Omar Gonzalez-Pagan, Counsel and Health Care Strategist
Email: ogonzalez-pagan@lambdalegal.org

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Via Email and Electronic Submission

Simone Marstiller, Secretary
Josefina M. Tamayo, General Counsel
Florida Agency for Health Care Administration
2727 Mahan Drive
Tallahassee, FL 32308
MedicaidRuleComments@ahca.myflorida.com
simone.marstiller@ahca.myflorida.com
josefina.tamayo@ahca.myflorida.com

Re: Comment to Proposed Changes to Rule No. 59G-1.050: General Medicaid Policy (Notice No. 25979915), Prohibiting Coverage of Treatment for Gender Dysphoria

Dear Secretary Marstiller and General Counsel Tamayo,

We write to express our opposition to the proposed changes to Fla. Admin. Code R. 59G-1.050(7) by the Agency for Health Care Administration (AHCA), Notice No. 25979915, which seek to prohibit coverage of medically necessary gender-affirming medical care for Florida's Medicaid participants (hereinafter the "Proposed Rule").

Founded in 1973, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal's works across the nation concerning issues of anti-LGBTQ and HIV discrimination in all areas of law including health care, identity documents, employment discrimination, students' rights, family law, and marriage equality. This includes work in Florida and the rest of the South through our Southern Regional Office in Atlanta.

We write to express our deep concerns and opposition to the Proposed Rule prohibiting Medicaid coverage for the treatment of gender dysphoria. These changes harmfully and unlawfully target some of Florida's most vulnerable people by

categorically prohibiting coverage of clinically effective, evidence-based, and medically necessary health care. This medical care is not only essential, it also is often lifesaving. If adopted, the Proposed Rule would cause serious, immediate, and irreparable harm to transgender Medicaid participants in Florida, who already experience well-documented stigma and discrimination, as well as significant challenges when seeking access to competent gender-affirming health care services.

Gender-Affirming Medical Care Is Effective, Evidence-Based, and Medically Necessary.

Gender identity is a person's internal sense of one's sex, such as male or female. Although most people are cisgender, meaning their gender identity matches their birth-assigned sex, transgender people have a gender identity that differs from their birth-assigned sex. Left untreated, the dissonance between one's gender identity and birth-assigned sex can be associated with clinically significant distress or significant impairment of functioning. The medical diagnosis for that incongruence and the attendant distress or impairment is gender dysphoria. Being transgender is a normal variation of human development and "gender identity and gender incongruity … are not a matter of choice."[1]

The diagnosis of gender dysphoria is codified in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition ("DSM-5").[2] In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. Similarly, "gender incongruence" also is codified as a diagnosis in the International Classification of Diseases, 11th Version, published by the World Health Organization.[3] "Gender Incongruence of Adolescence and Adulthood is characterised by a marked and persistent incongruence between an individual´s experienced gender and the assigned sex, which often leads to a desire to 'transition', in order to live and be accepted as a person of the experienced gender, through hormonal treatment, surgery or other health care services to make the

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[1] *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Kadel v. N.C. State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422, 427 (4th Cir. 2021) (same).

[2] American Psychiatric Association. (2013). Diagnostic and Statistical Manual of Mental Disorders (5th ed.). Arlington, VA: American Psychiatric Publishing.

[3] World Health Organization. (2018). "Gender Incongruence." In International Classification of Diseases, 11th Revision.

individual´s body align, as much as desired and to the extent possible, with the experienced gender."[4] Gender dysphoria is a serious medical condition that, if left untreated, can result in debilitating anxiety, severe depression, self-harm, and suicidality.[5]

The World Professional Association for Transgender Health ("WPATH") and the Endocrine Society have published widely accepted guidelines for treating gender dysphoria.[6] The purpose of medical treatment for gender dysphoria is to eliminate the clinically significant distress by helping a transgender person live in alignment with their gender identity. This treatment is often referred to as "gender-affirming care."

