



June 21, 2018

Mario Schlosser
Chief Executive Officer, Oscar Health Agency, Inc.
295 Lafayette Street
New York, NY 10012

Dear Mario Schlosser:

On behalf of the undersigned organizations that represent or are concerned about millions of lesbian, gay, bisexual, and transgender (LGBT) people nationwide, we are deeply concerned about Oscar Health Agency, Inc.'s ("Oscar's") recent comments and practices related to providing medically necessary health care services to all of its members on an equal basis. We request that Oscar immediately amend its plans and policies—in all states—by eliminating discriminatory exclusions that target transgender people and the health care they need. We are particularly troubled that Oscar—a company that appears to cater to the millennial generation and brands itself as “a new kind of health insurance company”—would adopt such discriminatory practices.

In recent comments to CNN in a May 31 article titled *“To be herself, she needs to change her body. But first, comes the battle with insurers,”* Oscar General Counsel Bruce Gottlieb defended Oscar's blanket exclusions for coverage of transition-related care in multiple states. The comments signal a fundamental misunderstanding of issuers' legal obligations under the Affordable Care Act (“ACA”) and a disregard for federal law. The purpose of this letter is to clarify Oscar's obligations under federal law to provide coverage for medically necessary procedures in a manner that does not discriminate against transgender enrollees.

Oscar expressly recognizes that discrimination is against the law and claims to be a health insurer that does not illegally discriminate against people.ⁱ However, by having blanket exclusions of transition-related care without evaluating medical necessity, Oscar is illegally discriminating against transgender people. Oscar is specifically targeting care for transgender people by maintaining these blanket exclusions, in violation of the ACA's non-discrimination provisions (“Health Care Rights Law” or “Section 1557”). For example, Oscar's 2018 individual market policies in both Ohio and Tennessee include this exclusion:

“No coverage is available under this Policy for those procedures, equipment, services, supplies, or charges: ... Services and supplies related to sex transformation and/or the reversal thereof, or male or female sexual or erectile dysfunctions or inadequacies, regardless of origin or cause. This Exclusion includes sexual therapy and counseling. This exclusion also includes penile prostheses or implants and vascular or artificial reconstruction, Prescription Drugs, and all other procedures and equipment developed for or used in the treatment of impotency, and all related Diagnostic Testing.”ⁱⁱ

Exclusions like these are the very definition of discrimination, as they categorically deny coverage for medically necessary care that transgender people need, while often covering those same procedures for non-transgender people. Such exclusions fly in the face of medical and scientific consensus and are not based on professional standards of medical care. These exclusions are illegal, discriminatory, and bad business practice. They also prevent transgender people from accessing the life-saving care they need.

Transition-related care is medically necessary

The medical and scientific communities overwhelmingly recognize a person's innate experience of gender as an inherent aspect of the human experience for all people, including transgender people.ⁱⁱⁱ Many, though not all, transgender people experience a medical condition known as gender dysphoria. Gender dysphoria is a serious medical condition that is codified in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM 5), which defines it as clinically significant distress or impairment related to an incongruence between one's experienced gender and the gender one was thought to be at birth.^{iv}

It is the overwhelming consensus among medical experts that transition-related treatments, including hormone treatments and surgical procedures, are medically necessary, effective, and safe when clinically indicated to alleviate gender dysphoria.^v According to the American Medical Association (AMA), untreated gender dysphoria "can result in clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death."^{vi} When Oscar illegally excludes transition-related care, similar to if the company were to illegally decide to exclude coverage for other diagnoses, lives are at stake.

Federal law requires that Oscar provide transition-related care when medically necessary

Oscar's exclusions of transition-related care constitute impermissible and arbitrary sex discrimination against transgender people and are against federal law. Section 1557 of the ACA prohibits discrimination on the basis of sex, including discrimination based on transgender status, in federally funded health care programs. Section 1557 expressly applies to insurers that offer marketplace coverage and receive federal premium tax credits, such as Oscar.

Health insurance plans subject to Section 1557 may not categorically exclude care related to gender transition.^{vii} Even in the absence of a blanket exclusion of transition-related care, exclusions of other specific services may constitute illegal discrimination. This includes policies that deny coverage for services used in the treatment of gender dysphoria when similar services are covered for the purpose of treating other conditions.

Courts presented with the question of whether Section 1557's sex discrimination prohibition specifically covered anti-transgender discrimination have firmly ruled that it does.^{viii} And over the past twenty years, federal courts overwhelmingly have held that anti-transgender bias violates the prohibition on sex discrimination under federal laws like Title VII, Title IX, and Section 1557.^{ix}

State essential health benefits benchmark plans do not offer a "safe harbor" for insurers that discriminate based on gender identity.

