

BEFORE THE
DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

DISCRIMINATION ON THE BASIS OF SEX
80 FED. REG. 5245 (JAN. 30, 2015)

SUBMITTED BY EMILY T. PRINCE, ESQ.

The regulations proposed by the Office of Federal Contract Compliance Programs (OFCCP) are a positive first step in answering the many questions left unresolved by OFCCP in its December 2014 direct final rule implementing Executive Order 13672, prohibiting discrimination by Federal contractors on the basis of sexual orientation and gender identity. As OFCCP correctly notes, discrimination on the basis of sexual orientation and gender identity is also inherently discrimination on the basis of sex, and therefore such discrimination is within the scope of the proposed updates to regulations prohibiting discrimination on the basis of sex.¹ However, there are several areas where the rule requires improvement. Most importantly, § 60-20.6, “Other fringe benefits,” must be revised to clarify that offering insurance contracts that specifically exclude coverage for care related to the transition of the beneficiaries (“trans-exclusionary insurance contracts”) is an unlawful employment practice. Additionally, the text of the rule in § 60-20.2, “General prohibitions,” must be amended to clarify that transgender and non-binary employees must have access to appropriate changing facilities.

Many insurance contracts, including those offered by the Federal government to Federal employees, specifically exclude coverage for care related to the transition of beneficiaries from their sex assigned at birth through clauses that restrict coverage notwithstanding any other provision of the plan. As an illustrative example: since 1974²

¹ See, e.g., Chris Geidner, “The Growing Effort to Protect LGBT People From Discrimination Under the Civil Rights Act of 1964,” Feb. 18, 2015, available at <http://www.buzzfeed.com/chrisgeidner/the-growing-effort-to-protect-lgbt-people-from-discrimination> (citing a February 3, 2015 EEOC memo from the Office of Field Programs stating “(1) Complaints of discrimination on the basis of transgender status or gender-identity-related discrimination should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent; and (2) Individuals who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a charge with the EEOC, and their charges should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent.”)

² See United States Office of Personnel Management, FOIA Response FOIA/PA 2014-03980, Aug. 7, 2014, available at <http://www.emily-esque.com/wp/wp->

the Federal Employees Health Benefits Program (FEHB Program) has excluded from health insurance for Federal employees any “services, drugs, or supplies related to sex transformation.” Despite a FEHB Program Carrier Letter issued in June 2014,³ which made clear that the exclusions were voluntary on the part of insurance carriers participating in the FEHB Program, over 95% of the plans available to Federal employees continue to exclude transition-related care.⁴ Only 15 plans out of 304 FEHB Program plans available have voluntarily removed the clauses restricting access to medically necessary care on the basis that it is related to the gender identity of the beneficiary. This example makes clear the need for unequivocal action on the part of the Department of Labor to require Federal contractors to eliminate such sex-based discrimination.

It cannot be argued that trans-exclusionary health insurance contracts do not discriminate on the basis of gender identity and on the basis of sex. Whether in the blunt language of FEHB Program’s exclusion of care “related to sex transformation,” or as in examples from the private market, “any procedure or treatment, including hormone therapy, designed to change your physical characteristics from your biologically determined sex to those of the opposite sex” or “all services related to gender dysphoria or gender identity disorder,”⁵ such clauses are facially discriminatory. The plain language of such clauses reveals their intent to deny services to individuals solely on the basis of the individual’s gender identity being inconsistent with the individual’s sex assigned at birth. That activity, “treating an employee or applicant for employment adversely because [they have] undergone, is undergoing, or is planning to undergo sex-reassignment surgery or other processes or procedures designed to facilitate the adoption of a sex or gender other than the individual’s designated sex at birth,” is explicitly prohibited in the context of employment actions by the proposed rule at § 60-20.2(b)(11). To allow that exact form of discrimination to go unchecked in one of the places it most frequently appears would be to abdicate the responsibility of OFCCP in prohibiting discrimination on the basis of sex by Federal contractors.

When addressing this issue in response to a Department of Health and Human Services (HHS) request for information on 42 U.S.C. § 18116, prohibiting discrimination on the basis of sex in health care services, numerous organizations spoke out against

[content/uploads/2015/03/2014-08-25-FOIA-Response-from-OPM-re-Transgender-Exclusions-redacted.pdf](http://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-17.pdf).

³ United States Office of Personnel Management, FEHB Program Carrier Letter No. 2014-17, June 13, 2014, available at <http://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-17.pdf>.

⁴ See United States Office of Personnel Management, FOIA Response 2015-00122, Nov. 24, 2014, available at <http://www.emily-esque.com/wp/wp-content/uploads/2014/11/FY-2015-00122-Emily-T-Prince-Transgender-Final-11-24-14-Redacted.pdf>. See also Emily Prince, “OPM Continues to Have Nothing New to Say About Anti-Trans Discrimination,” Nov. 26, 2014, available at <http://www.emily-esque.com/wp/?p=464> (calculating the percentage of health carriers continuing to exclude transition-related care).

⁵ Kellan Baker and Andrew Cray, Center for American Progress, “Ensuring Benefits Parity and Gender Identity Nondiscrimination in Essential Health Benefits,” Nov. 15, 2012, available at <http://www.americanprogress.org/wp-content/uploads/2012/11/BakerHealthBenefits-2.pdf>.

transition-related exclusions. In public comments, the American Public Health Association,⁶ the Center for American Progress,⁷ the National Center for Transgender Equality,⁸ Lambda Legal,⁹ Transgender Legal Defense and Education Fund,¹⁰ the National LGBTQ Task Force,¹¹ the National Center for Lesbian Rights,¹² the National Women's Law Center on behalf of 30 other organizations,¹³ Human Rights Campaign,¹⁴ and Whitman-Walker Health¹⁵ all spoke out against trans-exclusionary health insurance contracts, and

⁶ American Public Health Association, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0117>.

⁷ Center for American Progress, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0084>.

⁸ National Center for Transgender Equality, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0155>.

⁹ Lambda Legal, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0161>.

¹⁰ Transgender Legal Defense and Education Fund, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0158>.

¹¹ National LGBTQ Task Force, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Oct. 17, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0105>.

¹² National Center for Lesbian Rights, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0145>.

¹³ National Women's Law Center on Behalf of 30 Organizations, "Comment on Department of Health and Human Services: Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0125>.

¹⁴ Human Rights Campaign, "Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0039>.

¹⁵ Whitman-Walker Health, "Response of Whitman-Walker Health to Request for Information on Regulations to Implement the Nondiscrimination Requirements in Section 1557 of the Affordable Care Act," Sep. 30, 2013, available at <http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2013-0007-0063>.

called upon HHS to interpret 42 U.S.C. § 18116 as prohibiting such clauses. HHS has yet to respond to the comments.

These comments draw upon the immense professional consensus that transition-related care is medically necessary and therefore that coverage for care should not be denied solely on the basis that it is related to transition.

The Center of Excellence for Transgender Health at the University of California, San Francisco (the Center) provides recommendations to health care professionals who treat transgender individuals using evidence-based transgender medicine. As the Center states, “Once [an insurance carrier] labels the patient as transgender or transsexual, many types of coverage may be routinely denied, where they would be covered for patients who are not identified as transgender or transsexual. Physicians or their support staff members may need to interact with insurance claims processors on behalf of their transgender or transsexual patients to insist that medically necessary treatments are covered.”¹⁶

The Center’s statements are consistent with the most recent statements of the foremost authority on transgender health, the World Professional Association for Transgender Health (WPATH). WPATH publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (SOC), currently in its seventh version.¹⁷ The SOC state, with respect to insurance carriers denying medically necessary care, “In many places around the world, access to health care for transsexual, transgender, and gender-nonconforming people is also limited by a lack of health insurance or other means to pay for needed care. WPATH urges health insurance companies and other third-party payers to cover the medically necessary treatments to alleviate gender dysphoria.”¹⁸

In 2013, Lambda Legal compiled a list of professional organization statements supporting transgender people in health care, including support for WPATH’s Standards of Care.¹⁹ These organizations include the American Medical Association,²⁰ the American Psychiatric Association,²¹ the American Psychological Association,²² the American Academy

¹⁶ Insurance Issues, *Primary Care Protocol for Transgender Patient Care*, Center of Excellence for Transgender Health, University of California, San Francisco, Department of Family and Community Medicine, April 2011, available at

<http://transhealth.ucsf.edu/trans?page=protocol-insurance>.

¹⁷ Standards of Care Version 7, World Professional Association for Transgender Health, 2011, available at

http://admin.associationsonline.com/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf.

¹⁸ Id. at 33.

¹⁹ Lambda Legal, *Professional Organization Statements Supporting Transgender People in Health Care*, July 2, 2013, available at

http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_4.pdf.

²⁰ American Medical Association, Resolution H-195.950, *Removing Financial Barriers to Care for Transgender Patients*, (Res. 122; A-08).