As a Consensus Study Report by the National Academies of Science, Engineering, and Medicine states,

> Clinicians who provide gender-affirming psychosocial and medical services in the United States are informed by expert evidence-based guidelines. In 2012, the World Professional Association for Transgender Health (WPATH) published version 7 of the *Standards of Care for the Health of Transgender, Transsexual, and Gender-Nonconforming People*, which have been continuously maintained since 1979, and revisions for version 8 are currently under way (Coleman et al., 2012). Two newer guidelines have also been published by the Endocrine Society (Hembree et al., 2017) and the Center of Excellence for Transgender Health (UCSF Transgender Care, 2016). Each set of guidelines is informed by the best available data and is intended to be flexible and holistic in application to individual people.

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[4] World Health Organization. (2018). "HA60 Gender incongruence of adolescence or adulthood." In International Classification of Diseases, 11th Revision.

[5] Kameg, B. N., & Nativio, D. G. (2018). Gender dysphoria in youth: An overview for primary care providers. *Journal of the American Association of Nurse Practitioners*, 30(9), 493–498. ("Because those with untreated gender dysphoria are at risk of a variety of negative outcomes, including mood symptomatology, suicidality, substance use disorders, and other psychosocial risk factors, it is critical that health care providers are adept in the provision of holistic, patient-centered care.").

[6] Coleman, E., Bockting, W., Botzer, M., Cohen-Kettenis, P., DeCuypere, G., Feldman, J., ... & Zucker, K. (2012). Standards of care for the health of transsexual, transgender, and gender-nonconforming people, version 7. *International Journal of Transgenderism*, 13(4), 165-232; Hembree, W. C., Cohen-Kettenis, P. T., Gooren, L., Hannema, S., Meyer, W. J., Murad, M. H., … T'Sjoen, G. G. (2017). Endocrine treatment of genderdysphoric/gender-incongruent persons: An Endocrine Society clinical practice guideline. *The Journal of Clinical Endocrinology & Metabolism*, *102*(11), 3869-3903.

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> A major success of these guidelines has been identifying evidence and establishing expert consensus that gender-affirming care is medically necessary and, further, that withholding this care is not a neutral option (World Professional Association for Transgender Health, 2016). A number of professional medical organizations have joined WPATH in recognizing that gender-affirming care is medically necessary for transgender people because it reduces distress and promotes well-being, while withholding care increases distress and decreases well-being (American Academy of Family Physicians, 2012; American Academy of Pediatrics, 2018; American College of Nurse Midwives, 2012; American College of Obstetricians and Gynecologists, 2011; AMA, 2008; American Psychiatric Association, 2018; American Psychological Association (APA), 2008, 2015; Endocrine Society, 2017). Accordingly, public and private insurers have expanded access to gender-affirming care; some have done so proactively, while others have been required by state and federal nondiscrimination laws to remove coverage exclusions (Baker, 2017).[7]

These guidelines "represent the consensus approach of the medical and mental health community … and have been recognized by various courts … as the authoritative standards of care."[8]

The precise treatment for gender dysphoria for any individual depends on that person's individualized needs, and the guidelines for medical treatment differ depending on whether the treatment is for an adolescent or an adult. No medical treatment is recommended or necessary prior to the onset of puberty. Under the guidelines, treatment for gender dysphoria may involve counseling, hormone therapy, and surgery. Medically necessary procedures treat gender dysphoria by bringing a person's body into better alignment with their gender identity and are similar to procedures performed for other diagnoses. Hormone therapy specifically for transgender adolescents may include puberty-delaying treatment. Puberty-delaying treatment essentially pauses puberty, so that an adolescent can undergo a single, correct pubertal process consistent with their gender identity. Again, no medical care is initiated until after the onset of puberty, and care is provided based

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[7] Nat'l Acad. of Sciences, Eng'r, and Med. (2020), *Understanding the Well-Being of LGBTQI+ Populations*, at 361, Washington, DC: The National Academies Press. https://doi.org/10.17226/25877.

