

**ATTORNEY GENERAL OF THE STATE OF NEW YORK
CIVIL RIGHTS BUREAU**

In the Matter of:

**THE INVESTIGATION BY ERIC T. SCHNEIDERMAN,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
OF**

THE OSWEGO COUNTY HEALTH PLAN

AOD No. 17-203

**ASSURANCE OF
DISCONTINUANCE**

On June 5, 2017, by letter to the county, the Office of the Attorney General of the State of New York ("OAG") began to investigate the County of Oswego ("County" or "Respondent"). The investigation sought to determine whether the County of Oswego Health Benefit Plan ("Plan") offered by the County to its employees and retirees discriminated against transgender Plan members by failing to provide them benefits under the Plan equivalent to cisgender Plan members. The investigation also sought to determine whether the County discriminated against transgender Plan members by failing to provide them benefits that would otherwise have been available to members for medical treatments and procedures but for those transgender members' diagnoses of gender dysphoria.

This Assurance of Discontinuance contains the OAG's findings in connection with its investigation and the resolution agreed to by the OAG and the County (collectively, the "Parties").

I.
DEFINITIONS

1. As used throughout this Assurance of Discontinuance, the terms set forth below shall mean as follows:
 - a. "Assurance" means this Assurance of Discontinuance.
 - b. "Cisgender" refers to individuals whose gender identity – *i.e.*, a person's intrinsic sense of being male or female – corresponds to the sex they were assigned at birth.
 - c. "County" means Oswego County, its Legislature, and all current and former officers, directors, employees, third-party administrators, pharmacy benefit administrators, or others acting on its behalf.
 - d. "Gender dysphoria" means distress caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).
 - e. "Mental Health Parity Act" means the Mental Health Parity and Addiction Equity Act of 2008, 29 U.S.C. § 1185 *et seq.*, and its implementing regulations, including but not limited to 45 C.F.R. § 146.136.
 - f. "New York State Human Rights Law" or "NYSHRL" means New York Executive Law §296 *et seq.*, and its implementing regulations, including but not limited to 9 N.Y.C.R.R. § 466.13.
 - g. "OAG" means the Office of the Attorney General of the State of New York.
 - h. "Parties" means the OAG and the County.

- i. "Title VII" means Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*
- j. "Transgender" refers to a diverse group of individuals who cross or transcend culturally defined categories of gender. The gender identity – *i.e.*, a person's intrinsic sense of being male or female – of transgender people differs to varying degrees from the sex they were assigned at birth.

II. FINDINGS

2. The County was created by Chapter XXII of the Laws of 1816 through an act of the New York State Legislature. It occupies 962 square miles of land on the southeastern shore of Lake Ontario and contains the cities of Oswego and Fulton. The County is governed by a legislature comprised of 25 districts. The County is also an employer, and in the execution of its duties it employs individuals in a number of departments, including, *inter alia*, departments of health, mental hygiene, motor vehicles, social services, veterans services, and corrections.
3. Among the benefits it offers to its employees and retirees, the County offers an ERISA-exempt, self-insured government employee health plan in accordance with New York State General Municipal Law § 92-a (the "County of Oswego Health Benefit Plan" or "Plan"). As described in the Master Plan Document and Summary Plan Description, the Plan is a "self-funded health benefit plan established for eligible Employees, Retirees, and their Eligible Dependents."¹
4. Section V of the Plan ("Exclusions") sets out various expenses that the Plan will not pay for members. Among these is a categorical exclusion for expenses related

¹ The power to insure implies the power to self-insure. *See, e.g.*, 1982 Opns. St. Comp. No. 82-197, at 250.

to gender transition and/or a diagnosis of gender dysphoria, which reads as follows:

In addition to limitations and exclusions shown elsewhere in this [Summary Plan Description], charges for the following expenses will not be paid by the Plan **25. Gender Identity Disorders.** Services or Supplies connected to sex change Surgery, transsexualism, gender dysphoria, sexual reassignment or change, or any treatment of gender identity disorders including medications, implants, hormone therapy, Surgery, medical, or psychiatric treatment.

