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January 21, 2016

Sound Health & Wellness Trust
201 Queen Anne Ave. N. #100
Seattle, WA 98109

Re: Gender Dysphoria Coverage Policy

Dear Trustees of Sound Health & Wellness Trust,

The ACLU of Washington would like to wholeheartedly commend you for recognizing that transgender enrollees in Sound Health & Wellness Trust (“SHWT”) health plans should have access to medically necessary care, and we applaud your recent adoption of a Gender Dysphoria Coverage Policy (the “Policy”). SHWT’s Policy is an important step towards ensuring that transgender people can access health care services, and we write to offer some suggestions for strengthening it, both to ensure compliance with federal and state law, and to ensure transgender enrollees have access to all medically necessary care.

Our recommendations are based on guidance from the American Medical Association and the American Psychiatric Association, as well as the standards of care published by the World Professional Association for Transgender Health (“WPATH Standards of Care”).¹ These organizations uniformly recognize that medically necessary transition-related care for transgender individuals may include hormone therapy, gender-confirming surgery, and other medical services aimed at aligning one’s physical body to one’s gender identity. Consequently, comprehensive health benefit coverage policies are critical to ensuring that transgender individuals can obtain all care deemed medically necessary by their health care providers.

These recommendations are also based on federal and state law. Title VII of the federal Civil Rights Act prohibits discrimination based on sex in employment,

¹ American Medical Association House of Delegates (hereinafter “AMA”), Resolution 122, A-08, Removing Financial Barriers to Care for Transgender Patients (2008), available at http://www.tgender.net/taw/ama_resolutions.pdf; American Psychiatric Association, Gender Dysphoria Fact Sheet, <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>; World Professional Association for Transgender Health, *WPATH Clarification on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide* (2008), available at http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947.

including in the provision of health care benefits to employees.² This prohibition includes a bar on discrimination based on transgender status. And employers that discriminate in the provision of health care benefits related to gender transition are liable under Title VII.³ In addition, under Section 1557 of the federal Affordable Care Act, any entity that receives federal funds is prohibited from discriminating based on sex, a term that includes a person's gender identity or transgender status.⁴ The U.S. Department of Health and Human Services recently published proposed regulations implementing Section 1557, which prohibit any covered health insurance entity from restricting coverage of "health services related to gender transition where such a denial or limitation results in discrimination against a transgender individual."⁵ Finally, the Washington State Office of the Insurance Commissioner issued an opinion letter in June 2014 clarifying that health coverage policies with discriminatory exclusions for transition-related health care violate state law.⁶

We believe that SHWT should take steps to ensure that its Policy aligns with medical best practices and relevant law and recommend the following:

1. Modify Eligibility Criteria for Mastectomies for Transgender Men

SHWT's Policy states that mastectomies for transgender men may be considered for coverage if enrollees satisfy a number of requirements, including two referral letters and 12 months of continuous hormone therapy. The requirements of the Policy are not consistent with the WPATH Standards of Care, which state that mastectomies may be performed for transgender men with only one referral and without hormone therapy as a prerequisite for surgery.⁷ We recommend that SHWT bring its mastectomy coverage policy in alignment with medical best practices.

2. End the Categorical Exclusion of Certain Procedures as *Per Se* Cosmetic

SHWT's Policy categorically excludes a wide range of procedures as cosmetic and not medically necessary. There is no medical basis for this categorical exclusion, and no scientific literature is cited in support of it. To the contrary, the WPATH Standards of Care explain that "[a]lthough most of these procedures are generally labeled 'purely aesthetic,' these same operations in an individual with severe gender

² 42 U.S.C. § 2000e-2(a)(1); 29 C.F.R. § 1604.9(a); *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 (1978); *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682-83 (1983).

³ See *Mia Macy*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁴ See 42 U.S.C. § 18116; *Rumble v. Fairview Health Servs.*, 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015); see also *Nondiscrimination in Health Programs and Activities*, 80 FR 54172-01 (proposed Sept. 8, 2015).

⁵ See *Nondiscrimination in Health Programs and Activities*, *supra* note 4.