²¹ American Psychiatric Association, *Position Statement on Access to Care for Transgender and Gender Variant Individuals*, 2012, available at

<http://www.psych.org/File%20Library/Advocacy%20and%20Newsroom/Position%20St>

of Family Physicians,²³ the American College of Nurse Midwives,²⁴ the National Association of Social Workers,²⁵ the National Commission on Correctional Health Care,²⁶ and the American College of Obstetricians and Gynecologists.²⁷

There is no serious question that the intent and impact of trans-exclusionary health insurance clauses was to discriminate against individuals on the basis of gender identity and against treatment for the diagnosis of “gender identity disorder” or “gender dysphoria.” Any denial of any claim on the basis of these exclusions necessarily constitutes discrimination on the basis of transition from one’s assigned sex at birth. The maintenance of such exclusions is discriminatory in both effect and, by its plain text, its intended application to deny medically necessary care to individuals solely on the basis that the care at issue is for the purpose of transition.

Such discrimination is illegal under Federal law, and Federal agencies and contractors are implicitly forbidden from engaging in such discrimination under the terms of the proposed rule. In *Macy v. Holder*,²⁸ the U.S. Equal Employment Opportunity Commission held that discrimination on the basis of gender identity was unlawful

[atements/ps2012_TransgenderCare.pdf](#); American Psychiatric Association, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals*, 2012, available at

http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf.

²² American Psychological Association, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, 2008, available at

<http://www.apa.org/about/policy/transgender.aspx>.

²³ American Academy of Family Physicians, *Transgender Care*, Resolution No. 1004, 2012, available at

http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf.

²⁴ American College of Nurse Midwives, *Transgender / Transsexual / Gender Variant Health Care*, 2012, available at

<http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000278/Transgender%20Gender%20Variant%20Position%20Statement%20December%202012.pdf>.

²⁵ National Association of Social Workers, *Transgender and Gender Identity Issues*, 2008, available at

<https://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%20nd%20round%20-%20Clean.pdf>.

²⁶ National Commission on Correctional Health Care, *Transgender Health Care in Correctional Settings*, 2009, available at <http://www.ncchc.org/transgender-health-care-in-correctional-settings>.

²⁷ American College of Obstetricians and Gynecologists, *Health Care for Transgender Individuals*, 2011, available at

http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Transgender_Individuals.

²⁸ *Macy v. Holder*, U.S. Equal Employment Opportunity Commission Appeal No. 0120120821 (April 20, 2012).

discrimination on the basis of sex under Title VII on three separate but equally controlling bases. One of these bases addressed transition. The Commission held that discriminating against the act of transition was discrimination “because of sex,” drawing the analogy that it would be similarly unlawful discrimination “because of religion” to discriminate against someone on the basis of religious conversion.²⁹ Discrimination against claims for “sex transformation” or other similar exclusion language is necessarily within the scope of the conduct prohibited by *Macy*.

Because the only possible reading of trans-exclusive health insurance clauses is that they discriminate on the basis of gender identity, the final rule must add a new paragraph to § 60-20.6, “Other fringe benefits,” reading:

(d) It shall be an unlawful employment practice for a contractor to offer health insurance that does not cover care related to gender identity or any process or procedure designed to facilitate the adoption of a sex or gender other than the beneficiary’s designated sex at birth.

While such conduct should also be covered by § 60-20.2(b)(11), an explicit prohibition is necessary to avoid confusion and promote compliance with Executive Orders 11246 and 13672.

Similarly, to avoid confusion, § 60-20.2(b)(9) and (b)(10) must be revised to avoid a drafting error that could be exploited to allow transgender employees to be denied access to changing rooms. Paragraphs (b)(9) and (b)(10) currently read that the following are unlawful employment practices:

(9) Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms or changing facilities, the contractor must provide separate or single-user restrooms or changing facilities to assure privacy between the sexes;

(10) Denying transgender employees access to the bathrooms used by the gender with which they identify;

The discrepancy in language between paragraphs (b)(9) and (b)(10) would likely require clarification to ensure that transgender and non-binary employees have access to changing facilities “used by the gender with which they identify,” to use the language of paragraph (b)(10). Changing facilities, along with restrooms, are frequently turned into battlegrounds by those who would deny transgender and non-binary people access.³⁰ It must be clear

²⁹ *Id.* at 13-14; *see also* *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

³⁰ *See, e.g.*, Marianne Mollmann, International Gay and Lesbian Human Rights Commission, “Enough with the Bathrooms: Stigma, Stereotypes, and Barriers to Trans Equality,” May 28, 2014, available at http://www.huffingtonpost.com/marianne-mollmann/enough-with-the-bathrooms_b_5043042.html; Luke Brinker and Carlos Maza, “15 Experts Debunk Right-Wing Transgender Bathroom Myth,” Mar. 20, 2014, available at <http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533>; *see also* Mark Joseph Stern, “Florida’s Vicious Anti-Trans Bathroom Bill Easily Survives Its First Vote,” Mar. 5, 2015, available at http://www.slate.com/blogs/outward/2015/03/05/florida_trans_bathroom_bill_easily_survives_first_vote.html, Jack Brammer, “In Surprise Vote, Kentucky Senate Panel Approves Limits on Transgender Students’ Choices,” Feb. 23, 2015, available at http://www.kentucky.com/2015/02/23/3710823_in-surprise-vote-kentucky-senate.html,

that access to such facilities may not be denied on the basis of gender identity. As such, the final rule must be revised to read:

- (9) Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms or changing facilities, the contractor must provide separate or single-user restrooms or changing facilities to assure privacy ~~between the sexes~~ based on sex and gender identity;
- (10) Denying ~~transgender~~ employees access to the ~~bathrooms~~ restrooms or changing facilities used by the gender with which they identify consistent with their gender identity;

This change will ensure that the final rule precludes discriminating against transgender or non-binary employees in access to restrooms or changing facilities.

Sincerely,

A handwritten signature in black ink, appearing to read 'Emily T. Prince'.

Emily T. Prince, Esq.

and Mitch Kellaway, “Texas Bill Would Jail Those Whose Chromosomes Don’t Match the Restroom They’re Using”, Feb. 24, 2015, available at <http://www.advocate.com/politics/transgender/2015/02/24/texas-bill-would-jail-those-whose-chromosomes-dont-match-restroom-th> (discussing state legislative attempts in Florida, Kentucky, and Texas to prevent transgender, non-binary, and intersex people from using restrooms consistent with their sex and gender identity in defiance of Federal law).

POLITICS

The Growing Effort To Protect LGBT People From Discrimination Under The Civil Rights Act Of 1964

After decades of failed attempts to pass LGBT job protections through Congress, change could be coming instead through the historic civil rights law. A new memorandum from the Equal Employment Opportunity Commission obtained by BuzzFeed News lays out the case.

posted on Feb. 18, 2015, at 3:54 p.m.



Chris Geidner
BuzzFeed News Reporter



Diana Smithson, left, and Jacqueline Cote faced \$100,000 in health care costs because Wal-Mart

WASHINGTON — Federal agency action and court decisions could bring about something that advocates have been unable to achieve legislatively: federal LGBT job protections.

Efforts to protect transgender people under existing sex discrimination bans have been percolating — and, for the most part, successful — since 2011. But moves by a key executive agency over the past six months demonstrate a renewed focus on the previously unsuccessful effort to provide protections to gay, lesbian, and bisexual people under the same laws.

The Equal Employment Opportunity Commission and LGBT advocates have begun taking action and pressing their case, respectively, to encourage courts to take an expansive view of existing bans on sex discrimination to include discrimination against people based on both gender identity and sexual orientation.

The EEOC has, through its actions, informally taken the lead on the issue. In a comprehensive field memorandum issued Feb. 3 and obtained by BuzzFeed News, the agency argues that LGBT job protections should be — and within the agency, already are — available under current law.

Further still, the agency directs field offices to “alert” the main office “when they encounter [cases] with the potential for policy development,” signifying an interest in strong enforcement of this interpretation. Specifically, the memo mentions the EEOC’s interest in “claims related to discriminatory policies; insurance issues including benefits for same-sex couples or transgender individuals; access to facilities based on gender identity” and other questions about coverage of sexual orientation and gender identity under Title VII.

Multiple EEOC officials declined requests to discuss the memorandum on the record, and an EEOC Office of Communication and Legislative Affairs official who did respond to the request told BuzzFeed News she was unfamiliar with the field memo.

There is increasing support for the idea that the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 should be held to include transgender people even outside the EEOC. The Justice Department [backed](#) that interpretation of Title VII in December 2014 — with Attorney General Eric Holder calling it “the best reading” of the law. In January, the department [filed](#) a “statement of interest” in a case brought by a transgender woman who is suing Saks department store, asserting that she should be allowed to bring a lawsuit claiming anti-transgender discrimination under Title VII.

The argument that sexual orientation should be covered under Title VII’s sex discrimination ban, however, is more of an uphill battle — particularly due to

some early court rulings that held explicitly that sexual orientation discrimination is not protected by Title VII.

But those early rulings have been undermined by cases since then allowing sex-stereotyping claims under Title VII and barring same-sex sexual harassment — not to mention gay rights cases — and Gay & Lesbian Advocates & Defenders executive director Janson Wu told BuzzFeed News that now is the time to expand the way the law is interpreted.

“Decades ago, the courts made a wrong turn when they separated out sexual orientation from sex discrimination protections. And we are trying to right that wrong,” he said Tuesday. “When you are discriminating against somebody because of who they love or because of the sex of who they love, then you are discriminating against them on the basis of sex. You can’t separate out those two things.”

