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Correspondence Memorandum

Date: December 29, 2016

To: Group Insurance Board

From: David H. Nispel, General Counsel

Subject: 2017 Uniform Benefits and Services Related to Gender Reassignment or Sexual Transformation—HHS Nondiscrimination Rule

At the request of a Board Member, the Group Insurance Board (Board) is meeting to discuss and consider the 2017 uniform benefits and services related to gender reassignment or sexual transformation and the federal Department of Health and Human Services (HHS) nondiscrimination rule.

Memoranda on this topic were previously submitted for Board consideration in the August 16 memo, Group Insurance Board Correspondence (Ref. GIB | 8.16.16 | 7A).

- The Department of Justice (DOJ) memorandum (Attachment B) is in regard to the July 12, 2016 motion to approve changes to the Guidelines Contract and Uniform Benefits for 2017 (Ref. GIB | 07.12.16 | 3A).
- ETF reviewed the DOJ memo and provided additional information for Board consideration in its own memorandum (Attachment C). The ETF memorandum provided information concerning the fiduciary duties of Board members.
- At the December 13 Board meeting, a DOJ attorney recommended that the Board follow existing law on this issue. As of this date, ETF is not aware of any changes to the existing law.
- At the December 13 Board meeting, a DOJ attorney stated that DOJ was willing to prepare a legal opinion for the Board that addressed the fiduciary duties of Board members in light of the federal HHS issued final regulations pertaining to Section 1557 of the Affordable Care Act.

Staff will be at the Board meeting to answer any questions.

Attachment A: ETF Memo – Discussion and Consideration of 2017 Uniform Benefits, December 8, 2016
Attachment B: DOJ Memo – ETF's Proposed Revisions to Uniform Benefits Provisions Regarding "Gender Identity" Health Services
Attachment C: ETF Memo – Uniform Benefit Provisions Related to Sex Discrimination

Reviewed and Approved by John Voelker, Deputy Secretary

Electronically Signed: 12/29/16

Board	Mtg Date	Item #
GIB	12.30.16	3

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Correspondence Memorandum

Date: December 8, 2016

To: Group Insurance Board

From: Sara Brockman, Health Policy Advisor
Office of Strategic Health Policy

Subject: Discussion and Consideration of 2017 Uniform Benefits – HHS Nondiscrimination Rule

This item has been added to the December 13 Group Insurance Board (Board) meeting agenda at the request of a Board member. The Wisconsin Department of Justice has indicated the intent to send representation to the Board meeting to discuss the issue.

Memoranda on this topic were previously submitted for Board consideration as the August 16 memo, Group Insurance Board Correspondence (Ref. GIB | 8.16.16 | 7A).

- The DOJ memorandum (Attachment A) is in regard to the July 12, 2016 motion to approve changes to the Guidelines Contract and Uniform Benefits for 2017 (Ref. GIB | 07.12.16 | 3A).
- ETF reviewed the DOJ memo and provided additional information for Board consideration (Attachment B).

Staff will be at the Board meeting to answer any questions.

Attachment A: DOJ Memo – ETF's Proposed Revisions to Uniform Benefits Provisions Regarding "Gender Identity" Health Services
Attachment B: ETF Memo – Uniform Benefit Provisions Related to Sex Discrimination

Reviewed and Approved by John Voelker, Deputy Secretary

Electronically Signed: 12/9/16

Board	Mtg Date	Item #
GIB	12.13.16	6

Attachment A

WISCONSIN DEPARTMENT OF JUSTICE
MEMORANDUM

Date: August 10, 2016

To: Group Insurance Board

From: Andy Cook, Deputy Attorney General

Subject: ETF's Proposed Revisions to Uniform Benefits Provisions Regarding "Gender Identity" Health Services

Executive Summary

The Department of Justice writes to you regarding proposed revisions to the State of Wisconsin Department of Employee Trust Funds' ("ETF") current Uniform Benefits policy. As you know, the current policy excludes coverage for "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" and for "sexual counseling services . . . related to sexual transformation." ETF has recommended that the Group Insurance Board ("Board") remove these exclusions in order to comply with rules recently promulgated by the federal Department of Health and Human Services ("HHS"). Those rules purport to implement the Affordable Care Act's anti-discrimination provisions, and they generally ban discrimination based on "gender identity" in the provision of health services. *See* 45 C.F.R. §§ 92.206-207.

