HOUSE BILL REPORT
2SSB 5313

As Passed House - Amended:
March 24, 2021

Title: An act relating to health insurance discrimination.

Brief Description: Concerning health insurance discrimination.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Liias, Randall, Darneille, Das, Dhingra, Frockt, Hunt, Keiser, Kuderer, Lovelett, Nguyen, Nobles, Pedersen, Robinson, Stanford, Van De Wege and Wilson, C.).

Brief History:
Committee Activity:
Health Care & Wellness: 3/15/21, 3/17/21 [DP].
Floor Activity:
Passed House: 3/24/21, 57-41.

Brief Summary of Second Substitute Bill
(As Amended By House)

- Establishes that health carriers, public employee health plans, the Health Care Authority, and Medicaid programs may not deny coverage for medically necessary gender affirming treatment or apply categorical or blanket exclusions to gender affirming treatment.

HOUSE COMMITTEE ON HEALTH CARE & WELLNESS

Majority Report: Do pass. Signed by 9 members: Representatives Cody, Chair; Bateman, Vice Chair; Bronoske, Davis, Macri, Riccelli, Simmons, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 1 member: Representative Schmick, Ranking Minority Member.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Without recommendation. Signed by 5 members: Representatives Caldier, Assistant Ranking Minority Member; Harris, Maycumber, Rude and Ybarra.

Staff: Kim Weidenaar (786-7120).

Background:

Section 1557 of the federal Patient Protection and Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disabilities in health programs receiving federal funding, health programs administered directly by the federal government, and qualified health plans offered on health benefit exchanges. Federal rules implementing this requirement prohibit discrimination in the issuance of health plans, the denial or limitation of coverage, and marketing practices. Rules also prohibit discrimination against transgender individuals and prohibit insurers from categorically excluding gender transition services.

In 2016 a federal district court issued a nationwide injunction enjoining the enforcement of the federal rules prohibiting discrimination on the basis of gender identity or termination of pregnancy—*Franciscan Alliance, Inc. v. Burwell* (2016). The court subsequently stayed its ruling and in 2019, the United States Department of Health and Human Services (HHS) proposed rules clarifying the scope of the ACA's nondiscrimination provisions. In June 2020 the HHS issued final regulations implementing Section 1557, which narrows the scope of a rule issued in 2016 by the Obama Administration. The rules, among other provisions, removed gender identity and sex stereotyping from the definition of prohibited sex-based discrimination and eliminated the provision that prohibits a health plan from categorically or automatically excluding or limiting coverage for health services related to gender transition. Federal courts in New York and Washington, D.C. have since blocked the implementation of the 2020 HHS rules relying on an August 2020 Supreme Court ruling, in *Bostock v. Clayton County, Georgia* (2020), that found discrimination based on sex encompasses sexual orientation and gender identity in the context of employment.

State law prohibits a health carrier offering a non-grandfathered health plan in the individual or small group market from discriminating against individuals because of age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions. Such a health carrier may not, with respect to the health plan, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity, or sexual orientation. Further, health plans and state Medicaid services may not discriminate on the basis of gender identity or expression, or perceived gender identity or expression, in the provision of non-reproductive health care services.

Summary of Amended Bill:

For health plans issued on or after January 1, 2022:

- A health carrier may not deny or limit coverage for gender affirming treatment when

that care is prescribed to an individual because of, related to, or consistent with a person's gender expression or identity, is medically necessary, and is prescribed in accordance with accepted standards of care.

- A health carrier may not apply categorical cosmetic or blanket exclusions to gender affirming treatment. When prescribed as medically necessary gender affirming treatment, a health carrier must not exclude as cosmetic services facial feminization surgeries, other facial gender affirming treatment, and other care such as mastectomies and breast implants, including revisions to prior treatment.
- A health carrier may not issue an adverse benefit determination denying or limiting access to gender affirming services, unless a health care provider with experience prescribing or delivering gender affirming treatment has reviewed and confirmed the appropriateness of the adverse benefit determination.
- A health carrier may comply with all network access rules and requirements established by the Insurance Commissioner.

The Insurance Commissioner must adopt rules necessary to implement these provisions. The Insurance Commissioner, in consultation with the Health Care Authority (HCA) and the Department of Health, must report on the geographic access to gender affirming treatment across the state. The report must be updated biannually.