On Jan. 29, the EEOC agreed, issuing a “probable cause” notice in a claim GLAD brought on behalf of Jacqueline Cote, a Wal-Mart employee, and her wife, Diana Smithson. Cote was denied health insurance coverage for Smithson, who has been diagnosed with ovarian cancer.

“The aim of our lawsuit, first and foremost, is to achieve justice for Jackie and Dee, who have been wronged by Wal-Mart,” Wu said. “They racked up over \$100,000 in medical expenses because of Wal-Mart’s discrimination.” GLAD will seek conciliation of the claim now within the EEOC, but Wu said they are prepared to take the case to federal court in Massachusetts if that step fails. The LGBT legal group also has a second similar case pending in federal court in Connecticut.

He added, though, a larger goal: “Second, we absolutely believe it is right, legally, that discrimination against gay and lesbian people is illegal under sex discrimination prohibitions under Title VII,” he said. “And it could not be clearer in this case, where, if Jackie was a man, she would have gotten those benefits. Period.”

The EEOC has been a driving force behind this change, with part of its “strategic enforcement plan” adopted in 2012 specifically focused on LGBT protections.

In April 2012, the EEOC [issued](#) a decision asserting that Title VII’s sex discrimination ban included a ban on discriminating against transgender people. That case, brought by Mia Macy, has been the basis for much of the movement in support of the transgender coverage effort — including the EEOC’s first direct litigation, [filed](#) in September 2014, on the issue. Although most LGBT groups were loathe to discuss the issue publicly when serious efforts to pass legislation in the form of the Employment Non-Discrimination Act were afoot, many have spoken up more directly in recent months.

In August 2014, the EEOC acted again, [issuing](#) a decision that the sex discrimination ban often can include protections for people who are

discriminated against because of their sexual orientation as well — a small, but significant, step toward sexual-orientation inclusion under Title VII.

“I think the EEOC is definitely mapping out a more robust way of thinking about these claims. Just like for discrimination against trans people, you can view it as a type of sex stereotype or you could view it, per se, as a form of taking gender into account,” the ACLU’s Joshua Block told BuzzFeed News.




Office of
Field Programs

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

February 3, 2015

MEMORANDUM

TO: District Directors

FROM: 
Nicholas M. Inzeo, Director
Office of Field Programs

SUBJECT: Update on Intake and Charge Processing of Title VII Claims
Of Sex Discrimination Related to LGBT Status

The EEOC decisions are important because they are binding for federal employees’ claims and are taken into account by courts considering similar claims, but also because they stand as the view of the EEOC within the agency’s field offices across the country — where private discrimination claims are taken and investigated.

In a five-page memorandum issued on Feb. 3 and distributed to field offices across the country, the EEOC has moved forward on that final front. The memo — written by the director of the EEOC’s Office of Field Programs, Nicholas Inzeo — directs field offices across the country that people alleging both gender-identity-based and sexual-orientation-based discrimination have a right to file a complaint with the commission, which is to be investigated as a claim of sex discrimination under Title VII.

In addition to laying out the case made over recent years by the EEOC regarding transgender coverage under Title VII and a recent federal district court [decision](#) allowing a sexual orientation-based Title VII claim to proceed, Inzeo details at length a little-noted case that signals the EEOC’s path forward on the sexual orientation coverage issue.

When a three-judge panel of the 7th Circuit Court of Appeals decided in September 2014 that Warnether Muhammad could not bring a case against Caterpillar for sexual-orientation-based discrimination under Title VII or a related retaliation claim because, as the court put it by relying on earlier decisions of the 7th Circuit, such discrimination “is not prohibited conduct under

Title VII,” the EEOC and several LGBT groups quietly leapt into action.

Days after the decision, the ACLU of Illinois contacted Muhammad’s lawyer, letting him know that they wanted to support a request that the 7th Circuit reconsider Muhammad’s appeal. Specifically, they were concerned by the language in the decision that closed off the possibility of sexual-orientation-based discrimination being covered by the sex discrimination ban in Title VII.

On Oct. 9, 2014, the ACLU of Illinois was joined by the national ACLU, the Human Rights Campaign, Lambda Legal, and the Transgender Law Center in filing an amici curiae — or friends of the court — brief in Muhammad’s case, asking the court to remove the portions of the decision that “casually reaffirm[ed]” decisions that are more than a decade old “without fresh analysis,” including the recent EEOC decisions.

Block, who worked on the brief for the ACLU, explained that many of the earlier cases finding that Title VII did not include sexual-orientation-based claims “were decided before *Lawrence* [v. Texas],” the Supreme Court case striking down sodomy laws, “and I think the idea that Title VII could ever be used to protect sexual orientation discrimination, I think seemed so unimaginable to many judges that they just couldn’t interpret the statute that way — regardless of what [the Supreme Court] said” about sex stereotyping being impermissible.

In addition to the LGBT organizations, the EEOC itself filed its own amicus brief, stating that “an increasing number of courts (as well as the Commission) have recognized that intentional discrimination based on an individual’s sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes” since the 7th Circuit first considered the question “over thirty years ago.” In addition to its own rulings, the EEOC pointed to a March 2014 decision by a federal district court judge in D.C. that “‘plaintiff’s status as a homosexual’ — without more — plausibly suggested the discrimination was based on gender stereotypes, and thus states a Title VII sex-discrimination claim.”

A week later, on Oct. 16, 2014, the three-judge panel amended its ruling, deleting the language stating that sexual-orientation-based discrimination could not form the basis for a sex discrimination claim under Title VII.

Remarkably, none of the LGBT organizations involved in the 7th Circuit case issued news releases about the successful effort — nor did the EEOC. Since then, the EEOC has included discussion of the effort in its summaries of LGBT involvement, but it issued no news release regarding the filing of the amicus brief or when the amended decision was released.

Block said the silence on the development was simply because “it just seemed a little bit too technical of a law reform to go out with a press release,” adding, “[W]e didn’t actually change the law in the 7th Circuit and we didn’t actually get a different result for this person. It just avoided needlessly reaffirming old law.” HRC and Lambda Legal officials echoed Block’s explanation for the lack of

publicity on the brief and result.

In its field memo, the EEOC makes clear that its aim is more than protection of cases where someone is “viewed as insufficiently masculine or feminine by others based on the person’s dress or manners” — an argument firmly established in case law as covered by Title VII.

Rather, EEOC’s Enzeo wrote that the agency’s argument in the *Muhammad* filing was that “intentional discrimination based on an individual’s sexual orientation can be proved to be grounded in sex-based norms [because they] can include the expectation that men should be sexually attracted to women and that women should be sexually attracted to men.”

Such an interpretation would, in most cases, mean that sexual-orientation-based discrimination itself would effectively be protected under Title VII — similar to the growing support for gender-identity-based discrimination protections under the Civil Rights Act of 1964.

The field memo now directs that EEOC offices across the country should treat sexual-orientation-based discrimination complaints as such. As Tico Almeida of Freedom to Work told BuzzFeed News, “This memo shows that the EEOC’s doors are fully open to accepting and investigating complaints from gay, lesbian, and bisexual Americans who suffer workplace harassment or unjust firings simply because of the sex of the person they love.”

GLAD’s Wu, however, did not let Congress off the hook, saying, “People are being harmed today because of both a misinterpretation of [Title VII] law, as well as congressional inaction. ... We’re not going wait while more people are being harmed by employment discrimination.” Their litigation to expand the interpretation of Title VII, he added, “does not obviate the need for Congress to pass explicit protections.”

But, until then, and although most LGBT organizations have been quiet about their work on this front until now, the effort to expand Title VII protections for lesbian, gay, and bisexual workers — in addition to the transgender workers already seeing some protections — appears to be one of the next fronts in the LGBT rights movement.

Of the success seen thus far on the transgender coverage efforts, the ACLU’s Block said that “courts are shedding the blinders that they had that artificially constrained” rulings in favor of trans inclusion.

“I think you’ll see a similar thing with sexual orientation discrimination — or at least that’s certainly what we’re hoping will happen,” he added.

Read [the EEOC field memorandum](#):

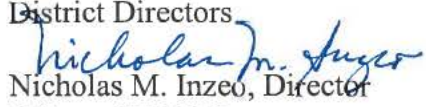


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February 3, 2015

MEMORANDUM

TO: District Directors
FROM: 
Nicholas M. Inzeo, Director
Office of Field Programs
SUBJECT: Update on Intake and Charge Processing of Title VII Claims
Of Sex Discrimination Related to LGBT Status

The purpose of this memorandum is to reiterate the importance of proper handling of LGBT-related discrimination claims and to update the internal coordination process for such cases in light of recent Commission enforcement efforts and rapidly developing case law.

My memorandum of November 9, 2012, in accordance with then-Chair Berrien's October 27, 2011 memorandum and the EEOC's federal sector decisions, provided charge processing instructions for such cases. There have been a number of developments at the EEOC and in the courts since that time, so this memorandum updates and supersedes my previous memorandum.

