



August 30, 2021

Blue Cross Blue Shield of Kansas  
Attn: Scott Raymond  
Vice President, Legal and Compliance Services and General Counsel  
1133 SW Topeka Blvd  
Topeka, Kansas 66629-0001  
[scott.raymond@bcbsks.com](mailto:scott.raymond@bcbsks.com)

Blue Cross Blue Shield of Kansas  
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**Re: Removing barriers to accessing transgender-related care**

Dear Mr. Raymond:

The Transgender Legal Defense and Education Fund (TLDEF) and the ACLU of Kansas have been contacted by a Blue Cross Blue Shield of Kansas (“BCBSKS”) plan member who is being incorrectly denied insurance coverage for medically necessary gender-affirming care under a Marketplace-based BCBSKS health plan. We bring the matter to your attention so that this member’s issue can be promptly addressed while also ensuring that no other transgender members are similarly denied care.

Currently, the BCBSKS Medical Policy on Sex Reassignment Surgery<sup>1</sup> (“Policy”) contains provisions that are out of step with the law, clinical practice, and the current version of the World Professional Association for Transgender Health (WPATH) *Standards of Care* (SOC).<sup>2</sup>

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<sup>1</sup> Blue Cross Blue Shield of Kansas, *Medical Policy: Sex Reassignment Surgery* (March 18, 2021), [https://www.bcbsks.com/customerservice/providers/medicalpolicies/policies/policies/SexReassignmentSurgery\\_2021-03-18.pdf](https://www.bcbsks.com/customerservice/providers/medicalpolicies/policies/policies/SexReassignmentSurgery_2021-03-18.pdf).

<sup>2</sup> WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed.)

Specifically, the Policy (1) contains criteria not rooted in clinical practice or the WPATH SOC and (2) contains blanket exclusions for care that is widely regarded as medically necessary, including by WPATH. WPATH is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health. Both the medical profession,<sup>3</sup> courts,<sup>4</sup> and the U.S. Department of Justice<sup>5</sup> widely recognize the SOC as the standard of care in this area.

BCBSKS' Policy not only contains unwarranted deviations from the WPATH SOC, it also conflicts with non-discrimination provisions in Section 1557 of the Patient Protection and Affordable Care Act and K.S.A. 40-2404(7), as detailed herein.

TLDEF is a non-profit civil rights organization that has successfully negotiated with nonprofits,

(2012), <https://www.wpath.org/publications/soc> [hereinafter SOC or SOC v.7].

<sup>3</sup> See Am. Med. Ass'n House of Delegates, Resolution 122 (A-08) *Removing Financial Barriers to Care for Transgender Patients* 1 (2008), [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf) (characterizing WPATH as “the leading international, interdisciplinary professional organization devoted to the understanding and treatment of gender identity disorders” and the SOC as “internationally accepted” by the medical community); Am. Psychological Ass'n, *Report of the APA Task Force Report on Gender Identity and Gender Variance* 32 (2009), <http://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf> (noting that the Standards of Care reflect “the consensus in expert opinion among professionals in this field on the basis of their collective clinical experience as well as a large body of outcome research”); Jason Rafferty, Am. Acad. of Pediatrics, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 4 Pediatrics 142 (Oct. 2018), <https://doi.org/10.1542/peds.2018-2162> (acknowledging that “[m]ost protocols for gender-affirming interventions incorporate World Professional Association of Transgender Health and Endocrine Society recommendations” and applying the SOC to recommendations and conclusions throughout).

<sup>4</sup> *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 595–96 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (“[W]e now have modern accepted treatment protocols for gender dysphoria. Developed by the World Professional Association for Transgender Health (WPATH), the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th Version 2012) (hereinafter “WPATH Standards of Care”) represent the consensus approach of the medical and mental health community, Br. of Medical Amici 13, and have been recognized by various courts, including this one, as the authoritative standards of care, *see De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013); *see also Edmo*, 935 F.3d at 769; *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1294 (N.D. Fla. 2018), *vacated sub nom. Keohane v. Fla. Dep't of Corrs. Sec'y*, 952 F.3d 1257 (11th Cir. 2020). “There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.” *Edmo*, 935 F.3d at 769 (quoting *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018)). *See also Monroe v. Jeffreys*, No. 3:18-CV-00156-NJR, (S.D. Ill. Aug. 9, 2021) (memorandum and order granting preliminary injunction) (acknowledging “[WPATH] Standards of Care for the treatment of gender dysphoria are the benchmark for appropriate care of individuals with this diagnosis.”); *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2021 WL 3292057, at \*4 (E.D. Ark. Aug. 2, 2021) (granting a preliminary injunction of an Arkansas law that sought to limit access to transgender-related health care in contravention of the WPATH Standards of Care, which are “widely accepted medical protocols for treatment of adolescent gender dysphoria”); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at \*11 (E.D. Mo. Feb. 9, 2018) (granting preliminary injunction to cease enforcement of a prison medical policy that contravened the WPATH Standards of Care).

