September 10, 2012

Jim Reisberg, Commissioner of Insurance, Colorado Division of Insurance
Colorado Health Benefits Exchange Board Members

We are pleased to have the opportunity to comment on the recommended Kaiser Ded/CO HMO1200D benchmark plan selection for Colorado's essential health benefits (EHB) package.

We are pleased that the proposed benchmark selection includes coverage for all statutorily mandated benefits established by the Colorado legislative process. This ensures that the EHB standard for our state will reflect the unique health priorities established by representative process, and will not impose additional costs to the state for the next two years while ensuring compliance with our benefits mandate laws.

Additionally, we would like to draw attention to the need to ensure that Colorado's benchmark selection complies with the nondiscrimination requirements of state and federal law. We urge the adoption of standards for EHB-based plans that prevent arbitrary discrimination and ensure parity in coverage for medically necessary essential benefits across the ten statutory categories of EHB coverage. In particular, we encourage the state to ensure Colorado's EHB benchmark, and plans based on the EHB standard, do not discriminate against transgender Coloradans by incorporating arbitrary coverage exclusions specifically targeting them for denial of coverage afforded to non-transgender people.

The proposed selection of the Kaiser Ded/CO HMO1200D plan will, without action on the part of the state, impose a harmful standard that discriminates against transgender Coloradans by incorporating an arbitrary exclusion prohibiting coverage for "all services related to sexual reassignment."[i] The adoption of this type of exclusion in Colorado's EHB standard is incompatible with the Affordable Care Act's goal of promoting equity in coverage and eliminating health disparities, as well as with Colorado laws prohibiting unfair discrimination against transgender people.

Both the Affordable Care Act and Colorado law require equal treatment for transgender people in the design of essential health benefits

To promote equitable access to comprehensive, affordable coverage, the Affordable Care establishes nondiscrimination requirements regarding the designation of essential health benefits and coverage under insurance plans based on the EHB standard.[ii] Key first steps in effectuating these protections and avoiding potential liability for discrimination include removing transgender-specific exclusions from Colorado's EHB standard, including the exclusion for "all services related to sexual reassignment" contained in the proposed benchmark selection. Additionally, the use of arbitrary condition-based exclusions, including those targeting transgender people on the basis of gender dysphoria or related diagnoses (e.g. Gender Identity Disorder), should be prohibited in the EHB standard and in all EHB-based plans sold in Colorado.

Exclusions of the kind contained in the Kaiser Ded/CO HMO 1200D plan unfairly discriminate against transgender Coloradans by preventing access to medically necessary essential benefits.

The Kaiser Ded/CO HMO1200D plan contains an exclusion for "all services related to sexual reassignment."[iii] Exclusions of this kind are frequently utilized to deny transgender plan enrollees coverage for basic services they need and that clearly fall within the EHB categories outlined in Section 1302 of the Affordable Care Act (ACA), such as prescription drugs, mental health services, and preventive and wellness services. For example, a transgender woman in New Jersey was denied coverage for a mammogram on the basis that it fell under her plan's sweeping exclusion for all treatments "related to changing sex." After a two-year appeal process and intervention from the Transgender Legal Defense & Education Fund, the carrier reversed its position and agreed that the exclusion had unfairly prevented her from receiving medically necessary care.[iv]

Such exclusions have no basis in medical science and frequently have substantial negative health outcomes for transgender people. Moreover, the medical necessity of transition-related care for transgender people is no longer open to debate. The American Medical Association, the American Psychological Association, the American Psychiatric Association, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health all clearly state that transition-related services such as mental health services, hormone therapy, and appropriate reconstructive surgeries are medically necessary for many transgender people.[v] According to these expert bodies, determination of the medical necessity of any particular service for an individual patient properly rests with medical providers.

These exclusions unfairly hinder access both to medically necessary care related to gender transition and to basic medical care that is erroneously assumed to be related to being transgender. Many medical interventions needed by transgender people during transition and at other points in their lives are also part of the course of care for other medical conditions and are routinely covered by health insurance plans. For instance, hormone therapy may be utilized for patients with hypogonadism and other endocrine disorders, as well as menopausal symptoms. Preventive services such as pelvic or prostate exams are an important part of overall health and well-being for all individuals, while various surgeries and reconstructive procedures are commonly covered for treating injuries, intersex conditions, or for cancer treatment or prevention. The practice of denying medically necessary care to transgender people, particularly when such services are covered for non-transgender people, is unfairly discriminatory and not a practice that should be incorporated in Colorado's EHB standard.

Because all Coloradans should have equal access to the essential health benefits they need to be healthy, the Division of Insurance and Colorado Health Benefits Exchange must affirm that the EHB standard incorporates the fundamental principle of nondiscriminatory access to essential benefits for every eligible individual, including transgender people. This may be done both by removing the discriminatory exclusions in the proposed Kaiser benchmark plan from Colorado's EHB standard, by enforcing nondiscrimination protections for consumers enrolled in plans based on the EHB standard, and by prohibiting the use of arbitrary condition-based exclusions, including those targeting transgender people, from insurance plans required to cover essential health benefits.