Specifically, the basic instructions from those earlier memos remain in effect with modifications below that reflect subsequent EEOC and court activity. Field offices are instructed to handle LGBT charges as follows:

- (1) Complaints of discrimination on the basis of transgender status or gender-identity-related discrimination should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent (discussed below); and**
- (2) Individuals who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a charge with the EEOC, and their charges should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent (discussed below).**

These instructions are based on a number of Commission actions. In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012), the Commission ruled that employment discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination because of sex in violation of Title VII. Following *Macy*, the Commission in December 2012 approved the Strategic Enforcement Plan and its designation of the issue of "coverage of lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions, as they may apply," as an Emerging and Developing Issue priority. The Commission has since

issued a series of additional federal sector decisions explicating its views on LGBT issues. See *Federal Sector Cases Involving Transgender Individuals and Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals*, www.eeoc.gov/federal/reports/lgbt_cases.cfm. Similarly, in private sector litigation, the Commission has filed lawsuits and amicus briefs addressing Title VII sex discrimination cases involving LGBT status. See *Fact Sheet on Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII*, www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm; *Jamal v. Saks & Co.* (S.D. Texas No. 4:14-cv-02782) (Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae submitted Jan. 22, 2015). The U.S. Department of Justice has joined the EEOC in both its enforcement and defensive litigation in asserting that discrimination based on transgender status is sex discrimination in violation of Title VII. See, e.g., *Burnett v. City of Philadelphia-Free Library* (E.D. Pa. No. 2:09-cv-04348) (Statement of Interest of United States filed Apr. 4, 2014) (arguing discrimination against a transgender individual because she does not conform to gender stereotypes is discrimination because of sex under Title VII); *Jamal v. Saks & Co.* (S.D. Texas No. 4:14-cv-02782) (Statement of Interest of United States filed Jan. 26, 2015) (same); Memorandum from the Attorney General re: “Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964” (dated Dec. 15, 2014), www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.

Notably, in October 2014, the Commission approved participation as amicus curiae in support of panel rehearing in *Muhammad v. Caterpillar, Inc.* (7th Cir. 12-1723) to challenge language in the Seventh Circuit panel opinion that stated categorically that Title VII does not prohibit sexual orientation discrimination or related retaliation. The petition for rehearing resulted in modification of the Seventh Circuit panel’s opinion to delete this language. See 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014). In *Muhammad*, the Commission took the position that intentional discrimination based on an individual’s sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes and thus violate Title VII’s prohibition on discrimination because of sex. As reflected in the foregoing and in the Commission’s other recent decisions, such norms and expectations can include the expectation that men should be sexually attracted to women and that women should be sexually attracted to men, and do not require that the person claiming sex discrimination has been viewed as insufficiently masculine or feminine by others based on the person’s dress or manners. See *Muhammad* brief at 5; see also *Terveer v. Billington*, 2014 WL 1280301 (D.D.C. Mar. 31, 2014) (relied upon by the Commission in *Muhammad* for the proposition that plaintiffs do not need to plead specific facts relating to views about “behavior, demeanor, or appearance” to support a claim of sex discrimination under a sex-stereotyping theory). Additionally, in our brief to the 5th Circuit in *EEOC v. Boh Brothers* (5th Cir. 11-30770), the Commission stated that terms historically used against gay and lesbian persons, such as “fag” or “faggot,” are degrading sex-based epithets and constitute evidence of discrimination on the basis of sex. See also *Complainant v. USPS*, EEOC Appeal No. 0120132452 (Nov. 18, 2014).

Addressing the issue of retaliation, the Commission also stated in its brief in *Muhammad*, above, that employee complaints about sexual orientation discrimination can constitute “protected activity” for purposes of a retaliation claim. The brief stated that in light of the EEOC’s

enforcement efforts and recent court decisions, individuals who complain may at least have an objectively reasonable belief that Title VII prohibits sexual-orientation discrimination.

A document compiling all of these developments, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, with additional links to documents compiling the private and federal sector EEOC cases on this topic, is available on our website at www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm, and should be a useful resource for investigations, litigation, and outreach. Another good outreach resource is the brochure, "Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Workers," available at www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm.

Charges should be processed in accordance with these Commission positions.

Charge coordination: The November 2012 and October 2011 memoranda required that all charges raising issues related to LGBT discrimination be shared with Sharon Alexander in the Office of the Chair. We have been advised by the Office of the Chair that this step is no longer required given the ability of the field to track LGBT charges in IMS (outlined below). Thus, LGBT charges no longer need to be shared with the Chair's staff. Charges should be coordinated with legal units in the field, as appropriate, and staff should also feel free to consult with members of the General Counsel's LGBT work group, who are listed on OGC's "Emerging Issues" inSite page on LGBT, at <http://insite/OGC/SEP-Emerging-Issues.cfm>, and reachable by e-mail at WORKGROUP.CHICPO.EEOCCHIC@EEOC.GOV.

However, we remain interested in learning of particular charges involving issues of first impression or other issues of significance regarding LGBT-related discrimination. These would include claims related to discriminatory policies; insurance issues including benefits for same-sex couples or transgender individuals; access to facilities based on gender identity; questions of coverage (i.e., whether the alleged discrimination related to transgender status, gender identity, or sexual orientation constitutes sex discrimination under Title VII); and any other unsettled issue on which stakeholders could benefit from policy guidance, technical assistance, or outreach. Additionally, to enable the Commission to articulate policy on emerging or novel issues of this nature, we want to identify possibly appropriate vehicles for a Commission Decision.

For these reasons, enforcement staff should alert Susan Murphy and Evangeline Hawthorne in OFP when they encounter charges with potential for policy development, and OFP will coordinate with OGC and OLC. For monitoring purposes, this notification should be provided as early in the process as possible and may be made by brief e-mail with the charge number.

I would also like to summarize ongoing requirements for tracking and handling charges:

- **Charge basis coding in IMS:** In January 2013, we began collecting information on charges filed alleging discrimination related to gender identity or sexual orientation. Ensuring accurate and consistent data entry on these charges remains very important. As you know, we created two new Title VII sex discrimination basis codes in IMS: (1) **GT – Sex – Gender Identity/Transgender** for sex discrimination claims based on transgender status

(also known as gender identity discrimination); and (2) **GO – Sex – Sexual Orientation** for sex discrimination claims by lesbian, gay, and bisexual individuals, including sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's failure to conform to sex stereotypes. This code should also be used for an allegation by a heterosexual individual of sex discrimination related to sexual orientation.

Please remind your staff of the appropriate steps to take when using these codes:

First, as for any sex discrimination claim, enter the applicable sex discrimination basis code (**GF – Sex – Female** or **GM – Sex – Male**). It is important to include the sex discrimination basis code in all charges alleging sex discrimination.

Note: For **Sex - Gender Identity/Transgender** charges, the Sex-Female or Sex-Male code selection is derived from how the Charging Party identifies himself or herself at the time the alleged discrimination occurred. If the information is known, it is helpful to include in the IMS Notes section that the CP has transitioned from "male to female" or "female to male."

Second, enter the appropriate code for the type of discrimination alleged: **GT – Sex -- Gender Identity/Transgender**; or **GO – Sex – Sexual Orientation**. Thus, LGBT-related charges will have two basis codes: either GF or GM, **and** GT or GO.

- **Charge prioritization under SEP:** As noted, the Strategic Enforcement Plan lists "coverage of lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as an enforcement priority. Charges should be identified in IMS as "Emerging and Developing Issues – LGBT (SEP 3C)." The SEP designation is in addition to the basis coding.
- **FEPA Charge Processing:** FEPAs have been informed that they should advise Charging Parties that they have a right to file with the EEOC under Title VII because of sex discrimination based on sexual orientation or gender identity. Where a state or local law prohibits discrimination based on sexual orientation or gender identity, EEOC staff should counsel individuals that they may also have a right to file a charge under the state or local law. As previously advised, Directors and State and Local Program Managers/Coordinators should work out an arrangement with FEPAs having such laws to ensure that charges are filed under the FEPA's explicit provisions, in order to protect the rights of Charging Parties under state or local law.

For more information: A collection of internal resources, including OFP's LGBT Cultural Competence Training, IMS Codes Training, and OGC's iClasses on LGBT Claims under Title VII, can be found on the [SEP Team inSite pages](http://insite.eeoc.gov/Chair/SEP/sephome.cfm), under "Emerging Issues," at <http://insite.eeoc.gov/Chair/SEP/sephome.cfm>, as well as on OGC's inSite page on LGBT, <http://insite.eeoc.gov/OGC/SEP-Emerging-Issues.cfm>.

Please share these instructions with your managers to ensure that all staff members are made aware of the Commission's policies and apply them consistently to inquiries and charges. If you have any questions about this guidance, please contact Susan Murphy in OFP.

cc: P. David Lopez
General Counsel

Peggy R. Mastroianni
Legal Counsel

Carlton M. Hadden
Director, Office of Federal Operations

Cynthia G. Pierre
Chief Operating Officer

Cathy Ventrell-Monsees
Senior Counsel
Office of the Chair

Antoinette Eates
Senior Attorney-Advisor
Office of the Chair



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Healthcare and
Insurance

August 7, 2014

Emily T. Prince



Re: FOIA/PA 2014-03980

Dear Ms. Prince:

This letter responds to your Freedom of Information Act (FOIA) request dated June 23, 2014 seeking documentation of the exclusion for services related to "sex transformations" in the Federal Employees Health Benefits (FEHB) Program.