To the extent the Board believes that the new HHS rules compel it to accept ETF's recommended changes, it should reconsider for two reasons. First, HHS's rules are unlawful, at least as applied to coverage provisions that classify health services based on "gender identity." The Affordable Care Act's anti-discrimination provisions incorporate Title IX's prohibition against discriminating on the basis of "sex." *See* 42 U.S.C. § 18116; 20 U.S.C. § 1681. But HHS's rules improperly reinterpret Title IX to cover "gender identity" – an expansion Congress has never adopted and that HHS may not effect on its own.

Even if HHS had not misread Title IX, its "gender identity" rules improperly intrude on powers reserved to the State of Wisconsin to administer its own health policy. The United States Constitution prohibits the federal government and HHS from threatening to withhold ETF's receipt of Medicare Part D subsidies if ETF does not comply with the federal mandate. Separately, the Fourteenth Amendment does not authorize HHS to issue these rules, since ETF's policies do not violate that Amendment.

Second, even if HHS's rules were lawful, they do not mandate coverage for any particular procedures – which is effectively what ETF's proposed revisions accomplish. Instead, those rules allow coverage exclusions based on neutral

reasons, such as whether medical necessity demands the services at issue. This allows a narrower revision to the provision regarding gender reassignment services than ETF has proposed. And the Board likely need not revise the provision regarding sexual transformation counseling at all. Since non-transgender patients cannot receive such counseling, no discrimination exists by denying coverage for it. Alternatively, a blanket exclusion for all sexual counseling services would further protect the Uniform Benefits from challenge. Specific alternative proposals are presented at the end of this memorandum.

Analysis

I. HHS's Rules Improperly Require the State of Wisconsin To Enforce A Misreading of the Affordable Care Act and Title IX.

HHS's rules are unlawful because they rest on a misreading of the Affordable Care Act and Title IX. *See* 5 U.S.C. § 706 (agency actions are unlawful if undertaken "in excess of statutory jurisdiction, authority, or limitations"). The Affordable Care Act only prohibits discrimination coextensive with Title IX. But Title IX's prohibition against discrimination on the biological basis of "sex" does not extend to the distinct concept of "gender identity." Since HHS cannot issue rules that amend the Affordable Care Act and Title IX – which is what these rules effectively do – the Board need not conform ETF's Uniform Benefits to them.

First, nothing in Title IX's text suggests that the statute covers "gender identity." The statute's plain language is clear: "No person in the United States shall, ***on the basis of sex***, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 28 U.S.C. § 1681 (emphasis added). Again, "on the basis of ***sex***," not "on the basis of sex ***or gender identity***."

Legislative history confirms that Title IX covers just what it says – "sex," not "gender identity." Nowhere in the Congressional debates over Title IX does the phrase "gender identity" or "transgender" appear. Moreover, Congress has refused to amend Title IX to cover "gender identity."[1] Congress clearly would not have tried to add superfluous new protections for "gender identity" if Title IX already provided them.

Case law affirms Title IX's plain language and legislative history, holding that its protections do not extend to "gender identity." One well-reasoned opinion

[1] *See* H.R. 1652, 113th Cong. (2013); S.439, 114th Cong. (2015).

held, after carefully analyzing Title IX's plain language and its legislative history, that "Title IX's language does not provide a basis for a transgender status claim." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015). And *Johnston* is supported by many other cases that reach the same result under Title VII, Title IX's sister anti-discrimination statute in the employment context.

