

Transgender Related Care and Services

Effective date: 4/27/16

Pursuant to authority vested in the Commissioner of Health by Sections 201 and 206 of the Public Health Law and Sections 363-a and 365-a(2) of the Social Services Law, Section 505.2 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows, to be effective upon publication of a Notice of Adoption in New York State Register.

Subdivision (l) of section 505.2 is amended to read as follows:

(l) Gender dysphoria treatment.

(1) As provided in this subdivision, payment is available for medically necessary hormone therapy and/or gender reassignment surgery for the treatment of gender dysphoria.

(2) Hormone therapy, whether or not in preparation for gender reassignment surgery, may be covered for individuals 18 years of age or older.

(3) Gender reassignment surgery may be covered for an individual who is 18 years of age or older [, or 21 years of age or older if the surgery will result in sterilization,] and has letters from two qualified New York State licensed health professionals who have independently assessed the individual and are referring the individual for the surgery. One of these letters must be from a psychiatrist, [or] psychologist, or psychiatric nurse practitioner with whom the individual has an established and ongoing relationship. The other letter may be from a licensed psychiatrist, psychologist, physician, psychiatric nurse practitioner, or licensed clinical social

worker acting within the scope of his or her practice, who has only had an evaluative role with the individual. Together, the letters must establish that the individual:

- (i) has a persistent and well-documented case of gender dysphoria;
- (ii) has received hormone therapy appropriate to the individual's gender goals, which shall be for a minimum of 12 months in the case of an individual seeking genital surgery, unless such therapy is medically contraindicated or the individual is otherwise unable to take hormones;
- (iii) has lived for 12 months in a gender role congruent with the individual's gender identity, and has received mental health counseling, as deemed medically necessary, during that time;
- (iv) has no other significant medical or mental health conditions that would be a contraindication to gender reassignment surgery, or if so, that those are reasonably well-controlled prior to the gender reassignment surgery; and
- (v) has the capacity to make a fully informed decision and to consent to the treatment.

(4) Payment will not be made for the following services and procedures:

- (i) cryopreservation, storage, and thawing of reproductive tissue, and all related services and charges;
- (ii) reversal of genital and/or breast surgery;
- (iii) reversal of surgery to revise secondary sex characteristics;
- (iv) reversal of any procedure resulting in sterilization; and
- (v) cosmetic surgery, services, and procedures, including but not limited to:
 - (a) abdominoplasty, blepharoplasty, neck tightening, or removal of redundant skin;
 - (b) breast augmentation;
 - (c) breast, brow, face, or forehead lifts;

- (d) calf, cheek, chin, nose, or pectoral implants;
- (e) collagen injections;
- (f) drugs to promote hair growth or loss;
- (g) electrolysis, unless required for vaginoplasty;
- (h) facial bone reconstruction, reduction, or sculpturing, including jaw shortening and rhinoplasty;
- (i) hair transplantation;
- (j) lip reduction;
- (k) liposuction;
- (l) thyroid chondroplasty; and
- (m) voice therapy, voice lessons, or voice modification surgery.

(5) For purposes of this subdivision, cosmetic surgery, services, and procedures refers to anything solely directed at improving an individual's appearance.

(6) All legal and program requirements related to providing and claiming reimbursement for sterilization procedures must be followed when transgender care involves sterilization.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single State agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, which shall be consistent with law, and as may be necessary to implement the State's Medicaid program. SSL section 365-a authorizes Medicaid coverage for specified medical care, services and supplies, together with such medical care, services and supplies as authorized in the regulations of the Department.

Legislative Objective:

Section 365-a of the SSL requires Medicaid to pay for part or all of the cost of medical, dental, and remedial care, services, and supplies that are necessary to prevent, diagnose, correct or cure conditions that cause acute suffering, endanger life, result in illness or infirmity, interfere with a person's capacity for normal activity, or threaten some significant handicap.

Needs and Benefits:

The proposed amendments would revise the Department's existing regulations providing for Medicaid coverage of treatments to address gender dysphoria. The current regulation sets forth a minimum age of 21 for coverage of gender reassignment surgery (GRS) if such surgery will result in sterilization. The proposed amendments would establish a minimum age of 18 for coverage of GRS, even in instances where sterilization would result. In addition, the proposed amendments would: add psychiatric nurse practitioners to the list of medical professionals who

can provide letters establishing the appropriateness of GRS for a particular individual; and correct a numbering error in the existing regulation.

The minimum age of 21 for GRS that results in sterilization was based on federal Medicaid regulations prohibiting coverage of sterilization for individuals under 21 years of age. However, the Department concluded that federal regulations were unclear with respect to whether Medicaid may cover a procedure performed on an individual under age 21 that results in sterilization, but was performed for a reason other than to render the individual incapable of reproducing. The Department sought and obtained clarification from the Centers for Medicare & Medicaid Services that medically necessary procedures that result in sterilization can be covered for individuals under 21 if the procedure is not being performed solely for the purpose of rendering the individual incapable of reproducing. Accordingly, the proposed amendments would revise § 505.2(l)(3) to set a minimum age of 18 for medically necessary GRS regardless of whether sterilization will result.