You specifically requested the following:

Any and all documents establishing "the requirement that FEHB brochures exclude 'services, drugs, or supplies related to sex transformations' in Section 6 of the FEHB plan brochure" effective prior to the 2015 plan year, as referenced in FEHB Program Carrier Letter No. 2014-17, issued by John O'Brien, Director, Healthcare and Insurance, Office of Personnel Management on June 13, 2014.

A records search was conducted by Healthcare and Insurance. We were not able to locate any records or files pertaining to your specific request.

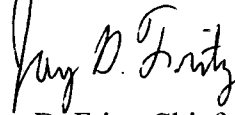
However, based on a review of brochure language, we determined that FEHB plans have excluded "services, drugs or supplies related to sex transformations" since 1974.

The undersigned is responsible for this determination. You have the right to appeal this decision. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to:

U.S. Office of Personnel Management
Office of the General Counsel
1900 E Street, N.W.
Washington, D.C. 20415

Both the front of the envelope and the first page of your letter should be marked "FOIA Appeal."
Copies of the FOIA regulations are available at www.opm.gov/efoia .

Sincerely,

A handwritten signature in black ink, appearing to read "Jay D. Fritz". The signature is written in a cursive, flowing style.

Jay D. Fritz, Chief
Program Analysis and Systems Support
Federal Employee Insurance Operations
Healthcare and Insurance



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Healthcare and
Insurance

NOV 24 2014

Ms. Emily T. Prince, Esq.
[REDACTED]
[REDACTED]

FOIA: 2015-00122

Dear Ms. Prince:

This letter is the final response to your October 5, 2014, Freedom of Information Act (FOIA) request addressed to the Office of Personnel Management (OPM) seeking the following records:

1. Any and all documents received from insurance carriers in response to FEHB Program Carrier Letter 2014-17 ("Carrier Letter").

After a thorough review of the requested records, it has been determined that these records are exempt from release under 5 U.S.C. § 552 (b)(4). We are prohibited from releasing records that are confidential and/or contain proprietary information.

2. Any and all documents indicating which insurance plans will and will not remove the categorical exclusion for drugs, services, or supplies related to "sex transformation," including but not limited to summaries of plan responses, memoranda listing plan responses, and documents which specify aggregate numbers of plans maintaining and not maintaining the exclusion.

Summaries of FEHB plan responses, memorandums listing plan responses are part of the negotiation process and are exempt from release under 5 U.S.C. § 552 (b)(4). We are prohibited from releasing records that are confidential and/or contain proprietary information.

However we have enclosed a list of Federal Employees Health Benefits (FEHB) Program plans that will offer services and benefits for Gender Identity Disorder/Gender Dysphoria beginning 2015. These services and benefits vary by plan. Please visit the FEHB Program website at <http://www.opm.gov/healthcare-insurance/healthcare/plan-information/> and review the plan's brochure for the level of benefits offered.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$25 minimum, there is no charge.

Ms. Emily T. Prince, Esq.

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The undersigned is responsible for the partial denial determination. You have the right to appeal this adverse determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to:

U.S. Office of Personnel Management
Office of the General Counsel
1900 E Street, N.W.
Washington, D.C. 20415

Both the front of the envelope and the first page of your letter should be marked "FOIA Appeal." Copies of the FOIA regulations are available at www.opm.gov/efoia.

Sincerely,



Alan P. Spielman
Assistant Director for
Federal Employee Insurance Operations
Healthcare and Insurance

Enclosure

Federal Employees Health Benefits (FEHB) Program plans that will offer services and benefits for Gender Identity Disorder/Gender Dysphoria beginning 2015.

Plan	Code	State/Coverage Area	Brochure Section
Kaiser Northern California	59, KC	CA/Northern CA	5(b)
Kaiser Northern California-Fresno	NZ	CA/Fresno County	5(b)
Kaiser Southern California	62	CA/Southern CA	5(b)
Kaiser Georgia	F8	GA/Atlanta, Athens, Columbus, Macon, Savannah	5(b)
Kaiser Hawaii	63	Hawaii	5(b)
Kaiser Mid-Atlantic States,	E3	DC/Maryland/Northern VA	5(b)
Kaiser Foundation Health Plan of the Northwest	57	OR/Portland & Salem; WA/Vancouver & Longview	5(b)
Independent Health Association	QA, C5	NY/Western NY	
Aetna HDHP/Aetna Direct	22, N6	All States & DC	5(b)
Aetna CDHP/Aetna Value Plan	EP, F5, G5, H4, JS	All States & DC	5(b)
Aetna Open Access (Capital Region)	JN	DC, MD (Northern/Central/Southern) & VA (Northern/Central/Richmond)	5(b)
Aetna Open Access (National High/Basic)	JC, JR, P3	DE, NJ, NY, PA	5(b)
Aetna Open Access (National High Option Only)	2X, 2U, C3, HF, UB, WQ, YE	AZ, CA, GA, NV, PA, TN, WA	5(b)
Aetna Whole Health	ES, D9, J9, F7	TX, VA, WI	5(b)
Innovation Health Plan	LQ	Virginia (Northern)	5(b)

OPM Continues to Have Nothing New to Say about Anti-Trans Discrimination

Since June 13, 2014, it has been the explicit policy of the U.S. government to discriminate on the basis of gender identity with respect to health insurance.

I have attempted since that date to get the Administration to rectify this discrimination. It has failed to do so.

In a November 24 discussion of Federal benefits, the Office of Personnel Management chose to address the question squarely:

Here's the offending language:

There is an evolving professional consensus that treatment is considered medically necessary for certain individuals who meet established Diagnostic and Statistical Manual (DSM) criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria. Accordingly, OPM is removing the requirement that FEHB brochures exclude “services, drugs, or supplies related to sex transformations” in Section 6 of the FEHB plan brochure effective with the 2015 plan year.

Carriers will propose one of two options on coverage of services, drugs, and supplies regarding a diagnosis of Gender Identity Disorder/Gender Dysphoria:

- 1) Remove the **General Exclusion** language and provide to OPM the specific brochure text that describes the covered components and limitations of care for the diagnosis; or
- 2) Maintain the **General Exclusion** language for the 2015 plan year.

You might notice that the woman called on to respond is reading the June 13 letter that was referenced in my question, which she clearly had at the ready to read, **verbatim**, as an answer to the question. This is what OPM considers “responsiveness.”

The gentleman hosting that call was Alan P. Spielman, Assistant Director for Federal Employee Insurance Operations in OPM’s Healthcare and Insurance Program Division. Sometime that same day, November 24, 2014, [Mr. Spielman signed the response to my FOIA request of July 29, 2014](#). Again, this is what OPM considers “responsiveness.”

In that FOIA response, OPM provides a complete list of plans that do not discriminate on the basis of gender identity. There are 304 FEHB plans.

Federal Employees Health Benefits (FEHB) Program plans that will offer services and benefits for Gender Identity Disorder/Gender Dysphoria beginning 2015.

Plan	Code	State/Coverage Area	Brochure Section
Kaiser Northern California	59, KC	CA/Northern CA	5(b)
Kaiser Northern California-Fresno	NZ	CA/Fresno County	5(b)
Kaiser Southern California	62	CA/Southern CA	5(b)
Kaiser Georgia	F8	GA/Atlanta, Athens, Columbus, Macon, Savannah	5(b)
Kaiser Hawaii	63	Hawaii	5(b)
Kaiser Mid-Atlantic States,	E3	DC/Maryland/Northern VA	5(b)
Kaiser Foundation Health Plan of the Northwest	57	OR/Portland & Salem; WA/Vancouver & Longview	5(b)
Independent Health Association	QA, C5	NY/Western NY	
Aetna HDHP/Aetna Direct	22, N6	All States & DC	5(b)
Aetna CDHP/Aetna Value Plan	EP, F5, G5, H4, JS	All States & DC	5(b)
Aetna Open Access (Capital Region)	JN	DC, MD (Northern/Central/Southern) & VA (Northern/Central/Richmond)	5(b)
Aetna Open Access (National High/Basic)	JC, JR, P3	DE, NJ, NY, PA	5(b)
Aetna Open Access (National High Option Only)	2X, 2U, C3, HF, UB, WQ, YE	AZ, CA, GA, NV, PA, TN, WA	5(b)
Aetna Whole Health	ES, D9, J9, F7	TX, VA, WI	5(b)
Innovation Health Plan	LQ	Virginia (Northern)	5(b)

That's 15. 15 plans out of 304, or less than 5%, do NOT discriminate on the basis of Gender Identity.

Under current OPM policy, the other 289 health insurance carriers may continue to exclude care solely because it is a "service, drug, or supply related to sex transformations." That means that even if a service is covered, if it is related to a "sex transformation" (i.e. transition, described using the most offensive language possible), a carrier may exclude it. Under FEHB regulations, OPM accepts legal responsibility for each of these health insurance plans.

Under *Macy v. Holder*, such discrimination is illegal. Under Title VII, such discrimination is illegal. Under the President's Executive Order of July 21, 2014 (EO 13,672) such discrimination is illegal.

The Office of Personnel Management clearly does not care.

Thanks to Amélie E. Koran for compiling information on the total number of plans and their general lack of trans-inclusiveness.