We are particularly troubled by Mr. Gottlieb's inaccurate statement of the law regarding issuers' obligation to cover the ACA's essential health benefits (EHB) package as a defense for discrimination. Federal regulations make it clear that insurers must still comply with federal nondiscrimination

standards—including Section 1557 as well as other qualified health plan (QHP) regulations—regardless of whether a state’s EHB-benchmark plan includes discriminatory benefit design or not.

Under the ACA, insurers that offer individual and small group coverage must cover a minimum set of 10 EHBs, including hospitalization, preventive care, prescription drug coverage, and mental health care. In defining EHB, federal regulators allowed each state to select an EHB-benchmark plan to serve as a reference plan for designing benefits for ACA-compliant plans.

A state’s EHB-benchmark plan decision notwithstanding, QHP issuers are prohibited from explicitly adopting benefit designs that discriminate on the basis of gender identity (as well as race, color, national origin, disability, age, sex, and sexual orientation).^x Federal regulations also state that an issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual’s present or predicted disability, degree of medical dependency, quality of life, or other health conditions.^{xi} Plans with continued transgender exclusions likely violate these long-standing federal regulations.

Further, the U.S. Department of Health and Human Services (HHS) has explicitly stated that nondiscrimination requirements supersede any discriminatory benefit design in a state’s EHB-benchmark plan.^{xii} As HHS put it in its final rule on EHBs from 2013, “[t]o the extent that a state benchmark plan includes a discriminatory benefit design, non-discrimination regulations at § 156.110(d) and § 156.125 require issuers to meet the benchmark requirements in a nondiscriminatory manner.”^{xiii}

These regulations, in addition to Section 1557 of the ACA, make clear that Oscar cannot include transgender exclusions simply because of a state’s selection of an EHB-benchmark plan. But *even if* these benchmark plans contain transgender exclusions, we are disappointed that Oscar would choose to cover life-saving care for transgender people only when it is explicitly mandated by a state’s EHB-benchmark plan, instead of based on best medical evidence and need.

Oscar is one of few health insurers to keep illegal discrimination in its business model

Most health insurers have removed blanket exclusions for transition-related care. In November 2017, Out2Enroll collected and analyzed 548 silver marketplace plan options from 71 insurers in 18 states.^{xiv} Of those 71 insurers, 90% did not include transgender-specific exclusions.^{xv} Only plans from five insurers included discriminatory transgender exclusions. Oscar was one of these insurers, including transgender exclusions in its plans in Ohio and Tennessee. In fact, in Ohio and Tennessee *all other* plans analyzed *except* Oscar covered transition-related care.

This practice is difficult to understand when Oscar *does* cover transition-related care in other states where it offers marketplace coverage, such as California. Oscar clearly sees the value of offering medically necessary health care to transgender people in some states, but not others. Instead of being a leader in this area and delivering on its tagline of “a new kind of health insurance company,” Oscar’s continued use of outdated and discriminatory transgender exclusions makes it an outlier—in a negative way.

Oscar’s decision to continue discriminatory transgender-specific exclusions in some of its individual market plans places it in the small minority of health insurers who are refusing to follow the law. Providing insurance coverage for medically necessary transition-related care does not lead to “adverse selection” in insurance markets, as claimed by Oscar, but rather has become

standard practice. We encourage Oscar to comply with federal law and, like the vast majority of insurers who are subject to the ACA, eliminate its use of discriminatory blanket exclusions for transition-related care.

Conclusion

Claiming on a website and in the news that Oscar does not discriminate against people does not make it so. By maintaining blanket exclusions for transition-related care (even if only in some states but not others), Oscar is treating transgender beneficiaries in a discriminatory manner and is in direct violation of its obligations under federal law. Most health insurance plans across the country have removed these unlawful exclusions and worked to fairly treat and serve their transgender enrollees. We strongly encourage Oscar to do the same to ensure compliance with the law and fair treatment for all consumers and their families.

Sincerely,

[UNDERSIGNED ORGANIZATIONS]

ⁱ “Oscar complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex. Oscar does not exclude people or treat them differently because of race, color, national origin, age, disability, or sex.” *Notice of Non-Discrimination: Discrimination is Against the Law*, Oscar Health Agency, Inc., available at <https://www.hioscar.com/legal/non-discrimination/>.

ⁱⁱ See, e.g., Oscar 2018 Tennessee Individual On-Exchange Policy, 88 (last accessed June 11, 2018), available at: https://assets.contentful.com/plyq12u1bv8a/4ArrFEGiuIg8SQy2ao8Suo/a1cc4822ed3d785868a60ed1b8be6ef8/2018_IND_OnEx_TN_EOC_2017-11-10_clean.pdf; Oscar 2018 Ohio Individual On-Exchange Policy, 96 (last accessed June 11, 2018), available at: https://assets.ctfassets.net/plyq12u1bv8a/5v4XP7xBMAMUU8i0a4iSGi/91412aa5cd2ed4863f893409ebf5a839/2018_IND_OnEx_OH_EOC_2017-11-09.pdf.