5. The County is subject to federal and state laws governing unlawful employment practices, including Title VII and the NYSHRL, which both prohibit employers from discriminating on the bases of an employee's gender identity and expression, transgender status, and disability.
6. The County is also subject to federal law governing mental health parity, including the Mental Health Parity Act. The Mental Health Parity Act prohibits group health plans, including self-funded plans, from setting financial requirements and treatment limitations on mental health benefits that are more restrictive than requirements and limitations applying to medical and surgical benefits.
7. The OAG's investigation found that the Plan's exclusion set forth above violates Title VII, the NYSHRL, and the Mental Health Parity Act.
8. The County neither admits nor denies the OAG's findings as set forth in Paragraphs 2-7, *supra*. The County has agreed to this Assurance in settlement of the violations alleged above and to avoid the time, expense, and distraction of litigation.

9. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance in lieu of commencing a proceeding for violations of Title VII, the NYSHRL, and the Mental Health Parity Act based on the conduct described above.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

III.
RELIEF

10. **General Injunction.** The County shall not engage, or attempt to engage, in violations of any applicable laws, including but not limited to Title VII, the NYSHRL, and the Mental Health Parity Act, and expressly agrees and acknowledges that any such conduct is a violation of the Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in Paragraph 9 *supra*, in addition to any other appropriate investigation, action, or proceeding.
11. **Programmatic Relief.**
- a. **Removal of Exclusion/Implementation of Benefit.** Within fourteen (14) days of the Effective Date, the County shall remove the categorical exclusion identified in Paragraph 4 of this Assurance, and shall submit to the OAG for its review and approval a proposed benefit to be offered to all Plan members covering treatments and procedures for gender transition and/or the diagnosis of gender dysphoria, as well as any medical coverage policy, guidelines, or other implementing requirements for the proposed benefit ("Benefit").

- i. The Benefit shall, at minimum, cover all prescriptions, treatments, and procedures listed in Exhibit A to this Assurance.
- ii. As implemented, the Benefit shall be no more restrictive than the requirements, and shall reflect the principles, set forth in Exhibit B to this Assurance.

Within fourteen (14) days of OAG approval of the Benefit, the County shall issue a written notice to all Plan members concerning the Benefit, which notice shall include a copy of the Benefit language and any implementing requirements concerning the Benefit. The County shall offer the Benefit to all Plan members irrespective of (A) whether the County uses a third-party administrator to administer the Plan, (B) whom the County may use as such a third-party administrator, or (C) any change the County may make in the use of a third-party administrator. For the duration of this Assurance, any future change to the Benefit shall be subject to OAG review and approval.

- b. Training. Within thirty (30) days of OAG approval of the Benefit, the County shall submit for OAG review and approval training materials concerning the Benefit ("Materials"). The Materials shall include discussion of the following elements:
 - i. The requirements of Title VII and the NYSHRL with respect to gender identity and/or transgender status;
 - ii. The requirements of the Mental Health Parity Act with respect to individuals who have a diagnosis of gender dysphoria;

- iii. The content of the Benefit, the categorical exclusion the Benefit replaces, and the OAG investigation that led to the change; and
- iv. How any County employee or agent interfacing with Plan members should assist members concerning inquiries about the Benefit or its implementing requirements.

Within fourteen (14) days of OAG approval of the Benefit, the County shall hold one or more in-person training sessions for all County employees or agents who have or may interface with Plan members concerning Plan Benefits. Such training shall be held annually or, in the event the County proposes a change to the Benefit, such training shall be held within thirty (30) days of OAG approval of any change to the Benefit, and annually thereafter. If the County employs a third-party administrator to interface with Plan members concerning Plan benefits, the County shall require any third-party administrator to offer such training consistent with the substantive parameters, timeframes, and approval requirements set forth in this paragraph. The County and/or its third-party administrator shall use sign-in sheets for all trainings covered by this paragraph and shall retain records of such sign-in sheets.

12. **Recordkeeping and Reporting.**

- a. For the duration of this Assurance, the County shall:
 - i. Retain all records relating to its obligations hereunder, including but not limited to its training requirements, any proposed changes to the Benefit, and any complaints received from Plan members

concerning the Benefit or its implementing requirements. If the County employs a third-party administrator to execute any duties covered by this Assurance, the County shall require any third-party administrator to retain all records relating to the County's obligations hereunder.