<sup>5</sup> Statement of Interest of the United States, *Diamond v. Ward*, No. 5:20-cv-00453-MTT (M.D.Ga. April 22, 2021), [https://ccrjustice.org/sites/default/files/attach/2021/04/65\\_4-22-21\\_DOJ-SOI\\_w.pdf](https://ccrjustice.org/sites/default/files/attach/2021/04/65_4-22-21_DOJ-SOI_w.pdf); Statement of Interest of the United States, *Diamond v. Owens*, :15-cv-50-MTT-CHW (M.D.Ga. April 3, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/diamond\\_soi\\_4-3-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/diamond_soi_4-3-15.pdf).

universities, unions, the railroad industry,<sup>6</sup> and companies such as the U.S. Postal Service, GEICO, Adecco, and Allied Universal to remove transgender exclusions from their employee health plans. We have also worked directly with insurance companies, such as Aetna<sup>7</sup> and Blue Cross Blue Shield of North Carolina<sup>8</sup> to remove exclusions. When necessary, we have also succeeded in having employers remove such exclusions through litigation.<sup>9</sup>

The ACLU of Kansas is a non-profit organization dedicated to protecting the civil rights and civil liberties of all people living in Kansas. We work in the state legislature, the courts, and local communities to protect and strengthen rights inherent in the state and federal constitution and state and federal laws. In particular, the ACLU of Kansas works to protect the civil rights of segments of our population that have traditionally been marginalized, including transgender Kansans. When necessary, the ACLU of Kansas litigates to achieve its goals.

We write in the hope that these exclusionary criteria and exclusions are removed as amicably and promptly as possible, without the need for any of your members to obtain counsel.

## **BCBSKS' Policy Contains Unwarranted Barriers to Care**

The Policy explicitly deems a limited number of gender-affirming surgeries to be medically necessary when certain criteria are met. However, a number of those criteria have no basis in clinical practice or the WPATH SOC. The application of those criteria results in the denial of medically necessary care that should be covered under the terms of the plan. The fact that these criteria have no legitimate non-discriminatory basis also point to the fact that they are arbitrary, discriminatory barriers to gender-affirming care.

### ***Recommendations***

Specially, we request that the Policy eliminate the following criteria:

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<sup>6</sup> John Riley, *Railroad Employee Health Care Plans Agree to Drop Exclusions on Transgender Surgery*, METRO WEEKLY (Aug. 18, 2020), <https://www.metroweekly.com/2020/08/railroad-employee-health-care-plans-agree-to-drop-exclusions-on-transgender-surgery>.

<sup>7</sup> Reed Abelson, *Aetna Agrees to Expand Coverage for Gender-Affirming Surgeries*, NY TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/health/transgender-aetna-health-insurance.html>.

<sup>8</sup> TLDEF Advocacy Brings Changes to Blue Cross Blue Shield of NC Coverage of Gender-Affirming Health Care, July 13, 2021, <https://www.transgenderlegal.org/stay-informed/tldef-advocacy-brings-changes-to-blue-cross-blue-shield-of-nc-coverage-of-gender-affirming-health-care>; Maria Clark, *LGBTQ inclusive insurance protections expand in Blue Cross NC case*, CITIZEN TIMES, (July 29, 2021), <https://www.citizen-times.com/story/news/2021/07/29/gender-affirming-health-care-coverage-lgbtq-south-expanding-limited/7972289002>.

<sup>9</sup> Eric Sturgis, *UGA employee says settlement is step forward for transgender rights*, ATLANTA JOURNAL-CONSTITUTION, Oct. 1, 2019, <https://www.ajc.com/news/local-education/uga-employee-says-settlement-step-forward-for-transgender-rights/Rfq95Ylk4XmWrt2Idn5iNN> (noting the settlement included removal of the exclusion and \$100,000 in damages).

1. The requirement that the individual make “changes to their legal documents (eg, name, gender)”<sup>10</sup>
2. For mastectomy, the requirement for two referrals from qualified mental health professionals.
3. The requirement that an individual is at least age 18.
4. Requirements that exclude nonbinary individuals: “The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment.”

Additionally, we request that the Policy eliminate Section F, which categorically excludes a number of medically necessary procedures, including facial gender reassignment surgeries, hair transplantation, non-genial hair removal, penile prostheses, breast augmentation, body contouring, voice surgery, and voice therapy.<sup>11</sup>

### ***Identity document requirement***

The requirement that an individual undergo a legal name and gender change prior to surgery has no bearing on medical necessity and should be eliminated. The current WPATH SOC (SOC v.7) contain no such requirement and instead list “[c]hanges in name and gender marker on identity documents” as additional or alternative measures a patient may pursue to alleviate gender dysphoria.<sup>12</sup> This framework replaced the SOC v.6, which was published nearly two decades ago and also stopped short of a blanket legal name and gender change requirement, but instead incorporated “acquir[ing] a (legal) gender-identity-appropriate first name” as part of the “real-life experience” criteria.<sup>13</sup> The BCBSKS Policy’s mandate of a name and gender change is outdated and needs to be eliminated.

Whether a person has a gender atypical name has no bearing on whether they are an appropriate candidate for surgery. For many transgender individuals, it may be dangerous for them to have a legal name or gender change on their identity documents prior to undergoing surgery because it would publicize their transgender status while they may still be visibly transgender.<sup>14</sup> For example, for a transgender man who has not had a mastectomy, a driver’s license with a male

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<sup>10</sup> Policy at 2.

<sup>11</sup> Policy at 6-7.

<sup>12</sup> SOC v.7 at 10. Previous versions of the SOC were published in 1979, 1980, 1981, 1990, 1998, and 2001. The 2001 version of the SOC were known as The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, Sixth Version (SOC v.6).

<sup>13</sup> The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, Sixth Version (Feb. 2001), <https://www.cpath.ca/wp-content/uploads/2009/12/WPATHsocv6.pdf>.