Ensuring Benefits Parity and Gender Identity Nondiscrimination in Essential Health Benefits

Kellan Baker and Andrew Cray November 15, 2012

Introduction

At the core of the Patient Protection and Affordable Care Act is the most comprehensive overhaul of the American health insurance system since the creation of Medicare and Medicaid more than 40 years ago. In particular, the health reform law enacts an important change to the private insurance industry: It creates the framework for a minimum set of essential benefits that many plans in every state will have to cover. As our nation begins a robust discussion of what constitutes appropriately comprehensive insurance coverage, nondiscrimination in plan design must rank alongside cost and quality as a fundamental consideration for regulators, policymakers, and insurance carriers themselves. These actors must define and address the impermissible discrimination against consumers purchasing insurance products based on the essential benefit standard during this crucial period before the essential benefits provision comes into force in 2014.¹ If they do not, it will seriously undermine the health reform law's goal of promoting equitable, comprehensive, and affordable coverage for all Americans.

This issue brief explores the problem of insurance discrimination from the perspective of one of the clearest and most widespread examples of arbitrary discrimination in plan design: coverage exclusions targeting transgender people for denial of benefits that are routinely covered for nontransgender people.

Establishing the essential health benefit standard

A centerpiece of the Affordable Care Act is the concept of an essential health benefit standard designed to ensure that insurance plans offer a comprehensive package of covered benefits. As defined in Section 1302 of the law, the essential health benefit standard will apply to all nongrandfathered plans in the individual and small-group markets in every state and will apply equally to plans inside and outside the health insurance exchanges, which are state-based marketplaces where individuals and small businesses

will be able to shop for affordable coverage beginning in 2014. This standard will also apply to the basic health programs that states may establish under the Affordable Care Act and to Medicaid benchmark and benchmark-equivalent plans.²

At its core, the essential health benefit concept requires insurers to cover benefits across 10 categories of care.³ The Affordable Care Act defines these categories as follows:

1. Ambulatory patient services
2. Emergency services
3. Hospitalization
4. Maternity and newborn care
5. Mental health and substance-use disorder services, including behavioral health treatment
6. Prescription drugs
7. Rehabilitative and habilitative services and devices
8. Laboratory services
9. Preventive and wellness services and chronic disease management
10. Pediatric services, including oral and vision care

The essential health benefit standard will take effect in 2014.⁴ To determine which benefits must be covered in each of the 10 categories, the U.S. Department of Health and Human Services has proposed using a state-specific benchmark approach. In this approach, states will have the flexibility to select a benchmark plan that broadly reflects the scope of benefits covered by a “typical employer plan.”⁵ Plans subject to the essential health benefit standard must then make any adjustments necessary to ensure they are offering coverage that is “substantially equal” to the benefits offered by the state’s benchmark plan.

Using guidance from the U.S. Department of Labor, the Department of Health and Human Services released a bulletin in December 2011 that identifies four kinds of plans intended to represent typical employer plans.⁶ States may choose any of these plans as their benchmark:

- The largest plan by enrollment in any of the three largest small-group insurance products in the state’s small-group market
- Any of the largest three state employee health benefit plans by enrollment
- Any of the largest three national Federal Employee Health Benefit Program plan options by enrollment
- The largest insured commercial non-Medicaid Health Maintenance Organization, or HMO, operating in the state

The Department of Health and Human Services set September 30, 2012 as the deadline for states to select their essential health benefit benchmarks.⁷ The department's guidance indicates that any state that did not select a benchmark plan by that date will use the default benchmark, which is the largest plan by enrollment in the largest product in the state's small-group market.⁸

Research undertaken by the Center for American Progress shows that as of the September deadline, 24 states had selected benchmark plans. Importantly, these state-selected benchmark plans do not themselves comprise a state's essential health benefit standard: States must also supplement and modify their selected benchmarks according to federal requirements before they are considered final.⁹ According to the Affordable Care Act, essential health benefits benchmarks:¹⁰

- Must cover services in all 10 categories
- Must balance coverage across all 10 categories
- Must account for varying health needs across diverse populations
- May not discriminate against individuals on the basis of age, disability, or expected length of life in benefit design, coverage decisions, reimbursement rates, or incentive programs

State essential health benefit benchmark plans must also comply with the Mental Health Parity and Addiction Equity Act of 2008 and other relevant federal and state nondiscrimination laws.¹¹

The problem of exclusions: Transgender Americans and the essential benefit standard

State essential health benefit benchmark plans, after supplementation and modification, will establish a baseline of coverage that will significantly affect access to care for diverse populations of consumers. It is thus vital that each state's essential health benefit benchmark comply with the nondiscrimination requirements of the Affordable Care Act and other relevant state and federal laws. These laws will be important to ensuring that plans subject to the essential health benefit standard do not arbitrarily discriminate on any protected basis, and that they appropriately provide consumers with parity in coverage for medically necessary services across the 10 categories of essential benefits.

Arbitrary discrimination is unfortunately a frequent practice in America's health insurance industry.¹² While it is true that discrimination is a fundamental premise of for-profit insurance, federal and state insurance law and regulation has consistently sought

to distinguish between discrimination in the form of rationally segmenting risk and pricing insurance products accordingly, and discrimination in the form of arbitrarily excluding services for particular conditions or groups of individuals. Too often, benefit exclusions and other coverage limitations have no sound medical or actuarial basis and serve only to arbitrarily discriminate against specific groups of consumers.

An example of such arbitrary discrimination by the health insurance industry is the proliferation of transgender-specific exclusions. A transgender person is someone whose internal sense of gender—also known as gender identity—is different from the gender typically associated with the sex on his or her original birth certificate. For example, a person who was assigned female at birth but who lives and identifies as male is a transgender man.

The medical diagnosis that correlates with a transgender identity is gender identity disorder, or GID. The American Medical Association and the World Health Organization both recognize gender identity disorder as a serious medical condition,¹³ and it is included in the Diagnostic and Statistical Manual of Mental Disorders, or DSM, maintained by the American Psychiatric Association.¹⁴ The current version of the manual describes gender identity disorder as a severe and persistent discomfort with one's assigned sex and with one's primary and secondary sex characteristics, which causes intense psychological pain and suffering.¹⁵ According to the American Medical Association, "GID, if left untreated, 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."¹⁶

The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the Endocrine Society, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health have all publicly stated that medically necessary treatments for transgender people may include mental health services, hormone therapy, and surgeries involving the primary and/or secondary sex characteristics.¹⁷ The goal of these treatments is to bring the patient's physical body into alignment with their gender identity in order to alleviate the clinically significant psychological distress that is the hallmark of gender identity disorder.

The medical treatments that may be medically necessary for transgender individuals in gender transition are the same services needed by nontransgender people for a variety of conditions. The hormone therapy used in transition, for example, is provided to patients with endocrine disorders and to women with menopausal symptoms.¹⁸ Surgeries and reconstructive procedures needed by many transgender people—such as breast removal or augmentation, hysterectomy, oophorectomy, orchiectomy, salpingectomy, phalloplasty, and vaginoplasty—are commonly used for treating injuries and intersex conditions, or for cancer treatment or prevention.¹⁹

To stay healthy throughout their lives, transgender people also need preventive care to keep from becoming ill, including services that are traditionally considered to be gender specific such as Pap smears, prostate exams, and mammograms. Transgender patients may need a mix of such screenings. Medically necessary preventive screenings for a transgender woman, for example, may include both a mammogram and a prostate exam.

Many health insurance plans, however, specifically target the transgender population for categorical denial of a wide range of services. In some instances these exclusions apply only to surgical treatments related to transition while permitting coverage for other benefits such as mental health services and hormone therapy. But most coverage exclusions are sweeping—excluding, for example, coverage of any “services, drugs, or supplies related to sex transformation,”²⁰ “all services related to sexual reassignment,”²¹ or “any treatment, drug, service or supply related to changing sex or sexual characteristics.”²²

Further, insurance carriers routinely invoke these exclusions to deny coverage for any services provided to transgender individuals, including preventive screenings, setting broken bones, and hospitalization for pneumonia. A transgender woman in New Jersey, for example, was denied coverage for a mammogram on the basis that it fell under her plan’s sweeping exclusion for all treatments “related to changing sex.” After a two-year appeals process and intervention from the Transgender Legal Defense and Education Fund, the carrier reversed its position and agreed that the exclusion had unfairly prevented her from receiving medically necessary care.²³

Unfortunately, as Table 1 shows, at least 15 of the 24 states that have publicly reported their submitted benchmark selections have selected plans that contain transgender-specific exclusions. Nine states have not provided sufficient plan documentation to offer insight into the full scope of their plans’ exclusions, but a review of the potential benchmarks in numerous states indicates that the likelihood is very high that these selected benchmarks will also include transgender-specific exclusions.