[8] *Grimm*, 972 F.3d at 595 (emphasis added; collecting authorities).

on the youth's unique cognitive and emotional maturation and ability to provide a knowing and informed consent.

Many medical organizations have examined the science and have recognized the clinical effectiveness and medical necessity for gender affirming care for gender dysphoria, including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, and the Endocrine Society, among others.[9] So has too the U.S.

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[9] See, e.g., Am. Acad. of Child and Adolescent Psychiatry, "Statement Responding to Efforts to ban Evidence-Based Care for Transgender and Gender Diverse Youth" (2019), *available at* https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx; Am. Acad. of Family Physicians, "Care for the Transgender and Nonbinary Patient" (2020), *available at* www.aafp.org/about/policies/all/transgender-nonbinary.html; Am. Acad. of Pediatrics, "Policy Statement: Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents" (2018), *available at* https://pediatrics.aappublications.org/content/142/4/e20182162; Am. Coll. of Obstetricians and Gynecologists, "Committee Opinion No. 823: Health Care for Transgender and Gender Diverse Individuals" (2021), *available at* https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals; Am. Med. Ass'n and GLMA, "Issue Brief: Health insurance coverage for gender-affirming care of transgender patients" (2019), *available at* https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf; Am. Psychiatric Ass'n, "Position Statement on Access to Care for Transgender and Gender Diverse Individuals" (2018), *available at* https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Access-to-Care-for-Transgender-and-Gender-Diverse-Individuals.pdf; Am. Psychological Ass'n. (2015). Guidelines for psychological practice with transgender and gender nonconforming people, *American Psychologist*, 70, 832-864; Hembree, W. C., Cohen-Kettenis, P. T., Gooren, L., Hannema, S., Meyer, W. J., Murad, M. H., … T'Sjoen, G. G. (2017). Endocrine treatment of genderdysphoric/gender-incongruent persons: An Endocrine Society clinical practice guideline. *The Journal of Clinical Endocrinology & Metabolism*, *102*(11), 3869-3903; Pediatric Endocrine Soc'y, "Pediatric Endocrine Society Opposes Bills that Harm Transgender youth" (2021), *available at* https://pedsendo.org/news-announcements/the-pediatric-endocrine-society-opposes-bills-that-harm-transgender-youth-2/; Pediatric Endocrine Soc'y, "Position Statement: Transgender Health" (2020), https://www.endocrine.org/-/media/a65106b6ae7f4d2394a1ebeba458591d.ashx; World Med. Ass'n, "WMA statement on transgender People" (2017), *available at* https://www.wma.net/policies-post/wma-statement-on-transgender-people/; World Prof'l Ass'n for Transgender Health, "Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A." (2016), *available at* https://www.wpath.org/newsroom/medical-necessity-statement; *see also* Prof'l Org. Statements Supporting Transgender People in Health Care, Lambda Legal, *available at* https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf (last visited July 8, 2022).

Department of Health and Human Services.[10] No credible major medical organizations have taken a contrary position.

What is more, scientific research demonstrates that care for gender dysphoria improves the well-being of transgender people, including youth. Indeed, there is "a robust international consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals. The literature also indicates that greater availability of medical and social support for gender transition contributes to better quality of life for those who identify as transgender."[11]

By contrast, as justification for the Proposed Rule, AHCA has relied upon a flawed and misguided memorandum premised upon the views of compromised and rejected "experts." More specifically, AHCA relies on a Generally Accepted Professional Medical Standards Determination on the Treatment of Gender Dysphoria ("GAPMS Memo") published on June 2, 2022.[12] But the GAPMS Memo is premised on reports by so-called "experts" who have been discredited (like Dr. James Cantor, Dr. Patrick Lappert, and Dr. Quentin Van Meter).[13] It also

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[10] Office of Population Affairs, U.S. Dep't of Health & Human Servs., "Gender-Affirming Care and Young People" (Mar. 2022), *available at* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.