A comment received on the existing regulation after the Notice of Adoption was submitted for publication urged the Department to add psychiatric nurse practitioners to the list of medical professionals in § 505.2(l)(3) who can provide letters establishing the appropriateness of GRS in individual cases. The Department has concluded that psychiatric nurse practitioners are qualified to diagnose gender dysphoria and to refer individuals for GRS; therefore the proposed regulations would add psychiatric nurse practitioners to § 505.2(l)(3).

Finally, the proposed amendments would designate the opening language of the existing regulation as paragraph (1), to correct a numbering error in the original promulgation of the regulation.

Costs:

Costs to Regulated Parties:

The proposed amendment pertains to a covered benefit under the State's Medicaid program. The amendment would not increase costs to regulated parties.

Costs to State Government:

The addition of psychiatric nurse practitioners to the list of medical professionals who can provide referral letters for GRS will not generate additional costs to the Medicaid program.

The Department believes any costs associated with covering GRS that results in sterilization, for persons age 18 or older and under age 21, were taken into account in the cost estimate prepared by the Department when promulgating the existing regulation. At the time the existing regulation was proposed, the Department looked at the number of current Medicaid recipients who were age 18 or older with a diagnosis of gender dysphoria, and made certain assumptions about the number of those recipients who would seek coverage of transition-related care, and the approximate costs of such care. The result was a rough estimate of the cost of eliminating the prohibition on coverage of transition-related care for gender dysphoria, and did not distinguish between persons who might seek such coverage from ages 18 to 20, versus persons seeking such coverage on or after age 21.

Costs to Local Governments:

Local social services districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of the proposed amendment.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

This amendment will not impose any program, service, duty, additional cost, or responsibility on any county, city, town, village, school district, fire district, or other special district.

Paperwork:

The proposed amendments would not increase the paperwork requirements for a medical provider to document the need for hormone therapy or GRS. It would merely add psychiatric nurse practitioners to the categories of medical professionals who can document the need for GRS.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

With respect to lowering the minimum age for covering GRS from 21 to 18 in cases where sterilization will result, no alternatives were considered. In the rulemaking for the existing regulation, the Department would have made Medicaid coverage of medically necessary GRS available for all individuals at or above the age of majority, but for the perceived conflict with federal Medicaid regulations governing sterilization. Because CMS has clarified that these federal regulations do not prohibit Medicaid coverage of medically necessary procedures for individuals under 21 that result in sterilization but are not performed solely for the purpose of rendering the individual incapable of reproducing, the regulation can now be revised to reflect the Department's original intent.

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

Regulated parties should be able to comply with the proposed regulations when they become effective.

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STATEMENT IN LIEU OF REGULATORY FLEXIBILITY ANALYSIS

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment pertains to a covered benefit under the State's Medicaid program. It would not impose an adverse economic impact on small businesses or local governments, and it would not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

STATEMENT IN LIEU OF RURAL AREA FLEXIBILITY ANALYSIS

A Rural Area Flexibility Analysis for the proposed amendments is not being submitted because the amendments would not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There would be no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

A Job Impact Statement for the proposed amendments is not being submitted because it is apparent from the nature and purpose of the amendment that it would not have a substantial adverse impact on jobs and/or employment opportunities.

ASSESSMENT OF PUBLIC COMMENT

Separate letters with comments were received from nine individuals, one advocacy organization, and one professional association. In addition, two legal aid organizations and a law firm provided joint comments.

The proposed regulations would establish a minimum age of 18 for Medicaid coverage of gender reassignment surgery (GRS), even in instances where sterilization will result, and would add psychiatric nurse practitioners to the list of medical professionals who can provide referral letters establishing the appropriateness of GRS for a particular individual. All commenters approved of these proposed changes.

However, all of the commenters urged that the list of individuals who can provide referral letters for GRS be further expanded. Suggestions included general nurse practitioners, licensed clinical social workers, licensed masters of social work under clinical supervision, mental health counselors, and individuals with a master's degree or its equivalent in a clinical behavioral science field. Some commenters suggested that under the current regulation, Medicaid recipients in some areas of the State would have difficulty finding qualified clinicians nearby to provide the required letters, and would have to travel to places where there are more qualified clinicians. In response, the Department notes Medicaid payment is available for transportation to and from the offices of qualified clinicians in order to obtain medically necessary services, and is available for certain medically necessary telemedicine consultations. In addition, the regulation is intended to strike a balance between enabling access to services and ensuring that Medicaid coverage of GRS is based on determinations of medical necessity made by individuals qualified to make such determinations. The Department will take the commenters' suggestions under advisement, but continues to believe the current requirement is reasonable and is not a barrier to transgender

individuals accessing necessary care. No changes were made to the proposed regulation as a result of these comments.

All of the commenters offered comments on provisions of 18 NYCRR 505.2(*l*) not affected by the proposed regulatory amendment. For example, commenters objected to existing provisions restricting coverage of transgender care and services to individuals 18 years of age or older, and prohibiting coverage for services provided for the sole purpose of improving an individual's appearance. Because these comments do not pertain to the amendments proposed in the current rulemaking, the Department will not address them, and no changes were made to the proposed regulation in response to these comments. The Department notes, however, that these objections were raised when it adopted the new section 505.2(*l*) in 2015, and were addressed in the Assessment of Public Comment accompanying that adoption.