

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT; ELIZABETH
MOHONDRO; and O.L. by and through her
parents, J.L. and K.L., each on their own behalf,
and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN OF
WASHINGTON; KAISER FOUNDATION
HEALTH PLAN OF WASHINGTON OPTIONS,
INC.; KAISER FOUNDATION HEALTH PLAN
OF THE NORTHWEST; and KAISER
FOUNDATION HEALTH PLAN, INC.,

Defendants.

NO. 2:17-cv-1611-RSL

NOTICE OF ADDITIONAL
AUTHORITY RELEVANT TO
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS THE FOURTH
AMENDED COMPLAINT

Noted for Consideration:
April 16, 2021

Plaintiffs hereby provide a notice of additional authority relevant to Plaintiffs' Opposition to Defendants' Motion to Dismiss, Dkt. No. 75, pp. 21-22:

On May 12, 2021, Governor Jay Inslee signed into law 2SSB 5313, legislation concerning health insurance discrimination. See

<https://app.leg.wa.gov/billssummary?BillNumber=5313&Year=2021&Initiative=false>

1 (last visited 5/17/21). The effective date of the law is July 25, 2021. *Id.* The new
2 legislation includes violations of RCW 48.43.0128 as “unfair discrimination” subject to
3 Washington’s Law Against Discrimination. *See* 2SSB 5313, Sec. 1; RCW 49.60.178(1).

4 DATED: May 17, 2021.

5 SIRIANNI YOUTZ
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7 /s/ Eleanor Hamburger

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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
Yeas 30 Nays 19

President of the Senate

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

**Speaker of the House of
Representatives**

Approved

Governor of the State of Washington

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.

Secretary

FILED

**Secretary of State
State of Washington**

SECOND SUBSTITUTE SENATE BILL 5313

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 Liias, 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Beginning January 1, 2022:

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

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

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