ⁱⁱⁱ See, e.g., Am. Psychological Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AMERICAN PSYCHOLOGIST 832, 834-35 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>; Brief of American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *G. G. v. Gloucester County Sch. Bd.*, No. 16-274 8–9 (Sup. Ct. filed March 2, 2017) (affirming that “[e]veryone—whether they are transgender or cisgender—develops awareness of their gender identity along a ‘pathway’” with typical stages and that transgender identity is a normal variation of this development); Human Rights Campaign, Am. Acad. of Pediatrics, & Am. College of Osteopathic Pediatricians, *Supporting & Caring for Transgender Children* (2016), <https://assets2.hrc.org/files/documents/SupportingCaringforTransChildren.pdf>; World Prof. Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 16 (7th ed. 2011), <https://www.wpath.org/publications/soc>.

^{iv} Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th ed. 2013).

^v *Id.* at 451.

^{vi} Am. Med. Ass’n House of Delegates, *Removing Financial Barriers to Care for Transgender Patients* (2008).

^{vii} *Cruz v. Zucker*, 195 F.Supp.3d at 581 (interpreting the statute); 45 C.F.R. § 92.4

^{viii} E.g., *Rumble v. Fairview Health Servs.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding that discrimination on the basis of gender identity is sex discrimination under Section 1557 of the Affordable Care Act); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017) (implicitly assuming that discrimination claims on the basis of transgender status are permitted under Section 1557 of the Affordable Care Act); *Boyden v. Conlin*, 2018 WL 2191733 (W.D. Wis. May 11, 2018) (implicitly assuming that discrimination claims on the basis of transgender status are permitted under Section 1557 of the Affordable Care Act).

^{ix} See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (sex discrimination under Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX); *Evancho v. Pine-Richland Sch. Dist.*, --- F.Supp.3d ---, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017) (Equal Protection Clause); *Mickens v. Gen. Elec. Co.*, No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (Title VII); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) (Title IX); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850 (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) (Title IX, Equal Protection Clause); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016) (Title VII); *U.S. v. S.E. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (Title VII); *Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008) (Title VII); *Mitchell v. Axcscan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006) (Title VII); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (Title VII). See also *Hively v. Ivy Tech*, 853 F.3d 339 (7th Cir. Apr. 4, 2017) (en banc) (citing gender identity cases favorably and holding that sexual orientation discrimination constitutes sex discrimination); *But see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (relying on now-overturned Seventh Circuit precedent to hold that anti-transgender discrimination is not covered *per se* under Title VII but may be covered as sex stereotyping discrimination). See, e.g., *Grimm v. Gloucester County School Board*, No. 4:15-cv-54 (E.D. Va. 2018) (holding that denying a transgender boy access to school restrooms matching his gender violated Title IX and the Equal Protection Clause of the U.S. Constitution); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.Supp.3d 704 (D. Md. 2018) (holding that prohibiting a transgender boy from boys' locker room based on transgender status is a Title IX sex-discrimination claim as well as a gender-stereotyping claim); *Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (holding a claim of discrimination based on gender identity constitutes sex discrimination under Title VII). See also: *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 720-23 (4th Cir. 2016) (holding that the Department of Education's then-current position that sex discrimination encompassed anti-transgender discrimination was a reasonable interpretation of Title IX); *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, at 727-28 (Davis, J., concurring) (affirming that circuit authority strongly favored the position that anti-transgender discrimination is a form of sex discrimination); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F.Supp.3d 704 (D. Md. 2018) (quoting *United States v. Giddins*, 858 F.3d 870, 886 n.12 (4th Cir. 2017) (affirming that *G.G.* remains binding circuit precedent to the extent it holds that Title IX does not preclude claims of discrimination by transgender students).

^x 45 C.F.R. 156.200(e); 45 C.F.R. 156.125(b) requires EHB issuers to comply with 45 C.F.R. 156.200(e).

^{xi} 45 C.F.R. 156.125(a).

^{xii} 78 Fed. Reg. 12834, 12842 (Feb. 25, 2013) "[W]e state that the EHB-benchmark plan must not include discriminatory benefit designs ... Issuers would also have to comply with the non-discrimination standards applicable to QHPs under the Exchange rules. These standards would apply both to benefit designs that limit enrollment, and those that prohibit access to care for enrollees."

^{xiii} 78 Fed. Reg. at 12847.

^{xiv} See Summary of Findings: 2018 Marketplace Plan Compliance with Section 1557, OUT2ENROLL, available at <https://out2enroll.org/out2enroll/wp-content/uploads/2017/11/Overview-of-Trans-Exclusions-in-2018-Marketplace-Plans-1.pdf>.

^{xv} *Id.*