- ii. Provide quarterly reports to the OAG of all denials of coverage made by the County for any Plan member seeking any prescription, treatment, or procedure set forth in Exhibit A, when such member has provided the County documentation of a diagnosis of gender dysphoria. Such reporting shall include the reason(s) provided by the County to the Plan member for each such denial.
- iii. Upon thirty (30) days written notice from the OAG, provide any and all additional documentation and information necessary for the OAG to verify compliance with this Assurance, including any documentation and information created or retained by any third-party administrator hired by the County.

- b. Respondent expressly agrees and acknowledges that a default in the performance of any obligation under this paragraph is a violation of the Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in Paragraph 9, in addition to any other appropriate investigation, action, or proceeding, and that evidence that the

Assurance has been violated shall constitute *prima facie* proof of the statutory violations described in Paragraph 9.

IV.
MISCELLANEOUS

Subsequent Proceedings.

13. In any subsequent investigation, civil action, or proceeding by the OAG to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to Paragraph 22, the Respondent expressly agrees and acknowledges:
- a. that any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
 - b. that the OAG may use statements, documents or other materials produced or provided by the Respondent prior to or after the effective date of this Assurance, consistent with the federal Health Insurance Portability and Accountability Act, the New York State Mental Hygiene Law, and the New York State Public Health Law;
 - c. that any civil action or proceeding must be adjudicated by the courts of the State of New York.
14. If a court of competent jurisdiction determines that the Respondent has violated the Assurance, the Respondent shall pay to OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, pursuant to any statutory provision authorizing the recovery of such costs.

Effects of Assurance.

15. This Assurance is not intended for use by any third party in any other proceeding.
16. This Assurance is not intended, and should not be construed, as an admission of liability by the Respondent.
17. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of the Respondent. Respondent shall cause this Assurance to be adopted in any such transfer agreement. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.
18. Nothing contained herein shall be construed as to deprive any person of any private right under the law.
19. Any failure by the Attorney General to insist upon the strict performance by Respondent of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the Attorney General, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by the Respondent.
20. Should the OAG find a breach of any component of this Assurance, including the General Injunction set forth in Paragraph 10, the County will be notified of the breach in writing, after which the County will have sixty (60) days to cure the breach and/or to object in writing to the OAG. Upon receipt of any objection, the OAG will make a final determination as to whether a material breach has occurred.

Communications.

21. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 17-203, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to the Respondent, to:

Carol Alnutt, Director
Oswego County Human Resources
46 East Bridge Street
Oswego, NY 13126
Tel.: (315) 349-8209
Carol.Alnutt@OswegoCounty.com

If to the OAG, to:

Justin Deabler
Assistant Attorney General
Civil Rights Bureau
Office of the New York State Attorney General
120 Broadway, 23rd floor
New York, NY 10271
Tel.: (212) 416-8097
Email: CivilRights@ag.ny.gov

or in his absence, to the person holding the title of Bureau Chief, Civil Rights Bureau.

Representations and Warranties.

22. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by the Respondent and its counsel and OAG's own factual investigation as set forth in Findings, Paragraphs 2-9, *supra*. The Respondent represents and warrants that neither it nor its counsel has made

any material representations to the OAG that are inaccurate or misleading. If any material representations by Respondent or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

23. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Respondent in agreeing to this Assurance.
24. The Respondent represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized.

General Principles:

25. Unless a term limit for compliance is otherwise specified within this Assurance, the Respondent's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondent of other obligations imposed by any applicable state or federal law or regulation or other applicable law.
26. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that the Respondent violates the Assurance after its effective date.
27. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.
28. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, including but not limited to subsequent

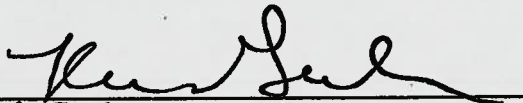
changes in federal law or regulation, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

29. Respondent acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.
30. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.
31. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.
32. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.
33. The effective date of this Assurance shall be the date on which it is executed by the OAG. This Assurance shall expire five (5) years from the effective date.

