeaceHealth's Plan.

## **What is a "self-funded" plan and what does the plan administrator do?**

A self-funded employee healthcare plan is one in which the employer pays members' eligible claims for benefits. This is different from a fully insured employee benefit plan, where the employer pays premiums to an insurance company, and the insurance company assumes the risk for paying members' eligible claims.

Self-funded healthcare plans usually hire a third party plan administrator to manage the plan. The plan administrator is responsible for paying and managing medical claims, establishing a provider network, and large case management. In 2016, PeaceHealth's Plan was administered by a subsidiary of Regence Insurance. In 2017, PeaceHealth changed plan administrators to a subsidiary of Aetna Inc. Both Regence and Aetna have concluded that transition-related care can be medically necessary and have policy manuals providing coverage for such care. PeaceHealth's Plan does not follow these policies, and PeaceHealth has prohibited the plan administrator from paying for transition-related care.

## **Is PeaceHealth, as a Catholic organization, exempt from the anti-discrimination laws?**

No. Section 1557 and the WLAD do not allow religiously affiliated health organizations to discriminate against their patients and employees on the basis of sex or being transgender.

The ACLU is a staunch defender of religious liberty. But this case is not about religious liberty. A large health care corporation is refusing to cover a medically necessary health care service for an employee's child solely because of that child's gender identity. This is discrimination plain and simple. Freedom of religion does not give people the right to impose their beliefs on others, to harm others, or to discriminate.