<sup>14</sup> Additionally, in North Carolina, applicants wishing to change their names must first post a Notice of Intent to Change Name on the courthouse bulletin board for ten consecutive calendar days. N.C. Gen. Stat. § 101-2(a).

gender marker might unnecessarily publicize his transgender status. Moreover, in order to petition for a legal name change in Kansas, the petitioner may be required to publicize their request in a local newspaper for three consecutive weeks—potentially subjecting them to harassment due to publicizing their transgender status.<sup>15</sup>

Furthermore, atypical or gender-neutral names are common today (e.g., Kelly, Dana, Taylor, Charlie) and many individuals may be comfortable with their birth name. Indeed, courts have rejected the idea of “gender-appropriate” names.<sup>16</sup> In *Matter of Guido*, 771 N.Y.S.2d 789, 791 (N.Y.C. Civ. Ct. 2003), the court noted:

The law does not distinguish between masculine and feminine names, which are a matter of social tradition. Some names are traditionally associated with one gender; some with the other; some with either. And, as pointed out by Petitioner, the gender association of some names has changed over time. Apart from the prevention of fraud or interference with the rights of others, there is no reason—and no legal basis—for the courts to appoint themselves the guardians of orthodoxy in such matters.

Finally, a name change implicates the candidate’s personal matters, such as their relationship with their families and employers. It is thus inappropriate for a health insurer to make surgery contingent upon a gender stereotype of what someone’s name ought to be.

### ***Onerous referral-letter requirements***

The Policy requires for all procedures two letters from mental health professionals who have independently evaluated the individual, one of which must be from a psychiatrist or PhD-level clinical psychologist and one of which should be from “a professional with a master’s degree (e.g. L.C.S.W., M.S.W.) or higher.”<sup>17</sup> However, for non-genital/gonadal surgeries, the SOC do not require a letter from a psychiatrist or PhD-level clinical psychologist. Rather, the SOC require only a letter from a qualified mental health professional.<sup>18</sup> Moreover, the SOC only imposes a two-letter requirement for genital surgeries.<sup>19</sup> Accordingly, BCBSKS should eliminate

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<sup>15</sup> 60-1402, [https://www.ksrevisor.org/statutes/chapters/ch60/060\\_014\\_0002.html](https://www.ksrevisor.org/statutes/chapters/ch60/060_014_0002.html); 60-307(d), [https://www.ksrevisor.org/statutes/chapters/ch60/060\\_003\\_0007.html](https://www.ksrevisor.org/statutes/chapters/ch60/060_003_0007.html); Notice of Hearing by Publication, <https://www.kansasjudicialcouncil.org/sites/default/files/Notice%20of%20Hearing%20by%20Publication%20%2812-2010%29.pdf>

<sup>16</sup> See, e.g., *Matter of Guido*, 771 N.Y.S.2d 789, 791 (2003); *Matter of Winn-Ritzenberg*, 891 N.Y.S.2d 220, 221 (2009)

<sup>17</sup> Blue Cross Blue Shield of Kansas, *Medical Policy: Sex Reassignment Surgery* (March 18, 2021), [https://www.bcbsks.com/customerservice/providers/medicalpolicies/policies/policies/SexReassignmentSurgery\\_2021-03-18.pdf](https://www.bcbsks.com/customerservice/providers/medicalpolicies/policies/policies/SexReassignmentSurgery_2021-03-18.pdf).

<sup>18</sup> SOC v.7 at 27.

<sup>19</sup> SOC v.7 at 27 *Compare* “Two referrals—from qualified mental health professionals who have independently assessed the patient—are needed for genital surgery (i.e., hysterectomy/salpingo-oophorectomy, orchiectomy, genital reconstructive

the Policy's requirement of two letters for non-genital/gonadal surgeries and also its requirement that one letter be from a psychiatrist or PhD-level clinical psychologist.

### *Age restrictions*

The Policy's age 18 requirement for transgender-related surgeries deviates from SOC and clinical practice.<sup>20</sup> For mastectomies, WPATH has no minimum age requirement, and the SOC note that surgery "could be carried out earlier [than the legal age of majority], preferably after ample time of living in the desired gender role and after one year of testosterone treatment."<sup>21</sup>

Clinical practice does not impose a bright-line age threshold for surgeries, and medical professionals routinely perform such procedures on individuals under age 18.<sup>22</sup> What should control is the provider's assessment of whether the individual has gender dysphoria, is ready for treatment, and can provide informed consent—not the patient's chronological age.<sup>23</sup> This has been recognized by other insurers.<sup>24</sup> The criterion that "[t]he candidate is at least 18 years of age" can be replaced with "the member is of the age of majority to consent to medical treatments, or documented as an emancipated adolescent, or has documentation of consent from a parent or guardian."<sup>25</sup> That along with the Policy's other documentation requirements will

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surgeries)" with "One referral from a qualified mental health professional is needed for breast/chest surgery (e.g., mastectomy, chest reconstruction, or augmentation mammoplasty)." (emphasis added).

<sup>20</sup> Blue Cross Blue Shield of Kansas, *Medical Policy: Sex Reassignment Surgery* (March 18, 2021), [https://www.bcbks.com/customerservice/providers/medicalpolicies/policies/policies/SexReassignmentSurgery\\_2021-03-18.pdf](https://www.bcbks.com/customerservice/providers/medicalpolicies/policies/policies/SexReassignmentSurgery_2021-03-18.pdf).

<sup>21</sup> SOC v.7 at 21.