Moreover, the State of Wisconsin has joined 12 other states in challenging another unlawful federal government mandate that rests on an identical misreading of Title IX. *See State of Texas, et al. v. United States, et al.*, No. 16-cv-00054 (N.D. Tex.). There, the federal government improperly demanded, again citing Title IX, that public schools allow students to use the bathrooms, locker rooms, and showers of the students' choosing, regardless of their biological sex. But that overreach must fail for the same reason as here – federal agencies cannot impose their policy preferences on the States by expanding Title IX to cover "gender identity" without Congressional action.

The United States Constitution also restrains HHS from imposing its view of the Affordable Care Act and Title IX on the State of Wisconsin and ETF. Although the federal government can contribute money to the States to be spent on various programs, that power cannot be used to "undermine the status of the States as independent sovereigns in our federal system." *See* U.S. CONST. art. I, § 8, cl. 1; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("*NFIB*"). Indeed, when federal funding conditions "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes." *Id.* at 2604.

HHS now threatens to withhold federal financial assistance if ETF refuses to implement the federal government's novel interpretation of Title IX. Specifically, HHS's new rules condition federal aid on ETF's "assurances" that its health programs comply with those rules. *See* 45 C.F.R. §§ 92.5-6 (requiring "assurances"); 42 U.S.C. § 18116 (applying Title IX's enforcement mechanisms to the Affordable Care Act); 20 U.S.C. § 1682 (compliance can be enforced by terminating federal assistance). Since ETF partly depends on federal financial assistance in the form of Medicare Part D subsidies, HHS improperly threatens to withhold those subsidies if ETF fails to comply with its novel reading of Title IX. *NFIB*, 132 S. Ct. at 2604. This likely amounts to unconstitutional coercion.

HHS also cannot find authority for its new rules in the Fourteenth Amendment. That Amendment allows Congress to "enforce, by appropriate legislation" its guarantee to "the equal protection of the laws." U.S. CONST. amend.

XIV, §§ 1, 5. But HHS can only issue rules that target a recognized equal protection violation. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). Since many courts have concluded that transgender individuals are not a "suspect class" that triggers heightened constitutional scrutiny, coverage exclusions like ETF's here "need only be rationally related to a legitimate governmental purpose" to be valid under the Fourteenth Amendment.[2]

ETF can easily clear that low bar. For instance, it can point to the high costs the State must bear for covering services and procedures related to gender transition, or to medical research suggesting that such procedures (especially sex transformation surgeries) may in fact harm patients. Even if a heightened level of scrutiny did apply here, these coverage exclusions could for the same reasons pass muster as "substantially related to a sufficiently important governmental interest."[3] Since ETF's coverage provisions at issue here do not violate the Fourteenth Amendment, HHS may not bar them by citing the Fourteenth Amendment.

II. Even If HHS's Rules are Lawful, the Board Need Not Revise the Uniform Benefits As ETF Has Recommended.

Leaving aside the validity of HHS's new rules, ETF's recommended revisions to the Uniform Benefits go beyond what those rules require. Again, ETF has recommended striking entirely two policy exclusions from the Uniform Benefits:

- "Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." Uniform Benefits § IV.1.a.

- "Sexual counseling services related to . . . sexual transformation." Uniform Benefits § IV.11.ah.

These revisions would arguably mandate that ETF cover ***all*** such procedures, whether medically necessary or not. But HHS expressly noted that its rules "do not . . . affirmatively require covered entities to cover any particular procedure or treatment for transition-related care." 81 Fed. Reg. 31376 at 31429 (May 18, 2016). Likewise, the rules "do not affirmatively require covered entities to cover any

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[2] *Claussen v. Pence*, - F.3d - , 2016 WL 3213036, at *4 (7th Cir. June 10, 2016) (outlining "rational basis" standard).

