

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

September 7, 2018

Director
Office of Regulation Policy and Management
Department of Veterans Affairs
810 Vermont Avenue NW
Room 1063B
Washington, DC 20420

Submitted electronically to: <http://www.regulations.gov>

Re: Notice of Petition for Rulemaking and request for comments — Exclusion of Gender Alterations from the Medical Benefits Package

Justice in Aging appreciates the opportunity to respond to the above referenced Request for Comment.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources. We have decades of experience with Medicare, Medicaid and other health benefits with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

We write to support the petition requesting that the excluded surgeries (hereinafter “the surgeries”), identified in the Request for Comments as “gender alterations,” become part of the VA medical benefits. As advocates for low income older adults, many of whom are veterans who rely on VA services, we urge VA coverage of the surgeries when medically necessary for the individual.

Our experience of coverage of the surgeries comes primarily from our work with the Medicare program. As the VA is aware, the Medicare program began coverage of the surgeries in 2014. Prior to 2014, the Medicare program had excluded the surgeries from Medicare coverage based on a 1981 National Coverage Determination (NCD) which had concluded that the surgeries were experimental. In 2014 the Departmental Appeals Board (DAB) of the Health and Human Services Department (HHS), after an exhaustive review by a medical panel of a voluminous record, overturned the NCD and determined that the surgeries would no longer be excluded and would be considered a covered Medicare benefit when medically necessary.¹

In its decision, the DAB made a number of findings: that there is acceptance of criteria for diagnosing gender dysphoria; that the surgeries are safe; that the surgeries are an effective treatment option in appropriate cases; and that previous rationale for considering the surgeries experimental is not valid.²

¹ HHS Departmental Appeals Board, Dec. No. 2576 (May 30, 2014), *available at* www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf

² *Id.* at pp. 9-24.

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Since the decision, Medicare has covered the surgeries on a case-by-case basis, having determined in 2016 that it would be inappropriate to set down national standards for medical necessity.³

We ask the VA to follow the lead of the Medicare program and address the needs of beneficiaries with gender dysphoria as it would any other medical condition. All eligible veterans deserve medically necessary care, and it is wrong and discriminatory to single out any group of veterans to deny medical care.

The need for a government health programs to be even-handed and based on sound medical practice is particularly strong for VA health benefits. VA coverage is meant to be comprehensive, in contrast to the Medicare program, which is a defined benefit program covering limited services.⁴ If Medicare, even with its limited benefits, covers the surgeries when medically necessary, the VA should certainly do so as well.

Finally, the Request for Comments asks about the impact of coverage on the availability of specialized surgeons. To the extent that there is any impact from this relatively small specialty,⁵ we believe that it is likely to be positive. It is our experience that when Medicare covers procedures, provider availability and beneficiary access for the entire population, not just Medicare beneficiaries, improve rather than diminish. Stable access to insurance coverage for particular procedures encourages a greater commitment by the provider community offering those procedures. Further, when government programs, like Medicare, offer coverage, private insurers often follow suit. We expect that the same pattern will play out with these surgeries in the VA context.

³ Pp. 51-52 (“We have clarified in this final decision memorandum that coverage is available for gender reassignment surgery when determined reasonable and necessary and not otherwise excluded by any other relevant statutory requirements by the MAC on a case-by-case basis. ‘The case-by-case model affords more flexibility to consider a particular individual’s medical condition than is possible when the agency establishes a generally applicable rule.’” Available at [www.cms.gov/medicare-coverage-database/shared/handlers/highwire.ashx?url=https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx@@@NCAId\\$\\$\\$282***CoverageSelection\\$\\$\\$Both***ArticleType\\$\\$\\$All***PolicyType\\$\\$\\$Final***s\\$\\$\\$All***Keyword\\$\\$\\$gender***KeywordLookUp\\$\\$\\$Title***KeywordSearchType\\$\\$\\$And***bc\\$\\$\\$gAAAACAACAAA%A%3d%3d***&session=db5fmcogfhdfldptat2drmf&kq=21775459](https://www.cms.gov/medicare-coverage-database/shared/handlers/highwire.ashx?url=https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx@@@NCAId$$$282***CoverageSelection$$$Both***ArticleType$$$All***PolicyType$$$Final***s$$$All***Keyword$$$gender***KeywordLookUp$$$Title***KeywordSearchType$$$And***bc$$$gAAAACAACAAA%A%3d%3d***&session=db5fmcogfhdfldptat2drmf&kq=21775459)

⁴ Besides gender alteration, the only health benefits not covered by the VA medical benefits package are: abortions and abortion counseling; cosmetic surgery; health club or spa membership; in-vitro fertilization; drugs, biologics and medical devices not approved by FDA; and services for inmates. See www.va.gov/healthbenefits/access/exclusions.asp.

⁵ A recent study found 4,118 gender affirming surgeries in the period from 2000 to 2014. J Canner, O Harfouch, L Kodadek, et al, Temporal Trends in Gender-Affirming Surgery Among Transgender Patients in the United States, JAMA Surg. 2018; 153(7):609-616 (July 2018), available at <https://jamanetwork.com/journals/jamasurgery/article-abstract/2673384>. Though numbers are rising, they are doing so from a very small base.

Thank you for considering our comments. If any questions arise concerning this submission, please contact me at jgoldberg@justiceinaging.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Goldberg". The signature is fluid and cursive, with the first name "Jennifer" and last name "Goldberg" clearly distinguishable.

Jennifer Goldberg
Directing Attorney