⁶ Washington State Office of the Insurance Commissioner, Letter to Health Insurance Carriers in Washington State (June 25, 2014), available at <http://www.insurance.wa.gov/about-oic/newsroom/news/2014/documents/gender-identity-discrimination-letter.pdf>.

⁷ WPATH Standards of Care at 59, 105.

dysphoria can be considered medically necessary, depending on the unique clinical situation of a given patient's condition and life situation.”⁸

In particular, there is a significant body of research documenting the medical necessity of facial feminization surgery and breast augmentation for some people as part of the transition process.⁹

Other health care insurers and programs, such as Washington State Medicaid,¹⁰ now cover facial feminization, breast augmentation, and similar procedures when they are medically necessary. While these procedures may be cosmetic or medically necessary for different individuals based on their individualized needs, there is no scientific basis for SHWT's Policy to exclude such procedures from coverage in *all* circumstances. We urge SHWT to amend its policy to cover medical and surgical procedures for transgender enrollees based on individualized determinations of medical necessity.

3. Eliminate Unduly Narrow Eligibility Criteria

SHWT's Policy imposes burdensome and arbitrary requirements for coverage, such as a strict age minimum and a requirement that individuals complete twelve consecutive months of hormone treatment or experience living “full-time” as their gender. Such strict requirements are inconsistent with established standards of care for gender dysphoria and may put urgently necessary care out of reach for many transgender individuals — including male chest reconstruction for minors in appropriate cases. We strongly encourage SHWT to adopt a revised policy that allows qualified physicians to make a case-by-case determination of medical necessity based on current scientific knowledge.

⁸ *Id.* at 64.

⁹ Luis Capitán et al., *Facial Feminization Surgery: The Forehead. Surgical Techniques and Analysis of Results*, 134 *PLASTIC & RECONSTRUCTIVE SURGERY* 609, 613 (2014); Tiffany A. Ainsworth & Jeffrey H. Spiegel, *Quality of Life of Individuals With and Without Facial Feminization Surgery or Gender Reassignment Surgery*, 19 *QUALITY OF LIFE RES.* 1019 (2010); Romain Weigert et al., *Patient Satisfaction with Breasts and Psychosocial, Sexual, and Physical Well-Being after Breast Augmentation in Male-to-Female Transsexuals*, 132 *PLASTIC & RECONSTRUCTIVE SURGERY* 1421 (2013); Katrien Wierckx et al., *Clinical Review: Breast Development in Trans Women Receiving Cross-Sex Hormones*, 11 *J. OF SEXUAL MEDICINE* 1240 (2014).

¹⁰ State of Washington Health Care Authority, Concise Explanatory Statement for RCW 34.05.325, at 6-7 (Aug. 7, 2015) available at <http://www.genderjusticeleague.org/wp-content/uploads/2015/08/Gender-Dysphoria-Answers.pdf>. Covered services include: Abdominoplasty, Blepharoplasty, Breast reconstruction (male to female), Laryngoplasty, and Rhinoplasty. Services covered when medically necessary include: Brow lift, Calf implants, Cheek/malar implants, Chin/nose implants, Collagen injections, Drugs for hair loss or growth, Facial or trunk electrolysis, Facial feminization, Face lift, Forehead lift, Hair transplantation, Jaw shortening, Lip reduction, Liposuction, Mastopexy, Neck tightening, Pectoral implants, Reduction thyroid chondroplasty, Removal of redundant skin, Suction-assisted lipoplasty of the waist, Trachea shave, Voice modification surgery, and Voice therapy.

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We are pleased with SHWT's adoption of a Gender Dysphoria Coverage Policy and believe that SWHT's Policy should be amended to ensure that transgender enrollees in SWHT health plans can access all medically necessary care consistent with medical best practices and relevant federal and state law. Please do not hesitate to contact me at (206) 624-2184 or mchen@aclu-wa.org should you wish to discuss these recommendations further.

Sincerely,

A handwritten signature in black ink, appearing to read 'M Chen', with a long horizontal flourish extending to the right.

Margaret Chen
Staff Attorney