[11] What We Know Project, Cornell University, *What Does the Scholarly Research say about the effect of gender transition on transgender well-being?* (2018) (online literature review), *available at* https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/; *see also* Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, Scientific American (May 12, 2022), *available at* https://www.scientificamerican.com/article/what-the-science-on-gender-affirming-care-for-transgender-kids-really-shows/.

[12] Agency for Health Care Admin., Generally Accepted Professional Medical Standards Determination on the Treatment of Gender Dysphoria (June 2022), *available at* https://www.ahca.myflorida.com/letkidsbekids/docs/AHCA_GAPMS_June_2022_Report.pdf.

[13] Just last month, the testimony of Dr. James Cantor was given "very little weight" by a federal court in Alabama "regarding the treatment of gender dysphoria in minors" because Dr. Cantor had never provided care to a transgender minor under the age of sixteen; had never diagnosed a child or adolescent with gender dysphoria; had never treated a child or adolescent for gender dysphoria; and had no personal experience monitoring patients receiving transitioning medications. *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *5 (M.D. Ala. May 13, 2022). Likewise, a federal court last month noted that there is evidence that calls Dr. Patrick Lappert's "bias and reliability into serious question" and concluded that Dr. Lappert "is not qualified to render opinions about the diagnosis of gender dysphoria, its possible causes, … the efficacy of puberty blocking medication or hormone treatments, the appropriate standard of informed consent for mental health

misrepresents the findings of various studies and ignores the significant body of research showing that gender affirming care is safe and effective.[14] For example, the GAPMS Memo "makes unfounded criticisms of robust and well-regarded clinical research and instead cites sources with little or no scientific merit, including journalism, a blog entry, letters to the editor, and opinion pieces."[15]

But actual experts, every major medical association, the U.S. Department of Health & Human Services, the National Academies of Sciences, Engineering, and Medicine, and even private insurers "all agree that, in certain cases, gender affirming medical and surgical care can be medically necessary to treat gender dysphoria."[16] AHCA "attempt[s] to create scientific controversy in this uniform agreement through experts who mix their scientific analysis with hypothetical speculation and political hyperbole."[17]

Within the last year, three federal courts across the United States have rejected claims that gender-affirming medical is not effective or experimental. For example, in *Eknes-Tucker v. Marshall* the U.S. District Court for the Northern District of Alabama found that Alabama officials "produce no credible evidence to show that transitioning medications are 'experimental.'"[18] The court further found that "the uncontradicted record evidence is that at least twenty-two major medical associations in the United States endorse transitioning medications as well-

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professionals or endocrinologists, or any opinion on [] non-surgical treatments," and that his views "do not justify the exclusion" of gender-affirming medical care. *Kadel v. Folwell*, No. 1:19CV272, 2022 WL 2106270, at *12-15 (M.D.N.C. June 10, 2022). And Dr. Quentin Van Meter was found by a court in Texas to not be qualified as an expert on the "question of whether an adolescent transgender child should be administered puberty blockers and whether affirmation of an incongruent gender in a child is harmful or not." Stephen Caruso, *A Texas judge ruled this doctor was not an expert. A Pennsylvania Republican invited him to testify on trans health care*, Pennsylvania Capital-Star (Sept. 15, 2020), *available at* https://www.penncapital-star.com/government-politics/a-texas-judge-ruled-this-doctor-was-not-an-expert-a-pennsylvania-republican-invited-him-to-testify-on-trans-health-care/.

[14] See Meredithe McNamara, et al., *A Critical Review of the June 2022 Florida Medicaid Report on the Medical Treatment of Gender Dysphoria* (July 8, 2022), *available at* https://medicine.yale.edu/lgbtqi/research/gender-affirming-care/florida%20report%20final%20july%208%202022%20accessible_443048_284_55174_v3.pdf.

[15] *Id.* at 2.