<sup>22</sup> "For the more complex surgery of vaginoplasty, over half of the surgeons practicing in this area have performed vaginoplasty on an individual under age 18. Nearly all surgeons relied on the term "maturity" rather than chronological age to determine patients' readiness for the procedure . . . Concerning the less controversial chest surgery, one study simply noted that patients who were 16 or older could be considered for virilizing mammoplasty." TLDEF, *Literature Review: Medical necessity of vaginoplasty to treat gender dysphoria in people under 18* at 20 (July 15, 2019), <https://transhealthproject.org/tools/medical-necessity-literature-reviews>.

<sup>23</sup> For an in-depth discussion on the medical necessity of top surgery in minors, see generally TLDEF, *Literature Review: Medical necessity of mastectomy and male chest reconstruction to treat gender dysphoria in people under 18* (June 17, 2020), <https://transhealthproject.org/tools/medical-necessity-literature-reviews>.

<sup>24</sup> TLDEF, *Health Insurance Medical Policies—Youth Services*, <https://transhealthproject.org/resources/health-insurance-medical-policies/views/youth-services>.

<sup>25</sup> See Paula Amato, "Fertility Options for Transgender Persons" in UCSF *Transgender Care Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People* (ed. Madeline B. Deutsch, June 17, 2016), <https://transcare.ucsf.edu/guidelines/fertility>. 34SOC 50-51 ("Health care professionals—including mental health professionals recommending hormone therapy or surgery, hormone-prescribing physicians, and surgeons—should discuss reproductive options with patients prior to initiation of these medical treatments for gender dysphoria.").



ensure that all appropriate candidates receive approval for surgery.

### *Nonbinary exclusionary language*

The Policy does not conform to the diagnostic criteria for gender dysphoria in the Diagnostic and Statistical Manual of Disorders, 5th Edition (DSM-5), which excludes nonbinary people from accessing care. The Policy requires patients to “desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment.” This contradicts the DSM-5’s statement that people with gender dysphoria may desire to be rid of “primary **and/or** secondary sex characteristics.”<sup>26</sup> Transgender people need not desire to undergo all possible medical treatments in order to qualify for medical intervention under the DSM-5 and WPATH criteria. Additionally, the DSM-5 does not require that people desire to live as “the opposite sex.” Rather, the DSM-5 explicitly includes the “desire to be of the other gender (or some alternative gender different from one’s assigned gender).”<sup>27</sup> Aetna’s policy offers an example of how to cite DSM-5 and SOC criteria without imposing additional limiting criteria.<sup>28</sup>

### *Categorical exclusions*

BCBSKS’ categorical exclusions also conflict with the current edition of the WPATH SOC.<sup>29</sup> WPATH maintains a list of procedures that, based on the SOC, should be covered by health plans as medically necessary treatments for gender dysphoria.<sup>30</sup> The WPATH list includes hair removal, hair grafts, voice therapy, voice surgery, facial surgeries, penile prostheses, breast augmentation, and body contouring (e.g. lipofilling, buttocks implants, pectoral implants, and calf implants).

The Policy, in contrast, categorically excludes all of these procedures for transgender individuals by deeming them “cosmetic.”<sup>31</sup> This contradicts WPATH’s specific recommendations that all of

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<sup>26</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Disorders*, 5th Edition, 452 (2013).

<sup>27</sup> *Id.*

<sup>28</sup> Aetna, Clinical Policy Bulletin 0615: Gender Affirming Surgery (Jan. 12, 2021), [http://www.aetna.com/cpb/medical/data/600\\_699/0615.html](http://www.aetna.com/cpb/medical/data/600_699/0615.html).

<sup>29</sup> World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th Ed.), [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English2012.pdf?t=1613669341](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?t=1613669341).

<sup>30</sup> World Professional Association for Transgender Health, *Transgender Medical Benefits* (June 28, 2018), [https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/6\\_June/Transgender%20Medical%20Benefits.pdf](https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/6_June/Transgender%20Medical%20Benefits.pdf). [https://perma.cc/YV6B-W5RD].

<sup>31</sup> Policy 6-7. “The following procedures are considered cosmetic and noncovered when used to improve the gender specific appearance of an individual who has undergone or is planning to undergo sex reassignment surgery, including, but not limited to, the following:

those procedures should be covered under insurance because they are medically necessary.<sup>32</sup> An increasing number of insurance companies explicitly cover these procedures.<sup>33</sup> WPATH urges the elimination of transgender exclusions from health insurance policy documents in recognition that transgender health care is medically necessary.<sup>34</sup>

## **The Policy Contravenes Kansas Law & Section 1557 of the Patient Protection & Affordable Care Act**

### ***The Policy Constitutes Unfair Discrimination in Violation of K.S.A. 40-2404(7)***

BCBSKS' policy also violates K.S.A. 40-2404(7), a Kansas law which prohibits unfair discrimination in the insurance industry. Specifically, K.S.A. 40-2404(7) proscribes “any unfair discrimination” in health insurance benefits “between individuals of the same class and of essentially the same hazard.”<sup>35</sup> The Kansas Department of Insurance has interpreted this

