

1 Hon. Richard A. Jones  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 E.S., by and through her parents, R.S. and J.S.,  
12 and JODI STERNOFF, both on their own  
behalf, and on behalf of all similarly situated  
individuals,

13 Plaintiffs,

14 v.

15 REGENCE BLUESHIELD; and CAMBIA  
16 HEALTH SOLUTIONS, INC., f/k/a THE  
REGENCE GROUP,

17 Defendants.

18 NO. 2:17-cv-1609-RAJ

19 NOTICE OF ADDITIONAL  
20 AUTHORITY RELEVANT TO  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' SECOND MOTION  
TO DISMISS

21 Noted for Consideration:  
22 January 29, 2021

23 Plaintiffs hereby provide notice of additional authority relevant to Plaintiffs'  
Opposition to Defendants' Second Motion to Dismiss, Dkt. No. 38, p. 20, n. 11:

24 On May 12, 2021, Governor Jay Inslee signed into law 2SSB 5313, legislation  
concerning health insurance discrimination. See  
<https://app.leg.wa.gov/billsummary?BillNumber=5313&Year=2021&Initiative=false>  
(last visited 5/17/21). The effective date of the law is July 25, 2021. *Id.* The new  
legislation includes violations of RCW 48.43.0128 as "unfair discrimination" subject to  
Washington's Law Against Discrimination. See 2SSB 5313, Sec. 1; RCW 49.60.178(1);

*Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 950, 946 P.2d 1242 (1997) (“WLAD is not limited to employment discrimination but rather guarantees the right to be free of discrimination in nonemployment settings”). RCW 48.43.0128 is directly enforceable as a private cause of action pursuant to the Washington Law Against Discrimination as of July 25, 2021.

RCW 48.43.0128 was previously enforceable under the Washington Law Against Discrimination since the Washington Legislature in 2020 concluded that a violation of RCW 48.43.0128 was “unfair discrimination” under RCW 48.30.300. *See* SHB 2338 (2020). RCW 48.30.300, in turn, is subject to Washington’s Law Against Discrimination. *See* RCW 49.60.178(1).

The most recent legislation (2SSB 5313) made more transparent the Legislature's intent that health insurance discrimination is subject to the Washington Law Against Discrimination.

A copy of 2SSB 5313 as passed by the Washington Legislature is attached for the Court's convenience.

DATED: May 17, 2021.

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NOTICE OF ADDITIONAL AUTHORITY - 2  
(Case No. 2:17-cv-1609-RAJ)

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# **APPENDIX A**

CERTIFICATION OF ENROLLMENT

**SECOND SUBSTITUTE SENATE BILL 5313**

67th Legislature  
2021 Regular Session

Passed by the Senate April 19, 2021  
Yea 30 Nays 19

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SECOND SUBSTITUTE SENATE BILL 5313** as passed by the Senate and the House of Representatives on the dates hereon set forth.

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**President of the Senate**

Passed by the House March 24, 2021  
Yea 57 Nays 41

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**Secretary**

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**Speaker of the House of Representatives**

Approved

FILED

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**Governor of the State of Washington**

**Secretary of State  
State of Washington**

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**SECOND SUBSTITUTE SENATE BILL 5313**

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AS AMENDED BY THE HOUSE

Passed Legislature - 2021 Regular Session

**State of Washington**

**67th Legislature**

**2021 Regular Session**

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

READ FIRST TIME 02/22/21.

1       AN ACT Relating to health insurance discrimination; amending RCW  
2 49.60.178, 41.05.017, and 48.43.0128; adding a new section to chapter  
3 74.09 RCW; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5       **Sec. 1.** RCW 49.60.178 and 2020 c 52 s 9 are each amended to read  
6 as follows:

7       (1) It is an unfair practice for any person whether acting for  
8 himself, herself, or another in connection with an insurance  
9 transaction or transaction with a health maintenance organization to  
10 cancel or fail or refuse to issue or renew insurance or a health  
11 maintenance agreement to any person because of sex, marital status,  
12 sexual orientation, race, creed, color, national origin, citizenship  
13 or immigration status, or the presence of any sensory, mental, or  
14 physical disability or the use of a trained dog guide or service  
15 animal by a person with disabilities: PROVIDED, That a practice which  
16 is not unlawful under RCW 48.30.300, 48.44.220, ((or)) 48.46.370, or  
17 48.43.0128 does not constitute an unfair practice for the purposes of  
18 this section. For the purposes of this section, "insurance  
19 transaction" is defined in RCW 48.01.060, health maintenance  
20 agreement is defined in RCW 48.46.020, and "health maintenance  
21 organization" is defined in RCW 48.46.020.