[16] *Kadel*, 2022 WL 2106270, at *32

[17] *Id.*

[18] *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *8 (M.D. Ala. May 13, 2022).

established, evidence-based treatments for gender dysphoria in minors," and "the record shows that medical providers have used transitioning medications for decades to treat medical conditions other than gender dysphoria." The U.S. District Court for the Eastern District of Arkansas similarly found that, "Gender-affirming treatment is supported by medical evidence that has been subject to rigorous study. Every major expert medical association recognizes that gender-affirming care for transgender minors may be medically appropriate and necessary to improve the physical and mental health of transgender people."[19] And most recently, the U.S. District Court for Middle District of North Carolina concluded that the "belief that gender affirming care is ineffective and unnecessary is simply not supported by the record."[20]

Only science that is relevant and reliable should drive AHCA's coverage regulations; not opinions infected with bias, speculation, and politics. The science surrounding gender-affirming medical care overwhelming supports the conclusion that medical care for the treatment of gender dysphoria is safe, effective, and not experimental.

The Proposed Rule Will Harm Florida's Transgender Medicaid Participants.

Transgender individuals are a high-risk population for mental and physical health problems and are consistently and systemically underserved by the American medical system.[21] Regular harassment and discrimination contribute to high rates of stress and—combined with adverse social, political, and economic risk factors—make transgender individuals significantly more likely to experience poor health outcomes.[22] Structural, institutional, and individual barriers in access to care, along with a lack of cultural competency from many health care providers, contribute to the large disparities in health between transgender and cisgender populations.[23]

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[19] *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021).

[20] *Kadel*, 2022 WL 2106270, at *32.

[21] Caroline Medina, Thee Santos, Lindsay Mahowald, and Sharita Gruberg, Ctr. for Am. Progress, "Protecting and Advancing Health Care for Transgender Adult Communities," Ctr. for Am. Progress (Aug. 18, 2021), available at https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/.

[22] *Id.*

[23] *Id.*

What is more, one in three transgender adults report an annual household income below $25,000 and receive Medicaid assistance.[24] Indeed, there are approximately 9,000 transgender adults enrolled in Medicaid in Florida.[25] Disparities in economic security and access to food have been proven to affect health status; one survey of transgender individuals in New York state found that those with incomes below the poverty line were almost twice as likely to report fair or poor health.[26] These obstacles not only exacerbate stress, leading to mental and physical ailments, but also make it more difficult for transgender individuals to afford quality care.[27] More than half of transgender individuals reported postponing or not receiving necessary medical care in the year prior to CAP's survey because they could not afford it, including 60 percent of transgender respondents of color.[28] And 40 percent avoided preventive screenings in the year prior to CAP's survey due to cost, including 31 percent of transgender respondents of color.[29]

Accordingly, the AMA has encouraged elected officials to oppose laws like the Proposed Rule, noting that the failure to provide "gender-affirming care can have tragic health consequences, both mental and physical."[30]

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[24] *Id.*

[25] Christy Mallory & William Tentindo, The Williams Inst., "Medicaid Coverage for Gender-Affirming Care" (Oct. 2019), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Gender-Care-Oct-2019.pdf.

[26] Somjen Frazer and Erin Howe, "Transgender health and economic insecurity: A report from the 2015 LGBT Health and Human Services Needs Assessment Survey" (New York: Empire State Pride Agenda, 2015), available at http://strengthinnumbersconsulting.com/wp-content/uploads/2017/06/TG-health-and-economic-insecurity-report-FINAL.pdf.

[27] Caroline Medina, Thee Santos, Lindsay Mahowald, and Sharita Gruberg, Ctr. for Am. Progress, "Protecting and Advancing Health Care for Transgender Adult Communities," Ctr. for Am. Progress (Aug. 18, 2021), available at https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/.

[28] *Id.*

[29] Lindsay Mahowald, Mathew Brady, and Caroline Medina, "Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results," Center for American Progress (Apr. 21, 2021), available at https://www.americanprogress.org/article/discrimination-experiences-among-lgbtq-people-us-2020-survey-results/.

[30] See Am. Med. Ass'n, "AMA to states: Stop interfering in health care of transgender children" (2021), *available at* https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children.

The Proposed Rule Is Unlawful.