[3] *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (establishing "intermediate scrutiny" standard); *Craig v. Boren*, 429 U.S. 190, 199–200 (1976) ("Clearly, the protection of public health and safety represents an important function of state and local governments.").

particular treatment, as long as the basis for exclusion is evidence-based and nondiscriminatory." *Id.* at 31435. And HHS's rules expressly note that they are not "intended to determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case." 45 C.F.R. § 92.207(d).

Attachment B

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Correspondence Memorandum

Date: August 11, 2016

To: Group Insurance Board

From: David H. Nispel, General Counsel
Diana M. Felsmann, Attorney

Subject: Uniform Benefits Provisions Related to Sex Discrimination

Information for GIB Consideration
After reviewing the Department of Justice (DOJ) August 10, 2016, memo requesting that the Group Insurance Board (GIB) reconsider its adoption of the Department of Employee Trust Funds' (ETF) recommended changes to the State of Wisconsin Group Health Insurance Program's Uniform Benefits, ETF offers additional information for the GIB's consideration:

- As fiduciaries,[1] GIB Board members must ensure that the Group Health Insurance Program complies with state and federal law. Basic fiduciary principles found in common law include the three "core" fiduciary duties: (1) the duty of loyalty, (2) the duty of impartiality, and (3) the duty of prudence. A fiduciary may rely on the advice and reports of experts (i.e., attorneys, accountants, financial advisors), provided the subject matter is within the expert's area or expertise and the expert is fully informed. Ensuring compliance with state and federal law falls under the duty of prudence.

- The United States Department of Health and Human Services (HHS) final rule implementing the Affordable Care Act's (ACA) nondiscrimination requirements provides that health insurance issuers may not contract away their own nondiscrimination obligations under the rule.[2] As a result, a decision not to comply with the HHS rule would jeopardize ETF's ability to contract with its health insurance issuers as of January 1, 2017.

[1] Wis. Stat. §40.03(6)(d).

[2] Moreover, nothing in the rule authorizes qualified health plan issuers or other issuers that are covered entities to contract away their own nondiscrimination obligations. Issuers must ensure that enrollees have equal access to health services provided by their coverage without discrimination on the basis of a prohibited criterion.

81 Federal Register 31376 (May 18, 2016), 31383.

- The cost of removing the Uniform Benefits exclusion related to benefits and services in connection with gender reassignment or sexual transformation is anticipated to be low. Based on a 2014 study Segal Consulting did for the state of Maryland, the highest estimated cost was .01% of the annual cost of Maryland's health insurance program. That study reflected that the annual costs associated with Maryland's health insurance program were approximately $1.3B. The largest estimated cost, $100,000 represents less than a 0.01% increase in annual costs for the cost of the initial procedure(s) and related drug therapy and counseling.

- The Group Health Insurance Program's Uniform Benefits continues to require that services be medically necessary,[3] as determined by the health plan and/or PBM.[4]

Background

The changes to the Group Health Insurance Program recommended in ETF's June 22, 2016, memo entitled *Guidelines Contract and Uniform Benefits Changes for 2017*, and adopted unanimously by the GIB on July 12, 2016, were made after careful research on the application of federal law, specifically the ACA nondiscrimination rule published by HHS on May 18, 2016. ETF's role in relation to the GIB is to make recommendations to assist the GIB in the performance of its fiduciary duties to the insurance programs administered by ETF, including the Group Health Insurance Program, and to provide information so that the Program is properly administered.

The recommended changes to the Program's Uniform Benefits in connection with the HHS rule, and as adopted by the GIB at the July 12, 2016 meeting were as follows:

1. Removing the current exclusion related to benefits and services related to gender reassignment or sexual transformation. Required effective date is January 1, 2017.

2. Including the federally required nondiscrimination notification language on all significant communications related to ETF's health programs. Required effective date is October 16, 2016 (90 days from July 18, 2016).