1       (2) The fact that such unfair practice may also be a violation of  
2 chapter 48.30, 48.43, 48.44, or 48.46 RCW does not constitute a  
3 defense to an action brought under this section.

4       (3) The insurance commissioner, under RCW 48.30.300 and  
5 48.43.0128, and the human rights commission, under chapter 49.60 RCW,  
6 shall have concurrent jurisdiction under this section and shall enter  
7 into a working agreement as to procedure to be followed in complaints  
8 under this section.

9       **Sec. 2.** RCW 41.05.017 and 2019 c 427 s 21 are each amended to  
10 read as follows:

11       Each health plan that provides medical insurance offered under  
12 this chapter, including plans created by insuring entities, plans not  
13 subject to the provisions of Title 48 RCW, and plans created under  
14 RCW 41.05.140, are subject to the provisions of RCW 48.43.500,  
15 70.02.045, 48.43.505 through 48.43.535, 48.43.537, 48.43.545,  
16 48.43.550, 70.02.110, 70.02.900, 48.43.190, 48.43.083, 48.43.0128,  
17 and chapter 48.49 RCW.

18       **Sec. 3.** RCW 48.43.0128 and 2020 c 228 s 9 are each amended to  
19 read as follows:

20       (1) A health carrier offering a nongrandfathered health plan or a  
21 plan deemed by the commissioner to have a short-term limited purpose  
22 or duration, or to be a student-only plan that is guaranteed  
23 renewable while the covered person is enrolled as a regular, full-  
24 time undergraduate student at an accredited higher education  
25 institution may not:

26           (a) In its benefit design or implementation of its benefit  
27 design, discriminate against individuals because of their age,  
28 expected length of life, present or predicted disability, degree of  
29 medical dependency, quality of life, or other health conditions; and

30           (b) With respect to the health plan or plan deemed by the  
31 commissioner to have a short-term limited purpose or duration, or to  
32 be a student-only plan that is guaranteed renewable while the covered  
33 person is enrolled as a regular, full-time undergraduate student at  
34 an accredited higher education institution, discriminate on the basis  
35 of race, color, national origin, disability, age, sex, gender  
36 identity, or sexual orientation.

1       (2) Nothing in this section may be construed to prevent ((an  
2       **issuer**) a carrier from appropriately utilizing reasonable medical  
3       management techniques.

4       (3) For health plans issued or renewed on or after January 1,  
5       2022:

6           (a) A health carrier may not deny or limit coverage for gender  
7       affirming treatment when that treatment is prescribed to an  
8       individual because of, related to, or consistent with a person's  
9       gender expression or identity, as defined in RCW 49.60.040, is  
10      medically necessary, and is prescribed in accordance with accepted  
11      standards of care.

12       (b) A health carrier may not apply categorical cosmetic or  
13      blanket exclusions to gender affirming treatment. When prescribed as  
14      medically necessary gender affirming treatment, a health carrier may  
15      not exclude as cosmetic services facial feminization surgeries and  
16      other facial gender affirming treatment, such as tracheal shaves,  
17      hair electrolysis, and other care such as mastectomies, breast  
18      reductions, breast implants, or any combination of gender affirming  
19      procedures, including revisions to prior treatment.

20       (c) A health carrier may not issue an adverse benefit  
21      determination denying or limiting access to gender affirming  
22      services, unless a health care provider with experience prescribing  
23      or delivering gender affirming treatment has reviewed and confirmed  
24      the appropriateness of the adverse benefit determination.

25       (d) Health carriers must comply with all network access rules and  
26      requirements established by the commissioner.

