



2526 SAINT PAUL STREET
BALTIMORE, MD 21218
TEL (410) 625-LGBT (5428)
FAX (410) 625-7423
www.freestate-justice.org

February 21, 2022

The Honorable Delores Kelley
Senate Finance Committee
3 East
Miller Senate Office Building
Annapolis, Maryland 21401

Testimony of FreeState Justice

IN SUPPORT OF

SB0682: Maryland Medical Assistance Program - Gender-Affirming Treatment (Trans Health Equity Act of 2022)

To the Honorable Chair Delores Kelley, Vice Chair Brian Feldman,
and esteemed members of the Senate Finance Committee:

FreeState Justice is Maryland's lesbian, gay, bisexual, transgender,
and queer (LGBTQ) civil rights advocacy organization. Each year,
we provide free legal services to dozens, if not hundreds, of LGBTQ+
Marylanders who could not otherwise be able to afford an attorney,
as well as advocate more broadly on behalf of the LGBTQ+
community.

We write today in support of Senate Bill 682, because it will end the
discriminatory treatment of transgender patients under Maryland's
Medicaid system, which currently includes a number of blanket
prohibitions of transition-related care, in violation of both Maryland
and federal law.

In 2020, Maryland adopted Insurance § 15-1A-22(d), which provides
that health insurance carriers

may not refuse, withhold, or deny any individual coverage
under a health benefit plan offered by the carrier or otherwise
discriminate against any individual because of the

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This legislation, which was heard by this very Committee, built upon existing federal protections under Section 1557 of the Affordable Care Act, codified at 42 USC § 18116(a), which prohibit insurance and healthcare providers receiving federal healthcare funding from discriminating on a number of protected grounds, including sex. Under both the United States Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 590 U.S. __ (2020), available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf, and guidance from the Department of Health and Human Services' Office for Civil Rights, "sex" includes both sexual orientation and gender identity. See "HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity" (May 10, 2021), available at <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

Maryland's current prohibition on certain transition-related care dates to a 2016 transmittal from the Maryland Department of Health and Mental Hygiene to Medicaid Managed Care Organizations. Under this transmittal, 31 different types of transition-related care are expressly excluded from coverage, regardless of medical necessity. See Susan J. Tucker, "Maryland Medical Assistance Program Managed Care Organizations Transmittal No. 110" (March 10, 2016), available at https://health.maryland.gov/mmcp/mcoupdates/documents/pt_37_16.pdf. Despite more recent legislation at both the state and federal level clarifying that discrimination on the basis of gender identity is prohibited, as well as court decisions that state Medicaid programs must make individualized determinations of medical necessity based on the circumstances of the individual, the Maryland Department of Health and Mental Hygiene has declined to reconsider or update its 2016 transmittal, making legislative action necessary.

In a recent case, *Burns v. Maryland Department of Health*, OAH No. MDH-MCP-012-21-17696, attorneys from FreeState Justice challenged the legality of Maryland's blanket exclusions under both Maryland and federal law. But while the administrative law judge in that case found these arguments compelling, he ultimately held that he lacked authority to rule on them.

At the hearing, the Appellant argued I should reverse Amerigroup's decision because the policy upon which Amerigroup based the decision discriminates against transgender individuals. Based upon the literature and evidence the Appellant presented, I find that point well taken as it relates to Transmittal 100. However, I find no authority for me, in this proceeding, to reverse

Amerigroup's decision on those grounds. I find such arguments better directed to causes of action in other tribunals against entities other than Amerigroup.

Burns v. Maryland Department of Health at 12 n 11.

Unlike that administrative law judge, this committee has the power to remedy the injustice of Transmittal 110 and Maryland's current blanket exclusion of many types of transition-related care. Please do so.

For these reasons, FreeState Justice urges a favorable report on Senate Bill 682.