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1. Abdominoplasty
  2. Blepharoplasty, Blepharoptosis, Brow lift
  3. Breast augmentation, Breast implants, Mastopexy, Pectoral implants
  4. Calf implants
  5. Chin augmentation reshaping or enhancing the size of the chin, Genioplasty, Chin implants, Mentoplasty
  6. Face lift (rhytidectomy), Facial implants, Facial bone reconstruction
  7. Gluteal augmentation
  8. Hair removal, Electrolysis, Hairplasty, Hair transplantation
  9. Jaw reduction (jaw contouring), Jaw sculpturing
  10. Lip reduction, Lip enhancement, Lipofilling, Lip collagen injections
  11. Liposuction, Lipoplasty
  12. Penile implant, penile prosthesis
  13. Removal of redundant skin
  14. Rhinoplasty, Nose implants
  15. Thyroid cartilage reduction, Chondroplasty, Chondrolaryngoplasty, Tracheal shave
  16. Voice modification surgery, Cricothyroid approximation, Laryngoplasty (for the purposes of voice modification)
  17. Voice therapy
  18. Reversal or revision of any aspect of gender reassignment surgery”

<sup>32</sup> WPATH, *Transgender Medical Benefits* (2018),

[https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/6\\_June/Transgender%20Medical%20Benefits.pdf](https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/6_June/Transgender%20Medical%20Benefits.pdf)

; See also TLDEF, Literature Review: *Medical necessity of facial gender reassignment surgery for transgender women* at 7–8 (Sept. 10, 2020) <https://transhealthproject.org/tools/medical-necessity-literature-reviews>.

<sup>33</sup> TLDEF, *Health Insurance Medical Policies – Facial Reconstruction*, <https://transhealthproject.org/resources/health-insurance-medical-policies/views/facial-reconstruction>.

<sup>34</sup> WPATH, Policy Statements: *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* (Dec. 21, 2016) <https://www.wpath.org/newsroom/medical-necessity-statement> (“The WPATH Board of Directors urges health insurance carriers and healthcare providers in the United States to eliminate transgender or transsexual exclusions from their policy documents and medical guidelines.”).

<sup>35</sup> K.S.A. 40-2404(7),

[http://www.kslegislature.org/li/b2021\\_22/statute/040\\_000\\_0000\\_chapter/040\\_024\\_0000\\_article/040\\_024\\_0004\\_section/040\\_024\\_0004\\_k/](http://www.kslegislature.org/li/b2021_22/statute/040_000_0000_chapter/040_024_0000_article/040_024_0004_section/040_024_0004_k/) (“The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance...Making or permitting any unfair discrimination between individuals of the same



language to “preclude discrimination amongst illnesses.” XXI Kan. Op. Att’y Gen. 24 (1987). In regulations implementing K.S.A. 40-2404(7), the Department of Insurance has stated that, “An insurance policy...shall not be delivered or issued for delivery in this state if the amount of benefits payable, or a term, condition, or type of coverage is...restricted, modified, excluded, or reduced on the basis of the sex...of the insured.”<sup>36</sup> Examples of prohibited insurance practices include “denying members of one sex insurance benefits that are offered to members of the other sex” or “establishing different conditions by sex under which the policyholder may exercise benefit options contained in the contract.”<sup>37</sup>

By requiring transgender patients—and only transgender patients—to change their legal documents before undergoing surgery, BCBSKS is unlawfully restricting the type of coverage available to transgender patients on the basis of their sex and their transgender status. For example, a transgender man would have to change his legal documents in order to obtain coverage for a bilateral mastectomy. However, a cisgender woman with a BRCA1 or BRCA2 variant seeking to obtain a bilateral mastectomy to reduce her risk of breast cancer would face no such requirement.<sup>38</sup> Similarly, a cisgender man injured in a car accident might obtain coverage for a phalloplasty if that surgery were deemed medically necessary. However, transgender man seeking that same medically necessary procedure for gender dysphoria would need to take the extra, unnecessary step of changing his identity documents. Establishing different conditions under which a policyholder may exercise benefit options based on their transgender status and their sex assigned at birth constitutes unfair discrimination in violation of K.S.A. 40-2404(7).

BCBSKS’ categorical exclusion for certain procedures like breast augmentation for transgender patients also violates K.S.A. 40-2404(7) by excluding benefits on the basis of the patient’s sex assigned at birth. For example, under BCBSKS’ current policy, a transgender woman could not obtain coverage for breast augmentation or breast implants, but a cisgender woman who’d had a mastectomy as part of her breast cancer treatment could.<sup>39</sup> Denying insurance benefits to some women while offering them to other women purely on the basis of sex assigned at birth is a clear

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class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.”)

<sup>36</sup> 40-1-31 Insurance policies; prohibiting certain discriminations.  
<https://insurance.ks.gov/documents/department/regulations-adopted/article-1/40-1-31.pdf>

<sup>37</sup> Bulletin 1977-3, 1977 WL 363841 (KS INS BUL), 1-2.

<sup>38</sup> Medical Policy: Risk-Reducing Mastectomy, April 19, 2021,  
[https://www.bcbsks.com/CustomerService/Providers/MedicalPolicies/policies/policies/Risk-ReducingMastectomy\\_2021-04-19.pdf](https://www.bcbsks.com/CustomerService/Providers/MedicalPolicies/policies/policies/Risk-ReducingMastectomy_2021-04-19.pdf)

<sup>39</sup> Medical Policy: Breast Reconstructive Surgery After Mastectomy, March 18, 2021,  
[https://www.bcbsks.com/CustomerService/Providers/MedicalPolicies/policies/policies/BreastReconstructiveSurgeryAfterMastectomy\\_2021-03-18.pdf](https://www.bcbsks.com/CustomerService/Providers/MedicalPolicies/policies/policies/BreastReconstructiveSurgeryAfterMastectomy_2021-03-18.pdf)

example of sex discrimination in violation of K.S.A. 40-2404(7).