TABLE 1

State	Benchmark-selection status	Exclusion language
Alabama	No selection	
Alaska	No selection	
Arkansas	Arkansas Blue Cross Blue Shield Health Advantage POS	No current evidence of coverage publicly available
Arizona	United Healthcare EPO	No current evidence of coverage publicly available
California	Kaiser Small Group HMO	“Transgender surgery”
Colorado	Kaiser Ded/CO HMO 1200D	“All services related to sexual reassignment”
Connecticut	ConnectiCare HMO	No current evidence of coverage publicly available
District of Columbia	BlueShield CareFirst BluePreferred	“Any treatment or procedure designed to alter an individual’s physical characteristics to those of the opposite sex”
Delaware	BlueCross BlueShield small-group EPO	No current evidence of coverage publicly available

State	Benchmark-selection status	Exclusion language
Florida	No selection	
Georgia	No selection	
Idaho	No selection	
Hawaii	HMSA Preferred Provider Plan 2010	"Services or supplies related to sexual transformation regardless of cause. This includes, but is not limited to, sexual transformation surgery."
Iowa	No selection	
Illinois	BlueCross BlueShield of Illinois BlueAdvantage small-group plan	No current evidence of coverage publicly available
Indiana	No selection	
Kansas	BlueCross BlueShield of Kansas Comprehensive Plan	"Services for gender reassignment or sex transformation"
Kentucky	Anthem PPO	"Services and supplies related to sex transformation and/or the reversal thereof..."
Louisiana	No selection	
Massachusetts	BlueCross BlueShield of Massachusetts HMO Blue	No current evidence of coverage publicly available
Maryland	State Employee Plan	"Any procedure or treatment designed to alter an individual's physical characteristics to those of the opposite sex"
Maine	No selection	
Michigan	Priority Health HMO	"Any procedure or treatment, including hormone therapy, designed to change your physical characteristics from your biologically determined sex to those of the opposite sex. This exclusion applies despite any diagnosis of gender role or psychosexual orientation problems."
Minnesota	No selection	
Mississippi	Network Blue	"Treatment related to sex transformations, sexual function, sexual dysfunctions or inadequacies regardless of Medical Necessity."
Missouri	No selection	
Montana	No selection	
Nebraska	High deductible health savings option	No current evidence of coverage publicly available
Nevada	No selection	
New Hampshire	Matthew Thorton Blue plan	No current evidence of coverage publicly available
New Jersey	No selection	
New Mexico	Lovelace Classic small-group PPO	"Services and procedures for sexual transformation"
New York	Oxford EPO	"Sex change procedures"
North Carolina	No selection	
North Dakota	No selection	
Ohio	No selection	
Oklahoma	No selection	
Oregon	PacificSource Preferred CoDeduct small-group plan	"Sex transformations," which prohibits coverage for "procedures includ[ing], but not limited to," surgical treatments that may be related to gender transition and "complications resulting from gender reassignment procedures."
Pennsylvania	No selection	
Rhode Island	United Health Choice Plus	"Sex transformation operations"
South Carolina	No selection	
Tennessee	No selection	

State	Benchmark-selection status	Exclusion language
Texas	No selection	
Utah	Utah Basic Plus State Employee Plan	"Gender reassignment surgery" and "All services related to gender dysphoria or gender identity disorder"
Vermont	BlueCross BlueShield Vermont	"Treatment leading to, or in connection with, transsexual surgery"
Virginia	No selection	
Washington	Regence Innova small group	"Treatment, surgery, and counseling services for sexual reassignment"
West Virginia	No selection	
Wisconsin	No selection	
Wyoming	No selection	

The essential benefits concept established by the Affordable Care Act is intended to ensure that a comprehensive range of essential services is available to those who need them. By any standard, this range includes many services that may be medically necessary for transgender people at various points in their lives such as mental health services, prescription drugs, preventive services, and ambulatory and hospital care. The arbitrary singling-out of the transgender population for categorical denials of coverage through transgender-specific exclusions runs contrary to the fundamental principle of the essential benefits concept.

Moreover, these exclusions also run afoul of federal nondiscrimination law. To promote equitable access to comprehensive, affordable coverage, the Affordable Care Act and federal regulations have established nondiscrimination protections that apply to the essential health benefit standard design and the activities of qualified health plans. Qualified health plans as defined by the Affordable Care Act are those certified as meeting the federal and state standards, including the essential health benefit standard, required for entry to the health insurance exchange marketplace.²⁴ The Affordable Care Act and federal regulations implementing the exchanges include relevant protections on the basis of sex, gender identity, and disability, as we discuss below.

[Nondiscrimination on the basis of sex and gender identity: Section 1557 of the Affordable Care Act and federal regulations regarding certification standards for qualified health plans](#)

Section 1557 of the Affordable Care Act prohibits discrimination in any health program receiving federal funds or by any entity established under Title I of the health reform law.²⁵ This provision references the protections of several federal civil rights laws, including Title IX of the Education Amendments of 1972, through which Section 1557 incorporates nondiscrimination protections on the basis of sex.²⁶ Recent interpretations by federal courts and executive agencies indicate that such sex-based protections cover transgender people through an interpretation of the term "sex" that includes

gender identity and nonconformity with sex stereotypes.²⁷ In particular, the U.S. Equal Employment Opportunity Commission recently issued a formal ruling that gender identity discrimination is per se sex discrimination,²⁸ and the Office for Civil Rights at the Department of Health and Human Services has explicitly stated that the sex-based nondiscrimination protections of Section 1557 extend to claims of discrimination based on gender identity.²⁹

Additionally, the Department of Health and Human Services issued regulations in March 2012 that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, sexual orientation, or gender identity in all exchange activities,³⁰ as well as the activities of qualified health plan issuers with regard to their qualified health plans.³¹ The cumulative effect of Section 1557 and these regulations is that qualified health plan issuers—whose qualified health plans and any other plans they offer in the individual and small-group markets must cover the full range of essential benefits—may not offer qualified health plans that discriminate on the basis of gender identity. This means that they cannot deny transgender consumers coverage for services that are covered for nontransgender consumers. As the American Medical Association recognizes, “the denial of ... otherwise covered benefits for patients suffering from GID represents discrimination based solely on a patient’s gender identity.”³²

[Nondiscrimination on the basis of disability: Section 1302 of the Affordable Care Act](#)

Section 1302 of the Affordable Care Act prohibits essential health benefit package designs that discriminate against individuals on the basis of factors such as disability.³³ Though the statute directs this requirement at the secretary of Health and Human Services, any scope and duration limits included in state-selected essential health benefit benchmarks will be subject to review by the Department of Health and Human Services, which effectively extends this requirement to the states.³⁴

Full compliance with federal nondiscrimination law thus requires appropriate restrictions on benefit exclusions and other limitations in state essential health benefit benchmarks. In particular, the goal of avoiding disability-based discrimination in essential health benefit design necessitates the review of exclusions in state-selected benchmarks to ensure that any coverage exclusions incorporated into final essential benefit standards do not arbitrarily discriminate against individuals with particular conditions.

Medicaid regulations similarly prohibit the arbitrary denial of benefits coverage based on diagnosis, type of illness, or condition.³⁵ The regulation is based on the view that “when a state singles out a particular medical condition ... it is ... wholly inconsistent with [the Medicaid statute’s] objective of providing medical assistance to eligible individuals in need of medical assistance.”³⁶ This standard, which has formed part of the bedrock of the Medicaid program for more than three decades, also reflects the coverage goals of the

Affordable Care Act and should provide guidance in establishing a limitation on condition-based exclusions in plans based on the essential health benefit standard.

Similar to other arbitrary exclusions that discriminate on the basis of medical condition without a sound medical or actuarial basis,³⁷ transgender exclusions represent exactly the kind of invidious barriers to coverage and care that the Affordable Care Act was designed to eliminate. The 2011 Institute of Medicine report on the essential benefits clarifies that Congress intended “to ensure that insurers do not make arbitrary and discriminatory decisions based on certain characteristics of people rather than assessing the individuality of each case when making medical necessity decisions and applying clinical policies.”³⁸ State essential benefit standards must thus provide coverage for essential benefits without discrimination on the basis of disability, gender identity, or other protected classes. They must also ensure that all individuals have full access to the services that are part of the essential benefits, regardless of the diagnosis or condition for which the individual’s health care provider has deemed these services medically necessary.

Implementing equity

Transgender-specific exclusions are incompatible with these nondiscrimination mandates and with health reform’s broader goal of ensuring that all Americans have access to a comprehensive set of essential benefits. Moreover, removing these exclusions improves the health of transgender people, particularly with regard to improved outcomes for some of the most significant health problems facing the transgender population. These include reduced suicide risk, lower rates of substance abuse, improved mental health outcomes, and increased adherence to HIV treatment regimens.³⁹

The experiences of both public and private programs demonstrate that offering coverage without these exclusions does not negatively impact the bottom line. When San Francisco became the first major U.S. city to eliminate transgender-specific insurance exclusions for its employees in 2001, the city responded to cost concerns by implementing a \$1.70 premium surcharge for all employees. Actual costs were so much less than expected that the premium surcharge produced a multi-million dollar surplus over the following years. In 2006, the city eliminated the surcharge entirely and endorsed widely available coverage free of transgender-specific exclusions.⁴⁰ Since then, Portland, Oregon; Seattle; and Oregon’s Multnomah County have eliminated transgender-specific exclusions from their employee coverage. And in November 2012, the San Francisco Health Commission voted to remove these exclusions from its Healthy San Francisco health access program, a public safety net program designed to make health services accessible and affordable for San Francisco’s 73,000 uninsured residents.⁴¹

In spring 2012, the California Department of Insurance released an economic impact assessment comparing the costs and benefits of a California law prohibiting insurance

discrimination against transgender people.⁴² The Department concluded that there was an “immaterial” impact on premium costs” and that “the benefits of eliminating discrimination far exceed the insignificant costs.” The experience of private employers overwhelmingly concurs. Kaiser Permanente removed transgender-specific exclusions from its non-represented employee plans in November 2012 and anticipates no resulting change to the cost trends of its health plans, and the 2013 Corporate Equality Index reports that 25 percent of Fortune 500 companies offer coverage with no transgender-specific exclusions.⁴³

Removing transgender-specific exclusions does not mandate coverage for procedures related to gender transition, nor does it create a new category of essential benefits in addition to those already required under the Affordable Care Act. It instead requires insurers to not arbitrarily discriminate in coverage determinations on the basis of factors such as gender identity or condition for which such benefit is sought. Removing these exclusions reflects the fact that fair and appropriate coverage determinations and essential benefit designs must necessarily arise from medically and actuarially sound principles rather than from discriminatory bias and scientifically outdated standards.

