

SENATE BILL REPORT

2SSB 5313

As Amended by House, 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 & Long Term Care: 2/03/21, 2/12/21 [DPS-WM, DNP, w/oRec].

Ways & Means: 2/19/21, 2/22/21 [DP2S, DNP, w/oRec].

Floor Activity: Passed Senate: 2/26/21, 30-17.

Passed House: 3/24/21, 57-41.

Brief Summary of Second Substitute Bill

- Establishes that health carriers and the Health Care Authority (HCA) may not deny coverage for medically necessary gender affirming treatment, or apply blanket exclusions to gender affirming treatment.
- Requires health carriers and the HCA to ensure access to medically necessary gender affirming treatment.

SENATE COMMITTEE ON HEALTH & LONG TERM CARE

Majority Report: That Substitute Senate Bill No. 5313 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Cleveland, Chair; Frockt, Vice Chair; Muzzall, Ranking Member; Conway, Holy, Keiser, Randall, Robinson and Van De Wege.

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: Do not pass.
Signed by Senator Padden.

Minority Report: That it be referred without recommendation.
Signed by Senators Rivers and Wilson, J.

Staff: Greg Attanasio (786-7410)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5313 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Lias, Mullet, Pedersen, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital; Braun, Gildon, Rivers, Wagoner and Warnick.

Minority Report: That it be referred without recommendation.
Signed by Senator Muzzall.

Staff: Sandy Stith (786-7710)

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, HHS issued final regulations implementing Section 1557, which significantly 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, DC 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 Second Substitute Bill: For health plans issued on or after January 1, 2022:

- a health carrier must 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 protected gender expression or identity, is medically necessary, and is prescribed in accordance with accepted standards of care;
- a health carrier must not to apply categorical cosmetic or blanket exclusions to gender affirming treatment;
- when prescribed medically necessary gender affirming treatment, a health carrier must not exclude as cosmetic services facial feminization surgeries and facial gender affirming treatment, such as tracheal shaves, hair electrolysis, and other care such as mastectomies, breast reductions, and breast implants, or any combination of gender affirming procedures, including revisions to prior treatment;
- health carriers must ensure health care providers who have experience delivering gender affirming treatment review and approve all adverse benefit determinations for gender affirming treatment; and
- a health carrier must comply with all network access rules.

The Health Care Authority (HCA) and managed care plans must not discriminate in the delivery of a service on the covered person's gender identity or expression or apply categorical cosmetic or blanket exclusions to gender affirming treatment. HCA and managed care plans must not exclude facial feminization surgeries and facial gender affirming treatment as cosmetic when prescribed as gender affirming treatment. HCA and managed care plans must ensure health care providers who have experience prescribing or delivering gender affirming treatment conduct utilization reviews for any claim for gender affirming treatment. If a managed care plan does not have an adequate network for gender affirming treatment, it 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.

Gender affirming treatment means a service or product 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 Insurance Commissioner, in consultation with the 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.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Health & Long Term Care): *The committee recommended a different version of the bill than what was heard.* PRO: Gender affirming care improves outcomes for the transgender community. Access to care reduces suicide and depression rates. Categorizing needed procedures as cosmetic forces people to seek care on the black market or outside the country. This bill can reduce care disparities within the transgender community. Loopholes remain in the law that allows carriers to deny needed coverage. Gender affirming care is lifesaving care and improves mental health. Clearly defining what gender affirming care means provides a clear path to relief.

OTHER: Carriers are unclear if the bill is an expansion required coverage but will work with the sponsor to address that concern.

Persons Testifying (Health & Long Term Care): PRO: Senator Marko Liias, Prime Sponsor; Kevin Wang, Swedish Family Medicine - First Hill; Ari Robbins; Lain Littlejohn; Tweetie Fatuesi, UTOPIA; Tepatasi Vaina, UTOPIA; Ander Lyon; Davia Loren, M.D.; Mattie Mooney, Ingersoll Gender Center, Trans Women of Color Solidarity Network; Dana Savage, QLaw; Andre Wilson, M.S.; Ara-Lei Yandall, UTOPIA; Venus Aoki, Gender Justice League; Emily Facci; Lannette Sargent; Mandy Weeks-Green, Office of the Insurance Commissioner; Yasmin Trudeau, Washington State Office of the Attorney General.

OTHER: Chris Bandoli, Association of Washington Healthcare Plans.

Persons Signed In To Testify But Not Testifying (Health & Long Term Care): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: Gender affirming care improves outcomes for the transgender community. Access to care reduces suicide and depression rates. This bill can reduce care disparities within the transgender

community. Gender affirming care is lifesaving care and improves mental health. This is good health policy that provides medically necessary care to a gender diverse population. Discrimination hurts vulnerable populations. This will help reduce costs by providing for basic health needs and by reducing health disparities. This does not create a new private cause of action. Enforcement of non-discrimination rules helps keep costs down.

OTHER: Carriers believe the changes made in the policy committee are good and still have some concerns with the language concerning same specialty review. Carriers will work with the sponsor to address that concern.

Persons Testifying (Ways & Means): PRO: Helen Weiss, Carolyn Downs/Country Doctor; Kevin Wang, M.D.; Mandy Weeks-Green, Office of the Insurance Commissioner; Larry Shannon, Washington State Association for Justice; Caprice Handlon.

OTHER: Chris Bandoli, Association of Washington Healthcare Plans.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.

EFFECT OF HOUSE AMENDMENT(S):

- Names the act the Gender Affirming Treatment Act.
- Removes the requirement that a health carrier, a plan offered to public employees, Medicaid managed care plans, and the health carrier ensure that prior to issuing an adverse benefit determination a health care provider with experience prescribing and delivering gender affirming treatment approve the determination and replaces it with a provision stating that these entities may not issue an adverse benefit determination denying or limiting access to gender affirming care, unless a health care provider with experience prescribing or delivering gender affirming care has reviewed and confirmed the appropriateness of the determination.
- Requires the HCA to adopt rules.
- Moves back the date for when the requirements regarding coverage of gender affirming treatment for Medicaid managed care organizations and the HCA go into effect to January 1, 2022.
- Moves back the date the Office of the Insurance Commissioner must submit a report on geographic access to gender affirming treatment to December 1, 2022.