### ***The Policy Violates Section 1557 of the Affordable Care Act***

Section 1557 of the Patient Protection and Affordable Care Act (“ACA”) stipulates that no individual shall on the basis of sex or disability “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance.”<sup>40</sup> Third party administrators of health insurance plans can be held liable for discriminatory exclusions under Section 1557.<sup>41</sup> As a “covered entity”<sup>42</sup> subject to Section 1557, BCBSKS may not discriminate on the basis of sex or disability in the administration of health benefits.<sup>43</sup> However, BCBSKS’ Policy discriminates against transgender patients on the basis of both sex and disability in violation of Section 1557.

Section 1557 incorporates Title IX to prohibit discrimination based on sex in healthcare.<sup>44</sup> Under Title IX, courts have consistently recognized that discrimination based on transgender status constitutes sex discrimination.<sup>45</sup> That interpretation is in line with the Supreme Court’s decision in *Bostock v. Clayton County*, finding that, “[i]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”<sup>46</sup> A growing

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<sup>40</sup> 42 U.S.C.A. § 18116 (West). See also *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 955 (9th Cir. 2020) (“Section 1557 is an affirmative obligation not to discriminate in the provision of health care...”)

<sup>41</sup> See *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (“Nothing in Section 1557, explicitly or implicitly, suggests that [third party administrators] are exempt from the statute’s nondiscrimination requirements. Accordingly, the Court concludes that HealthPartners may be held liable under Section 1557”); *C.P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at \*5 (W.D. Wash. May 4, 2021) (“(1) BCBS is a healthcare provider that receives federal financial assistance; (2) Plaintiffs were denied healthcare coverage and discriminated against; and (3) the latter occurred because of sex. Plaintiffs provide enough factual support to make these allegations plausible, and therefore, properly state a claim of sex discrimination under Section 1557.”)

<sup>42</sup> Section 1557: Frequently Asked Questions, U.S. Department of Health and Human Services, [https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html#\\_ftnt29](https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html#_ftnt29) (“covered entities include entities that provide or administer health insurance or other health coverage.”)

<sup>43</sup> See 42 U.S.C. § 18116(a).

<sup>44</sup> 42 U.S.C. § 18116(a); see *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 955 (9th Cir. 2020).

<sup>45</sup> See e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021) (denying a transgender student the use of a restroom corresponding with his gender violated Title IX); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–47 (7th Cir. 2017) (holding that Title IX prohibits treating transgender students differently from non-transgender students), *cert. dismissed sub nom.*; *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. Nov. 22, 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t. of Educ.*, 208 F. Supp. 3d 850, 856-58 (S.D. Ohio 2016), *stay pending appeal denied sub nom.*; *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016).

<sup>46</sup> *Bostock v. Clayton Cnty*, U.S. 140 S. Ct. 1731, 1741; see also *C.P. by & through Pritchard v. Blue Cross Blue Shield of*

number of courts have recognized that discrimination against transgender patients can constitute sex discrimination in violation of Section 1557<sup>47</sup>—including in the context of insurance exclusions.<sup>48</sup> Moreover, regulations do not displace Section 1557’s proscription of discrimination against transgender people. Instead, the “conclusion that Section 1557 prohibits discrimination based on gender identity relies solely on the plain, unambiguous language of the statute.”<sup>49</sup>

BCBSKS’ policy subjects transgender patients—and only transgender patients—to the requirement that they must change their legal documents in order to access medical care prescribed by their doctor. Likewise, BCBSKS’ blanket exclusions for certain procedures denies medically necessary care to transgender patients for no other reason than their transgender status.<sup>50</sup> Both these policies discriminate against transgender patients based on their sex.

In addition to prohibiting sex discrimination, Section 1557 also incorporates Section 504 of the Rehabilitation Act to prohibit healthcare discrimination based on disability.<sup>51</sup> Gender dysphoria

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*Illinois*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at \*4 (W.D. Wash. May 4, 2021).

<sup>47</sup> *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. Sept. 27, 2017) (“Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections.”); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at \*10 (D. Minn. Mar. 16, 2015) (“the Court finds the OCR’s interpretation of Section 1557 persuasively concludes that Section 1557 protects plaintiffs, like Rumble, who allege discrimination based on ‘gender identity.’”)

<sup>48</sup> *C.P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at \*1 (W.D. Wash. May 4, 2021) (Finding that a plaintiff who alleges that he was denied insurance coverage because he is transgender states a claim for sex discrimination under § 1557.); *Kadel v. Folwell*, 446 F. Supp. 3d 1, 14 (M.D.N.C. Mar. 11, 2020) (rejecting a motion to dismiss a claim against the North Carolina state employee health plan under § 1557 and Title IX under a *Price Waterhouse* sex-stereotyping theory and also because the exclusion discriminates on the basis of sex assigned at birth.); *Flack v. Wisconsin Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1015 (W.D. Wis. 2019) (finding a transgender exclusion in Medicaid discriminates on the basis of sex under § 1557 as detailed in *Flack*, 328 F. Supp. 3d at 951); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wisc. 2018) (applying § 1557 to Wisconsin state employee health plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (holding that employer and third-party administrator may be held liable under § 1557 for administering a plan containing an exclusion for “gender reassignment” treatment); *Cruz v. Zucker*, 116 F. Supp. 3d 334, 348 (S.D.N.Y. 2015) (entertaining a § 1557 sex discrimination claim for transgender people under Medicaid).