These discrimination and coverage provisions are applied to health plans offered to public employees and their dependents in addition to the state's prohibited discrimination provisions for non-grandfathered health plans.

The HCA and Medicaid programs (including managed care plans) and providers that administer or deliver gender affirming care services through Medicaid programs may not discriminate in the delivery of a service based on the covered person's gender identity or expression. The HCA and Medicaid programs may not apply categorical cosmetic or blanket exclusions to gender affirming treatment. When prescribed as gender affirming treatment, facial feminization surgeries, facial gender affirming treatment, and other care such as mastectomies and breast implants, including revisions to prior treatment, may not be excluded as cosmetic. The HCA and Medicaid managed care plans may not issue an adverse benefit determination denying or limiting access to gender affirming services, unless a health care provider with experience prescribing or delivering gender affirming treatment has reviewed and confirmed the appropriateness of the adverse benefit determination. If the HCA and Medicaid programs do not have an adequate network for gender affirming treatment, they must ensure timely and accessible delivery of care at no greater expense to the enrollee had the care been provided by an in-network provider. These requirements apply to the HCA and Medicaid programs beginning January 1, 2022. The HCA must adopt rules necessary to implement these provisions.

"Gender affirming treatment" means a service or product that a health care provider prescribes to an individual to treat any condition related to the individual's gender identity and is prescribed in accordance with generally accepted standards of care.

The act is to be known and cited as the Gender Affirming Treatment Act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) We know that transgender Washingtonians are often some of the furthest from health equity and this bill reduces health disparities. This bill seeks to empower trans people by closing loopholes in current law to make sure that all medically necessary gender affirming care and treatment is covered. This bill will save lives and improve the quality of life for many trans individuals. Denying and not covering these services has other consequences. The rates of suicide for trans individuals who do not have access to medical services are much higher than other groups. However, when trans individuals are provided access to medically necessary care, their health outcomes are just the same as every other group in Washington.

Currently many trans people are denied care for things that insurance companies claim are not medically necessary or are cosmetic, even though the health care provider has determined that the services are medically necessary and there is national consensus that these services are medically necessary. Additionally, the provision of these lifesaving gender affirming services is the standard of care and provides cost savings to the health care system.

This bill provides essential protections for the trans community. This bill is fair. Insurance should only cover cancer treatments for those with cancer, and it is not unfair to limit cancer treatments to only those individuals that the treatment is medically necessary. Likewise, it is not unfair to only cover these gender affirming services for those for whom it is medically necessary. Washington has made it clear that the state does not believe in discrimination and that includes limiting these services for minors. This bill is essential to ending arbitrary and unfair denials.

(Opposed) It is unfair to give certain groups special treatment. This bill discriminates against people who are not undergoing gender affirmation. If these services are covered for one group, they should be covered for all. This bill will increase health insurance premiums for everyone. There are many cosmetic surgeries that others would like to have and so it is unfair that only one group gets these services covered. There should also be an exemption for religious beliefs for plans that are associated with a religion. Some also question whether the Committee has done any research on the cost of transition surgeries and how

much will health insurance premiums go up if this bill passes.

The Committee should consider an age limit for any gender conforming treatment. Courts in other countries have found puberty blockers are experimental and should not be given to children under 16 without a court order. There is no age-appropriate way to explain to these children what losing their fertility and full sexual function may mean to them later in life.

(Other) As the bill was introduced there were a number of concerns, but stakeholders and agencies have been working together and improvements have been made. This bill also includes a study of the number of providers that provide these services. The lack of providers may have just as much of an impact on access to care as coverage requirements, and so the plans appreciate that the study is included in the bill.

Persons Testifying: (In support) Senator Liias, prime sponsor; Mandy Weeks-Green, Office of the Insurance Commissioner; Kevin Wang, Swedish Family Medicine - First Hill; Alphonse Littlejohn, QLaw Foundation; Mattie Mooney, Trans Women of Color Solidarity Network; Ari Robbins; and Tobi Hill-Meyer, Gender Justice League.

(Opposed) Sarah Davenport-Smith, Family Policy Institute of Washington and Human Life of Washington; Val Mullen; Margaret Lee.

(Other) Chris Bandoli, Association of Washington Healthcare Plans.

Persons Signed In To Testify But Not Testifying: None.