The Proposed Rule deprives transgender Floridians participating in Medicaid of coverage for the same treatments or services for which Medicaid would provide coverage to other Floridians simply because they are transgender. Singling out transgender people for such unequal treatment violates the Equal Protection Clause of the U.S. Constitution and federal law.

Exclusions prohibiting coverage of gender-affirming medical care "facially discriminate based on sex and transgender status."[31] Indeed, "[d]iscrimination against individuals suffering from gender dysphoria is also discrimination based on sex and transgender status."[32] Such discrimination because of sex triggers heightened scrutiny.[33] Likewise, discrimination based on transgender status triggers heightened scrutiny separately and by itself.[34] In any event, under any standard of constitutional review, given the governing medical standards for transgender people with gender dysphoria, the Proposed Rule would be indefensible in court.[35]

Moreover, Section 1557 of the Affordable Care Act prohibits discrimination on the basis of sex by any health program or activity receiving federal financial assistance. And as the U.S. Supreme Court held in *Bostock v. Clayton County, Georgia*, "discrimination based on … transgender status necessarily entails

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[31] *Kadel*, 2022 WL 2106270, at *19.

[32] *Id.* at *20; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S. Ct. 753, 760 (1993) ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.").

[33] *Grimm*, 972 F.3d at 608; *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Kadel*, 2022 WL 2106270, at *19; *Eknes-Tucker*, 2022 WL 1521889, at *10 ("The Act therefore amounts to a sex-based classification for purposes of the Equal Protection Clause."); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021); *Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1022 (W.D. Wis. 2019); ; *see also Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731, 1749 (2020); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (same).

[34] *See Grimm*, 972 F.3d at 610; *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); *Brandt*, 551 F. Supp. 3d at 889; *Evancho v. Pine-Richland Sch. Dist*., 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017).

[35] *See* notes 32 and 33, *supra.*

discrimination based on sex; the first cannot happen without the second."[36] And as the U.S. District Court for the Western District of Wisconsin has held, exclusions prohibiting Medicaid coverage of gender-affirming medical care, like the Proposed Rule, "surely amount[] to discrimination on the basis of sex in violation of the ACA."[37]

Providing Coverage for Gender-Affirming Medical Care Is Economically Sound.

While AHCA's mission to "Better Health Care for *All* Floridians," principles of equality, and a desire to avoid discrimination should drive decisions about benefit coverage, the case for the provision and coverage of gender-affirming medical care is also economically sound. Over and over again, reputable cost studies have shown that the cost of providing this care is less than one-tenth of one percent of an entity's health budget. For example, a study commissioned by the U.S. military concluded that costs associated with providing health care to transgender service members was considered by a former Secretary of the Navy to be "budget dust, hardly even a rounding error."[38] Likewise, research from the Johns Hopkins Bloomberg School of Public Health calculated that the costs would be fewer than two pennies per month for every person with health insurance coverage in the United States.[39] A cost analysis of the City and County of San Francisco's coverage of gender-affirming surgeries found that costs in the first five years to both insurers and employers were low, averaging between $0.77 and $0.96 per year per enrollee, and resulted in no surcharge or premium increases.[40] And a study commissioned by the North Carolina State Health Plan for Teachers and State Employees found that estimated that coverage for gender-affirming medical care would cost the plan between 0.011% to 0.027% of the plan's total premium.[41] Employers who provide

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[36] *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1747 (2020).

[37] *Flack*, 328 F. Supp. 3d at 951.

[38] *See* Declaration of Raymond Edwin Mabus, Jr., former Secretary of the Navy, In support of Plaintiff's Motion for Preliminary Injunction, No. 17-cv-1597 (CKK), *Doe v. Trump* (Aug. 28, 2017), *available at* https://www.glad.org/wp-content/uploads/2017/08/mabus-declaration.pdf.

[39] William V. Padula, Shiona Heru, Jonathan D. Campbell, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis* (Oct. 19, 2015), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686/.