<sup>49</sup> *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 957 (D. Minn. 2018); see also *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1105 (S.D. Cal. 2017) (“the ACA claim and the Court’s decision under the ACA do not depend on the enforcement or constitutionality of the HHS’s regulation.”); *Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at \*4 (W.D. Wash. May 4, 2021) (finding that a transgender exclusion can give rise to a claim because a “claim of discrimination in violation of Section 1557 does not depend on an HHS rule.”)

<sup>50</sup> Medical Policy: Breast Reconstructive Surgery After Mastectomy, March 18, 2021, [https://www.bcbsks.com/CustomerService/Providers/MedicalPolicies/policies/policies/BreastReconstructiveSurgeryAfterMastectomy\\_2021-03-18.pdf](https://www.bcbsks.com/CustomerService/Providers/MedicalPolicies/policies/policies/BreastReconstructiveSurgeryAfterMastectomy_2021-03-18.pdf)

<sup>51</sup> 42 U.S.C. § 18116(a); see also *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020), cert. granted in part, No. 20-1374, 2021 WL 2742790 (U.S. July 2, 2021).

is a disability under Section 504<sup>52</sup> and the Americans with Disabilities Act (“ADA”).<sup>53</sup> (The Rehabilitation Act and the ADA define disability in essentially the same terms.<sup>54</sup>) In *Henderson v. Bodine Aluminum*, the court found that health insurance plans that deny treatment for one condition but cover the same treatment for a different, comparable condition can violate the ADA.<sup>55</sup>

BCBSKS’ plan is comparable to the plan in *Henderson* in that its blanket exclusions for certain medically necessary procedures like breast augmentation deny treatment for patients with gender dysphoria but cover the same treatment for cisgender patients who’ve undergone breast cancer treatment—even though the complication rates for transgender and cisgender patients are comparable.<sup>56</sup> By denying certain medically necessary treatments to transgender patients and

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<sup>52</sup> *Doe v. Hosp. of Univ. of Pennsylvania*, 2021 WL 2661501, at \*10 (allowing a gender dysphoria claim to proceed under Section 504 of the Rehabilitation Act); *Shorter v. Barr*, No. 4:19-cv-108-WS/CAS, 2020 WL 1942785, at \*10 (N.D. Fla. Mar. 13, 2020), *report and recommendation adopted*, No. 4:19-cv-108-WS/CAS, 2020 WL 1942300 (N.D. Fla. Apr. 22, 2020) (denying “Defendant Barr’s motion to dismiss the Rehabilitation Act claim on the basis of the Act’s exclusion of ‘gender identity disorder not resulting from physical impairments.’”); *Iglesias v. True*, 403 F. Supp. 3d 680, 687 (S.D. Ill. 2019) (allowing a pro se incarcerated transgender woman’s Rehabilitation Act claim to proceed); *Cf. Darin B. v. McGettigan*, E.E.O.C. App. No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017) (establishing that a claim may proceed under Section 501 of the Rehabilitation Act where a transgender man was denied nipple reconstruction under his federal employee health plan).

<sup>53</sup> *Lange*, 499 F. Supp. 3d at 1270 (rejecting a motion to dismiss that argued gender dysphoria is not a disability under the ADA); *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822-JFL, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017) (gender dysphoria resulting in substantial limits on major life activities is encompassed within the protections of the ADA, and does not fall within the exemption under 42 U.S.C. § 12211(b) regarding the now-deprecated diagnosis of “gender identity disorder”); *Tay v. Dennison*, No. 19-CV-00501-NJR, 2020 WL 2100761, at \*3 (S.D. Ill. May 1, 2020) (allowing incarcerated transgender woman’s ADA failure to accommodate claim to proceed); *Doe v. Mass. Dep’t of Correction*, No. 1:17-cv-12255-RGS, 2018 WL 2994403, at \*6-8 (D. Mass. June 14, 2018) (drawing a distinction between gender identity disorder and gender dysphoria and suggesting that there may be a physical etiology underlying gender dysphoria sufficient to take it out of “not resulting from physical impairments” category); *Edmo v. Idaho Dep’t of Correction*, No. 1:17-CV-00151-BLW, 2018 WL 2745898, at \*8 (D. Idaho June 7, 2018) (declining to dismiss Title II claim because whether plaintiff’s; *Doe v. Hosp. of Univ. of Pennsylvania*, No. CV 19-2881-KSM, 2021 WL 2661501, at \*10 (E.D. Pa. June 29, 2021) (allowing a gender dysphoria claim to proceed under Title I and Title III).

<sup>54</sup> *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998) (“The ADA defines disability in essentially the same terms as the Rehabilitation Act...[T]he legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference when interpreting the ADA.”). *See also T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty., Fla.*, 610 F.3d 588, 604 (11th Cir. 2010) (“This Court ‘rel[ies] on cases construing [the Rehabilitation Act and the ADA] interchangeably’ because ‘the same standards govern discrimination claims’ under both statutes”); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 208 (3d Cir. 2009) (“The standards for determining whether a covered employer has violated § 794(d) [of the Rehabilitation Act] have been coextensive with the standards for determining whether a covered employer has violated the ADA...”)

<sup>55</sup> *See Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960–61 (8th Cir. 1995) (granting preliminary injunction to provide coverage for a certain cancer treatment because “denial of that treatment arguably violates the ADA” where “the plan provides the treatment for other conditions directly comparable to the one at issue”).