Ensuring nondiscrimination in Colorado's essential health benefits package does not mandate coverage for a particular set of services, or create an additional class of benefits to be covered by EHB-based plans.

Prohibiting the use of arbitrary benefits exclusions in EHB-based plans does not mandate coverage for procedures related to gender transition or create a new class of essential benefits in addition to those

already covered by the selected benchmark plan. It instead requires that insurers do not *arbitrarily* discriminate in coverage determinations on the basis of factors such as gender identity, diagnosis, type of illness, or condition for which such benefit is sought. This prohibition reflects the fact that fair and appropriate coverage determinations and benefits designs must necessarily arise from medically and actuarially sound principles, rather than discriminatory bias and outdated standards. Adhering to these basic principles of nondiscrimination, codified both in Colorado law and the Affordable Care Act, supports a decision to design the EHB standard in a manner that does not utilize exclusions based on arbitrary discrimination, and to ensure that Colorado's final EHB standard does not include such exclusions.

Summary of recommendations

To fulfill the coverage and equity aims of the Affordable Care Act, to ensure compliance with federal and state nondiscrimination laws, and to provide all Coloradans with a minimum standard of comprehensive, affordable coverage, the DOI and COHBE should adopt the following standards for Colorado's essential health benefits standard:

1. Apply and enforce federal and state nondiscrimination protections in any plan required to cover the essential benefits, including those in the individual and small group markets outside the Exchange. The rule that we propose could be drafted along these lines:

   Prohibition on discriminatory benefit design

   A health plan required to cover the essential benefits may not, with respect to any service included in any essential benefit category, employ coverage exclusions that arbitrarily exclude otherwise covered services to any individual solely on the basis of diagnosis, medical condition, or membership in a group listed as a protected class for purposes of the essential benefits, including race, color, national origin, disability, age, sex, sexual orientation, or gender identity. This shall not be construed to prohibit exclusion of coverage for services that are not medically necessary, that are experimental, or that are comparatively more expensive than other treatments.

2. Eliminate exclusions that lack a sound clinical and actuarial basis, including exclusions targeting the transgender population, from the state's selected EHB benchmark plan; and

3. Prohibit any such arbitrary condition-based exclusions, including those that unfairly discriminate against transgender people, in plans based on the EHB standard. The rule that we propose could be drafted along these lines:

   Limitation on condition-based exclusions.

   A health plan required to cover the essential health benefits may not arbitrarily deny or reduce the amount, duration, or scope of an essential health benefit solely because of the diagnosis, type of illness, or condition for which such benefit is sought. This section shall not be construed to prohibit a limitation or exclusion of coverage based on criteria of medical necessity, appropriateness, or comparative cost effectiveness.

We thank the Division of Insurance and the Colorado Health Benefits Exchange for the opportunity to comment on the proposed EHB benchmark selection. If you have questions regarding these comments or other opportunities for ensuring health equity for LGBT Coloradans, please do not hesitate to contact Brad Clark of One Colorado or Ashley Wheeland of the Colorado Consumer Health Initiative.

Thank you for your work to help all Coloradans gain access to insurance coverage that will allow them to get the health care they need, when they need it.

Sincerely,

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[i] *See* http://www.dora.state.co.us/insurance/consumer/fhcr/EHBOptAKaiserSmGrp062912.pdf

[ii] These nondiscrimination protections include ACA Section 1557, which prohibits discrimination on the basis of sex, among other protected classes. The HHS Office for Civil Rights has explicitly stated that the sex-based antidiscrimination protections of §1557 extend to claims of discrimination based on gender identity (*See* Letter from Leon Rodriguez, Director of the Office for Civil Rights, U.S. Department of Health and Human Services. July 12, 2012. Available at: http://hrc.org/files/assets/resources/HHSResponse8612.pdf).

[iii] *See* http://www.dora.state.co.us/insurance/consumer/fhcr/EHBOptAKaiserSmGrp062912.pdf

[iv] Transgender Legal Defense & Education Fund. April 30, 2012. "Victory! Transgender Woman Wins Health Insurance Coverage for Mammogram," available at: http://transgenderlegal.org/headline_show.php?id=382

[v] American Medical Association, H-185.950, Res. 122; A-08, Removing Financial. Barriers to Care for Transgender Patients, available at http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory- committee/ama-policy-regarding-sexual-orientation.page; American Psychological Association, Policy Statement on Transgender, Gender Identity and Gender Expression Non- Discrimination, (2008). http://www.apa.org/about/governance/council/policy/transgender.aspx; American Academy of Family Physicians, Summary of Actions: 2007 National Conference of Special Constituencies, Resolution No. 64 (2007). Available at http://www.aafp.org/online/etc/medialib/aafp_org/documents/membership/special/2007resolutions.Par.0001.File.tmp/2007N CSCSumm/Actions-new-seal.pdf; American College of Obstetricians and Gynecologists, Committee Opinion No. 512: Health Care for Transgender Individuals, OBSTETRICS & GYNECOLOGY 118(6): 1454 (2011).