27       (4) For the purposes of this section, "gender affirming  
28      treatment" means a service or product that a health care provider, as  
29      defined in RCW 70.02.010, prescribes to an individual to treat any  
30      condition related to the individual's gender identity and is  
31      prescribed in accordance with generally accepted standards of care.  
32      Gender affirming treatment must be covered in a manner compliant with  
33      the federal mental health parity and addiction equity act of 2008 and  
34      the federal affordable care act. Gender affirming treatment can be  
35      prescribed to two spirit, transgender, nonbinary, intersex, and other  
36      gender diverse individuals.

37       (5) Nothing in this section may be construed to mandate coverage  
38      of a service that is not medically necessary.

39       (6) By December 1, 2022, the commissioner, in consultation with  
40      the health care authority and the department of health, must issue a

1 report on geographic access to gender affirming treatment across the  
2 state. The report must include the number of gender affirming  
3 providers offering care in each county, the carriers and medicaid  
4 managed care organizations those providers have active contracts  
5 with, and the types of services provided by each provider in each  
6 region. The commissioner must update the report biannually and post  
7 the report on its website.

8 (7) The commissioner shall adopt any rules necessary to implement  
9 subsections (3), (4), and (5) of this section.

10 (8) Unless preempted by federal law, the commissioner shall adopt  
11 any rules necessary to implement subsections (1) and (2) of this  
12 section, consistent with federal rules and guidance in effect on  
13 January 1, 2017, implementing the patient protection and affordable  
14 care act.

15 **NEW SECTION.** **Sec. 4.** A new section is added to chapter 74.09  
16 RCW to read as follows:

17 (1) In the provision of gender affirming care services through  
18 programs under this chapter, the authority, managed care plans, and  
19 providers that administer or deliver such services may not  
20 discriminate in the delivery of a service provided through a program  
21 of the authority based on the covered person's gender identity or  
22 expression.

23 (2) Beginning January 1, 2022:

24 (a) The authority and any managed care plans delivering or  
25 administering services purchased or contracted for by the authority  
26 may not apply categorical cosmetic or blanket exclusions to gender  
27 affirming treatment.

28 (b) Facial feminization surgeries and facial gender affirming  
29 treatment, such as tracheal shaves, hair electrolysis, and other care  
30 such as mastectomies, breast reductions, breast implants, or any  
31 combination of gender affirming procedures, including revisions to  
32 prior treatment, when prescribed as gender affirming treatment, may  
33 not be excluded as cosmetic.

34 (c) The authority and managed care plans administering services  
35 purchased or contracted for by the authority may not issue an adverse  
36 benefit determination denying or limiting access to gender affirming  
37 treatment, unless a health care provider with experience prescribing  
38 or delivering gender affirming treatment has reviewed and confirmed  
39 the appropriateness of the adverse benefit determination.

1       (d) If the authority and managed care plans administering  
2 services purchased or contracted for by the authority do not have an  
3 adequate network for gender affirming treatment, they shall ensure  
4 the delivery of timely and geographically accessible medically  
5 necessary gender affirming treatment at no greater expense than if  
6 they had an in-network, geographically accessible provider available.  
7 This includes, but is not limited to, providing case management  
8 services to secure out-of-network gender affirming treatment options  
9 that are available to the enrollee in a timely manner within their  
10 geographic region. The enrollee shall pay no more than the same cost  
11 sharing that the enrollee would pay for the same covered services  
12 received from an in-network provider.

13     (3) For the purposes of this section, "gender affirming  
14 treatment" means a service or product that a health care provider, as  
15 defined in RCW 70.02.010, prescribes to an individual to support and  
16 affirm the individual's gender identity. Gender affirming treatment  
17 includes, but is not limited to, treatment for gender dysphoria.  
18 Gender affirming treatment can be prescribed to two spirit,  
19 transgender, nonbinary, and other gender diverse individuals.

20     (4) Nothing in this section may be construed to mandate coverage  
21 of a service that is not medically necessary.

22     (5) The authority shall adopt rules necessary to implement this  
23 section.

24                  NEW SECTION.   **Sec. 5.**   This act shall be known and cited as the  
25 Gender Affirming Treatment Act.

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---- END ----