IN WITNESS THEREOF, the undersigned subscribe their names:

Dated: Oswego, New York
November 15, 2017

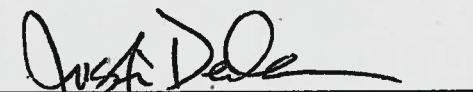
County of Oswego

By: 
Kevin Gardner
Chairman of the Oswego County Legislature

CONSENTED TO:

Dated: New York, New York
November 16, 2017

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: 
Justin Deabler
Assistant Attorney General

Sandra Pullman
Assistant Attorney General

Office of the New York State Attorney General
Civil Rights Bureau
120 Broadway, 23rd Floor
New York, New York 10271
Tel. (212) 416-8250
Fax (212) 416-8074

EXHIBIT A

The Benefit shall cover the following prescriptions, treatments, and procedures, as set forth below by category:

1. Prescriptions/hormone therapies: All medically necessary prescriptions and hormone therapies, including but not limited to: (i) puberty suppression, (ii) continuous hormone therapy (testosterone, estrogen, and androgen suppression), and (iii) laboratory testing to monitor the safety of such hormone therapies.

2. Mental health treatment: All medically necessary mental health treatment, including but not limited to treatment provided to the client, client's spouse, parent, guardian, child, or person with whom the client has a child in common, if the treatment is directly related to the client's transition.

3. Surgical care: All medically necessary surgical procedures, including but not limited to:

a. Chest surgeries: mammoplasty (transgender women); subcutaneous mastectomy, nipple grafts, chest reconstruction, nipple areola reconstruction (transgender men);

b. Genital surgeries: orchiectomy, penectomy, vaginoplasty, clitoroplasty, vulvoplasty, labiaplasty, urethroplasty, prostatectomy (transgender women); hysterectomy/salpingo-oophorectomy, metoidioplasty, phalloplasty (employing a pedicled or free vascularized flap), reconstruction of the fixed part of the urethra, . vaginectomy, vulvectomy, scrotoplasty, implantation of erectile and/or testicular prostheses, electrolysis as part of genital surgery site graft (transgender men); and

c. Other surgeries: facial reconstruction surgery, electrolysis or laser hair removal, thyroid cartilage reduction, hair reconstruction, voice surgery, liposuction, and lipofilling.

EXHIBIT B

In implementing the Benefit, the County shall impose requirements no more restrictive than the following:

Prerequisites for surgery:

In the requirements set forth below, "qualified mental health professional" includes certified and licensed: psychiatrists, clinical psychologists, psychiatric nurse practitioners, psychiatric physician assistants, psychotherapists/counselors, and social workers, or any health professional with behavioral health training and experience.

For chest surgery:

- Hormone therapy is not a prerequisite.
- One referral from a qualified mental health professional is needed for chest surgery.

For genital surgery:

- Two referrals from qualified mental health professionals who have independently assessed the patient are needed for genital surgeries. If the first referral is from the patient's psychotherapist, the second referral may be from a person who has only had an evaluative role with the patient, whether mental health professional or primary care provider.
- Two separate letters, or one letter signed by both (e.g., if both professionals are practicing within the same clinic) may be sent. Each referral letter is expected to cover the same topics in the following areas:
 1. The client's general identifying characteristics;
 2. Results of the client's psychosocial assessment, including any diagnoses;
 3. The duration of the mental health professional's relationship with the client, including the type of evaluation and therapy or counseling to date;
 4. An explanation that the criteria for surgery have been met, and a brief description of the clinical rationale for supporting the patient's request for surgery;
 5. A statement that informed consent has been obtained from the patient; and
 6. A statement that the treating professional is available for coordination of care.

In implementing the Benefit, the County shall also abide by the following principles:

- The County shall impose no more burdensome precertification requirements for any prescription, treatment, or procedure for a member with a diagnosis of gender dysphoria than the County imposes for the same medicine, treatment, or procedure for a member with a diagnosis other than gender dysphoria.
- The County shall take reasonable measures to avoid rejections of coverage on the basis of "gender incongruent" insurance coding (e.g., a transgender man who has an M gender marker in insurance records needs a hysterectomy, which is rejected because "M is incongruent with procedure").