[40] State of California Department of Insurance Economic Impact Assessment (Apr. 13, 2012), *available at* https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

[41] Memorandum from Segal Consulting to Mona Moon, Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees regarding Transgender Cost Estimate

health care coverage for their transgender employees likewise report very low costs, if any, from adding coverage of gender-affirming medical care to their health benefits plans or from actual utilization of the benefit after it has been added – with many employers reporting no costs at all.

The Rulemaking Process Is Flawed and Lacks Transparency.

Most disturbingly, the entire process leading to the Notice of Proposed Rule has been unusual and departs from established AHCA practices and norms. The process appears to have been driven by political appointees and Governor DeSantis, whose office apparently vetted the GAPMS Memo prior to its issuance.[42] Indeed, the result of this whole process appears to have been pre-ordained and calls into question any of AHCA's analysis about the scientific and medical literature regarding gender-affirming medical care to treat gender dysphoria.

In addition, AHCA seems to have proceeded with the rulemaking in a way that minimizes public participation and lacks transparency. For example, AHCA released the Notice of Proposed Rule on June 17, 2022, the Friday of holiday weekend, and set the minimum comment period of 21 days in a way that would encompass yet another major holiday weekend. AHCA has refused calls for workshops *prior to* the release of the Notice of Proposed Rule and has only set a two-hour hearing at 3:00pm local time on a summer Friday. In addition, AHCA asked individuals with disabilities who require accommodation to advise the agency at least 48 hours prior to the workshop but provided no avenue for a people with disabilities to request an accommodation. Finally, and most troublingly, AHCA's the description of the purpose and effect of the Proposed Rule contained in the Notice of Proposed Rule gives no notice of the actual purpose and effect of the rulemaking or the subject of the rulemaking.[43] The purpose and effect of the Proposed Rule is simply listed as "The purpose of the amendment to Rule 59G-1.050, Florida Administrative Code, (F.A.C.), is to update covered Medicaid services." It makes no mention of "gender dysphoria" or that if adopted the Proposed Rule would prohibit

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(Nov. 29, 2016), *available at* https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/plan_def0166383_segal_2021_cost_analysis.pdf.

[42] For example, in an unprecedented and unusual move, AHCA created an entire website dedicated to the release of the GAPMS that is titled "Let Kids. Be Kids." and includes infographics refuting guidance issued by the U.S. Department of Health & Humans Services. See generally https://ahca.myflorida.com/letkidsbekids/.

[43] The Notice of Development of Rulemaking was published in 48 Fl. Admin. Reg. 2270 (June 3, 2022) and likewise provides no specification of the subject of the rulemaking.

Medicaid coverage of medical services that up until now have been covered by Medicaid in Florida.

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AHCA's Proposed Rule would harm the neediest transgender Floridians who rely on Medicaid to access the medical care that they need, while flouting science and well-established medical standards. It invites the contentiousness and expense of litigation for the state, merely to inscribe discrimination into a rule—at least until the courts enjoin it—with no persuasive justification. But AHCA's "belief that gender affirming care is ineffective and unnecessary is simply not supported by the record."[44] AHCA should uphold the statutory and constitutional guarantees that protect all people who participate in Medicaid in Florida, especially marginalized populations like those who would be impacted by the Proposed Rule, by reversing course and abandoning efforts to promulgate the Proposed Rule. We most strongly urge AHCA to reject the proposed changes to Fla. Admin. Code R. 59G-1.050(7).

Thank you for the opportunity to submit this comment. Please do not hesitate to contact the undersigned at ogonzalez-pagan@lambdalegal.org or (212) 809-8585 with any questions or for further information.

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
Counsel and Health Care Strategist
National Headquarters (New York)

/s/ Carl S. Charles
Carl S. Charles
Senior Attorney
Southern Regional Office (Atlanta)

/s/ Avatara Smith-Carrington
Avatara Smith Carrington
Staff Attorney
South Central Regional Office (Dallas)

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[44] *Kadel*, 2022 WL 2106270, at *32.