<sup>56</sup> Bekeny JC, Zolper EG, Fan KL, Del Corral G. Breast augmentation for transfeminine patients: methods, complications, and outcomes. *Gland Surg.* 2020;9(3):788-796. doi:10.21037/gs.2020.03.18; Cuccolo NG, Kang CO, Boskey ER, et al. Epidemiologic Characteristics and Postoperative Complications following Augmentation Mammoplasty: Comparison of

requiring them to change their legal documents before undergoing gender-affirming surgery, BCBSKS' Policy discriminates against them on the basis of their gender dysphoria in violation of Section 1557's prohibition on disability discrimination.

## The Policy is Out of Step with BCBSKS's Values

Including comprehensive transgender-related health care aligns with BCBSKS' policies and values and would strengthen BCBSKS' commitment to nondiscrimination, inclusion, and diversity.<sup>57</sup>

Blanket exclusions for transgender-related health care single out transgender members and provide them with unequal treatment options. They also stigmatize transgender members and create unnecessary barriers to care for an already marginalized population. This is in conflict with BCBSKS' public dedication to treating customers equally without regard to sex or disability.<sup>58</sup> BCBSKS pledged to be “an organization where diversity and inclusion are institutionalized and integrated into how we go about our daily business in a manner that: recognize[s] the differences and similarities in each of us; invests in our strengths; maximizes our individual and collective potential.”<sup>59</sup> BCBSKS affirms this commitment in all aspects of the company, including its hiring practices, maintaining explicit protections for gender identity in its Equal Employment Opportunity policy.<sup>60</sup> BCBSKS also promotes diversity in its supply chain by boosting opportunities for small, minority-owned and women-owned businesses through its Small and Disadvantaged Business (SADBUS) program.<sup>61</sup>

Most importantly, BCBSKS is committed to “providing affordable healthcare access to those who need it most.”<sup>62</sup> Transgender Kansans most certainly match that description. An estimated 31 percent of transgender Americans lack regular access to health care.<sup>63</sup> In 2020, over half of

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Transgender and Cisgender Females. *Plast Reconstr Surg Glob Open*. 2019;7(10):e2461. Published 2019 Oct 29. doi:10.1097/GOX.0000000000002461.

<sup>57</sup> BCBSKS, *Careers*, <https://www.bcbsks.com/AboutUs/Careers/> (“As one of the largest employers in Kansas, we are committed to ensuring our company is a place of inclusion and diversity. At BCBSKS, each of us contributes to inclusion; we can grow and progress better together with a diverse team of employees.”)

<sup>58</sup> BCBSKS, *Meaningful Access* (2019), [https://www.bcbsks.com/CustomerService/Forms/pdf/29-100\\_meaningful-access.pdf](https://www.bcbsks.com/CustomerService/Forms/pdf/29-100_meaningful-access.pdf).

<sup>59</sup> *Careers*, <https://www.bluekc.com/consumer/blue-kc/careers.html>

<sup>60</sup> *Benefits of Blue*, <https://www.bcbsks.com/AboutUs/Careers/benefits-of-blue.shtml>

<sup>61</sup> *Supplier Info*, <https://www.bcbsks.com/AboutUs/SupplierInfo/>

<sup>62</sup> *Make A Career Move That Can Make A Difference*, <https://www.bluekc.com/consumer/blue-kc/careers.html>

<sup>63</sup> Neda Ulaby, "Health Care System Fails Many Transgender Americans," NPR, November 21, 2017, <https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans>

transgender adults avoided needed medical care due to cost and nearly a quarter for fear of discrimination.<sup>64</sup> More than twenty-five percent of transgender Kansans reported facing serious barriers to health because of being transgender, including being denied insurance coverage or mistreated, and thirty-eight percent had delayed needed health care in the past year because they could not afford it.<sup>65</sup>

It is in light of BCBSKS' values that we are reaching out to provide you with the opportunity to take action to remedy the fact that plan members are not being treated equally simply due to their status as transgender.

## Conclusion

Removing the exclusionary policies detailed above not only ensures that BCBSKS does not face legal liability, but it is also the right thing to do and would be a clear statement of BCBSKS' commitments to equity and fairness.

We welcome any questions, and we are happy to provide further guidance and resources regarding the above recommendations. Given that BCBSKS members are currently being denied coverage, we ask that you reach out to us by **September 13, 2021**, to discuss these issues. Please contact TLDEF at [ecukor@transgenderlegal.org](mailto:ecukor@transgenderlegal.org) or (646) 993-1676 or ACLU of Kansas at [sbrett@aclukansas.org](mailto:sbrett@aclukansas.org) to discuss. We look forward to hearing from you and working with BCBSKS to resolve these issues as quickly and amicably as possible.

Very truly yours,



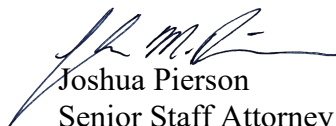
David Brown  
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Joshua Pierson  
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<sup>64</sup> Caroline Medina & Thee Santos et al., *Protecting and Advancing Health Care for Transgender Adult Communities*, Center for American Progress, 17 (2021), [https://cdn.americanprogress.org/content/uploads/2021/08/16055541/Advancing-Health-Care-For-Transgender-Adults.pdf?\\_ga=2.180782631.182294177.1629741139-604325153.1628862112](https://cdn.americanprogress.org/content/uploads/2021/08/16055541/Advancing-Health-Care-For-Transgender-Adults.pdf?_ga=2.180782631.182294177.1629741139-604325153.1628862112).

<sup>65</sup> *Id.*