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[3] Defined in ETF's Uniform Benefits as a service, treatment, procedure, equipment, drug, device or supply provided by a Hospital, physician or other health care Provider that is required to identify or treat a Participant's Illness or Injury and which is, as determined by the Health Plan and/or PBM:

1. consistent with the symptom(s) or diagnosis and treatment of the Participant's Illness or Injury; and
2. appropriate under the standards of acceptable medical practice to treat that Illness or Injury; and
3. not solely for the convenience of the Participant, physician, Hospital or other health care Provider; and
4. the most appropriate service, treatment, procedure, equipment, drug, device or supply which can be safely provided to the Participant and accomplishes the desired end result in the most economical manner. http://etf.wi.gov/members/IYC2016/IYC_Cert_of_Cov2107.pdf

[4] State of Wisconsin Group Health Insurance Program Uniform Benefits, Section III, Page 4-23.

Summary of August 10, 2016 Department of Justice Memo
In its August 10, 2016, memo to the GIB entitled *ETF's Proposed Revisions to Uniform Benefits Provisions Regarding "Gender Identity" Health Services*, the Department of Justice (DOJ), offers two reasons for the GIB to reconsider the changes to ETF's Uniform Benefits adopted at the July 12, 2016, GIB meeting.

The first reason DOJ provides is that the new HHS rule is unlawful, "at least as applied to coverage provisions that classify health services based on 'gender identity'." Included under that heading, DOJ writes that even if the new HHS rule is not based on a misreading of Title IX, which protects against sex discrimination, the rule "improperly intrude[s] on powers reserved to the State of Wisconsin to administer its own health policy."

The second reason offered by DOJ was that the HHS nondiscrimination rule does not mandate coverage for any particular procedure.

Benefits Coverage
Specific to the HHS rule and benefits coverage, as noted in ETF's June 22, 2016 memo to the GIB, ETF agrees with DOJ that the rule does not require coverage of specific benefits. However, of note:

- The rule specifies that categorical exclusions in coverage for all health services related to gender transition are facially discriminatory.

- The rule does not explicitly require the coverage of any particular service to treat gender dysphoria, and allows plans to deny services that are not medically necessary. HHS' Office for Civil Rights (OCR) will determine whether certain benefits designs are discriminatory on a fact-specific, case-by-case basis. 81 Fed. Reg. at 31434 & fn. 258.

- Denying coverage for transition-related services on the basis of those services not being medically necessary is anticipated to be subject to careful scrutiny. (Proposed HHS Nondiscrimination Rule) 80 Fed. Reg. 54172, 54190 (Sept. 8, 2015).

- The regulations allow covered entities to use reasonable medical management techniques and apply neutral, nondiscriminatory standards to health-related coverage. Specifically, OCR will consider whether an entity used "a neutral rule or principle when deciding to adopt the design feature or take the challenged action or whether the reason for its coverage decision is pretext for discrimination." 81 Fed. Reg. at 31433.

Penalties for Noncompliance with the HHS Rule

The HHS rule applies the same enforcement mechanisms under Title VI of the Civil Rights Act of 1964 (discrimination on the basis of race, color, and national origin), Title IX of the Education Amendments of 1972 (discrimination on the basis of sex), Section 504 of the Rehabilitation Act of 1973 (discrimination on the basis of disability), or the Age Discrimination Act of 1975. Penalties under Title IX include the termination of federal financial assistance.[5] Thus, one potential impact of a GIB decision to reconsider its adoption of the Uniform Benefits changes would be the Group Health Insurance Program's loss of Medicare Part D subsidies.[6] The Program received approximately $36 million in Medicare Part D subsidies in 2015.

In addition, the HHS rule allows for compensatory damages to be granted if an individual were to successfully litigate a claim that the Group Health Insurance Program was not in compliance with the law.[7]

Current EEOC Complaints Filed Against the GIB

It is important to note that two individual health plan participants have filed complaints with the Equal Employment Opportunity Commission (EEOC) against the GIB on the denial of benefits in relation to transgender services:

- EEOC Charge No. 443-2016-00291—Amended [redacted], Charging Party vs. University of Wisconsin, Respondent, and Department of Employee Trust Funds and Group Insurance Board, Additional Respondents.[8]

- EEOC Charge No. 443-2016-01428—Amended [redacted], Charging Party vs. Department of Employee Trust Funds, Respondent and Group Insurance Board, Additional Respondent.[9]

The EEOC takes the position that Title IX's prohibition against sex discrimination includes discrimination on the basis of gender identity. Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on gender identity.[10]

The HHS Rule references the EEOC's position, and indicates that HHS' Office for Civil Rights (OCR) intends to refer any cases that fall outside of OCR's jurisdiction to the EEOC for investigation.[11] As a result, if the GIB were to reconsider the changes it

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[5] 45 C.F.R. §92.301(a).
[6] *See* 20 U.S.C. §1682.
[7] 45 C.F.R. §92.301(b).
[8] *See* April 5, 2016, memo to the GIB from ETF General Counsel David H. Nispel.
[9] As of the writing of this memo, ETF has not yet received any details about this EEOC complaint. When ETF receives additional information, ETF will pass that information on to the GIB.
[10] The United States Department of Justice *Title VI Legal Manual*: https://www.justice.gov/crt/title-vi-legal-manual#XII (visited August 11, 2016).

[11] 81 Federal Register at 31432.

adopted to the Uniform Benefits on July 12, ETF anticipates an increase in complaints filed against the GIB.

GIB Authority to Modify Uniform Benefits

State law provides the GIB the authority to modify or expand insurance coverage when that modification or expansion is required by law.[12] The law further provides the GIB the authority to modify or expand benefits as it deems advisable unless the modification or expansion would increase premiums.[13]

The authority to make decisions on insurance coverage is necessary for the GIB, as trustees, to fulfill their fiduciary duties. Based on information provided by Segal Consulting, ETF anticipates the costs of providing the changes to the Uniform Benefits adopted by the GIB in relation to the HHS rule would be extremely low,[14] and would not increase premiums. As a result, whether the HHS rule is found to be invalid, the GIB would still have had the authority under state law to make these changes to the Uniform Benefits.

Recommendations Going Forward

1. ETF does not recommend the GIB reconsider its July 12, 2016, adoption of the changes made to the Group Health Insurance Program's Uniform Benefits in connection with the HHS rule. ETF recommended those changes after careful review of the HHS rule and in consideration of the GIB's fiduciary duties to the Group Health Insurance Program. In particular, the GIB's duty of prudence requires the GIB to ensure the Program is compliant with state and federal law.

   To address DOJ's questions with respect to the validity of the HHS rule, ETF recommends continuing with the changes as adopted at the July 12 GIB meeting, and revisiting that decision in one year. Such a reevaluation could be made in light of any court decisions interpreting the rule. In addition, reevaluation after one year would allow for ETF to present claims data to the GIB, which would provide the Board with insight into the cost of providing these benefits.

2. Important to note is the failure to meet fiduciary obligations may result in severe penalties, including personal liability. The August 10 DOJ memo does not address how the reconsideration of the GIB's adoption of the Uniform Benefits changes on July 12 comports with the GIB's fiduciary duties. As a result, if the GIB were to consider reversing its adoption of the changes to the Uniform Benefits, ETF first recommends the GIB obtain a legal opinion analyzing the Board's fiduciary duties under these specific circumstances.

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[12] Wis. Stat. §40.03(6)(c).
[13] Wis. Stat. §40.03(6)(c) & (d).
[14] Segal Consulting drafted a report for the State of Maryland in 2014 concluding that the cost of providing initial procedures, drug therapy and counseling would be approximately .01% of the state's total health insurance costs; *See also* page 2.