Recommended steps

To fulfill the comprehensive coverage and equity aims of the Affordable Care Act, ensure compliance with federal and state nondiscrimination laws,⁴⁴ and provide all consumers with a minimum standard of comprehensive and affordable coverage, regulators in states selecting their own benchmarks should take the following steps:

- Apply and enforce federal and applicable state nondiscrimination protections with regard to any plan required to cover the essential benefits, including those in the individual and small-group markets outside the exchanges.
- Remove arbitrary condition-based exclusions that lack a sound clinical and actuarial basis—including exclusions targeting the transgender population—from the state’s essential health benefit standard.
- Prohibit any such arbitrary condition-based coverage exclusions, including those that unfairly discriminate against transgender people, in all plans based on the essential health benefit standard.
- Ensure that the benefit designs in the state essential health benefit standard do not arbitrarily limit the benefits covered within a category of essential health benefits in a manner that discriminates on the basis of condition, including against transgender people.

Similarly, federal policymakers reviewing state essential health benefit benchmark selections and establishing policy for plans sold through federally facilitated exchanges must also play a role in ensuring nondiscrimination in these benefit standards. To ensure that the promises of health reform reach all Americans, including transgender Americans, the Department of Health and Human Services can take the following steps:

- As part of applying federal nondiscrimination protections on the basis of sex, gender identity, and disability to state-selected benchmark plans, federal policymakers can require states to remove arbitrary condition-based exclusions from their selected essential health benefit benchmark plans. This includes transgender-specific exclusions.
- They can ensure that the benefit designs in state essential health benefit standards do not arbitrarily limit the benefits covered within a category of essential health benefits in a manner that discriminates on the basis of a particular condition, including against transgender people.
- Federal officials can implement a certification standard prohibiting plans sold in federally facilitated exchanges from discriminating on the basis of race, color, national origin, disability, age, sex, sexual orientation, or gender identity.
- They can implement a certification standard prohibiting plans sold in federally facilitated exchanges from incorporating arbitrary condition-based exclusions, including transgender-specific exclusions.

Conclusion

The essential health benefit standard established under the Affordable Care Act and defined by the individual states is key in achieving the law's goal of making affordable, comprehensive health care coverage available to all Americans. Unless parity and nondiscrimination are part of the foundation for these standards, however, many transgender people and other underserved Americans will continue to face arbitrary barriers to coverage for the care they need. Thorough review of state-selected benchmark plans and strong standards for essential health benefit-based plans are crucial first steps to ensuring that these health insurance reforms live up to their promise of increasing access to care that supports healthy communities.

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Increasing access to comprehensive, effective, and affirming healthcare services for trans and gender-variant communities

Insurance Issues

Electronic Medical Records (EMR)

Patients may wish to be labeled 'Male' or 'Female' according to their gender identity and expression, their legal status, or according to the way they are registered with their insurance carrier. They may wish to be referred to as 'Female' in one situation (e.g., in their record with the physician's office and in personal interactions with the physician and staff), but 'Male' in other situations (e.g., on forms related to their insurance coverage, lab work, etc.). This application of terminology could change at any time as individuals come to understand or evaluate their gender.

EMR systems that do not have transgender-specific options make it more difficult for transgender people to change the sex designator under which they will be classified, or such systems may permit a change but will retain a record of that change which will be visible to numerous people outside of the physician or patient's control, leaving transgender and transsexual patients vulnerable to exposure and discrimination. Clinics are encouraged to adopt flexible systems or develop a workaround.

Insurance Issues

Health insurance policies often overtly exclude treatments for transgender or transsexual people's health care needs, even when these needs are not related to a gender transition. Some policies are beginning to offer transgender-inclusive plans where employers (who provide the plan as an employee benefit) have demanded that the carriers do so. Much of the difficulty that transgender people experience with respect to insurance is due to coding systems that provide certain procedures for individuals of one or the other sex. For example, if a transman who is enrolled in the insurance system as a male (which facilitates coverage for his labs that compare results with 'male' values) develops uterine fibroids and requires a hysterectomy, the insurance carrier typically denies coverage with the rationale that hysterectomy is only covered for females. Once the carrier labels the patient as transgender or transsexual, many types of coverage may be routinely denied, where they would be covered for patients who are not identified as transgender or transsexual. Physicians or their support staff members may need to interact with insurance claims processors on behalf of their transgender or transsexual patients to insist that medically necessary treatments are covered. In such interactions it will be necessary to support the patient's preferred gender in relationship to the insurance company in the best interests of the patient's health.



WPATH WORLD PROFESSIONAL
ASSOCIATION for
TRANSGENDER HEALTH

Standards of Care

for the Health of Transsexual,
Transgender, and Gender-
Nonconforming People

The World Professional Association for Transgender Health

Standards of Care

for the Health of Transsexual, Transgender, and Gender- Nonconforming People

Eli Coleman, Walter Bockting, Marsha Botzer, Peggy Cohen-Kettenis, Griet DeCuypere, Jamie Feldman, Lin Fraser, Jamison Green, Gail Knudson, Walter J. Meyer, Stan Monstrey, Richard K. Adler, George R. Brown, Aaron H. Devor, Randall Ehrbar, Randi Ettner, Evan Eyler, Rob Garofalo, Dan H. Karasic, Arlene Istar Lev, Gal Mayer, Heino Meyer-Bahlburg, Blaine Paxton Hall, Friedmann Pfäfflin, Katherine Rachlin, Bean Robinson, Loren S. Schechter, Vin Tangpricha, Mick van Trotsenburg, Anne Vitale, Sam Winter, Stephen Whittle, Kevan R. Wylie & Ken Zucker

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7th Version¹ | www.wpath.org

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¹ This is the seventh version of the *Standards of Care* since the original 1979 document. Previous revisions were in 1980, 1981, 1990, 1998, and 2001. Version seven was published in the *International Journal of Transgenderism*, 13(4), 165–232. doi:10.1080/15532739.2011.700873

If mental health professionals are uncomfortable with, or inexperienced in, working with transsexual, transgender, and gender-nonconforming individuals and their families, they should refer clients to a competent provider or, at minimum, consult with an expert peer. If no local practitioners are available, consultation may be done via telehealth methods, assuming local requirements for distance consultation are met.

Issues of Access to Care

Qualified mental health professionals are not universally available; thus, access to quality care might be limited. WPATH aims to improve access and provides regular continuing education opportunities to train professionals from various disciplines to provide quality, transgender-specific health care. Providing mental health care from a distance through the use of technology may be one way to improve access (Fraser, 2009b).

In many places around the world, access to health care for transsexual, transgender, and gender-nonconforming people is also limited by a lack of health insurance or other means to pay for needed care. WPATH urges health insurance companies and other third-party payers to cover the medically necessary treatments to alleviate gender dysphoria (American Medical Association, 2008; Anton, 2009; The World Professional Association for Transgender Health, 2008).

When faced with a client who is unable to access services, referral to available peer support resources (offline and online) is recommended. Finally, harm-reduction approaches might be indicated to assist clients with making healthy decisions to improve their lives.

VIII

Hormone Therapy

Medical Necessity of Hormone Therapy

Feminizing/masculinizing hormone therapy—the administration of exogenous endocrine agents to induce feminizing or masculinizing changes—is a medically necessary intervention for many transsexual, transgender, and gender-nonconforming individuals with gender dysphoria

FEHB Program Carrier Letter

All FEHB Carriers

U.S. Office of Personnel Management
Healthcare and Insurance

Letter No. 2014-17

Date: June 13, 2014

Fee-for-Service [14] Experience-rated HMO [14] Community-rated HMO [15]

SUBJECT: Gender Identity Disorder/Gender Dysphoria

This letter provides guidance for FEHB carriers regarding treatment of individuals who meet established criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria.

Carrier Letter 2011-12 directed carriers to allow individuals who identify as transgender to select their preferred gender designation for health records. It also reinforced the need to provide health benefits consistent with each person's individual medical status before and after gender transition.

There is an evolving professional consensus that treatment is considered medically necessary for certain individuals who meet established Diagnostic and Statistical Manual (DSM) criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria. Accordingly, OPM is removing the requirement that FEHB brochures exclude "services, drugs, or supplies related to sex transformations" in Section 6 of the FEHB plan brochure effective with the 2015 plan year.

Carriers will propose one of two options on coverage of services, drugs, and supplies regarding a diagnosis of Gender Identity Disorder/Gender Dysphoria:

- 1) Remove the **General Exclusion** language and provide to OPM the specific brochure text that describes the covered components and limitations of care for the diagnosis; or
- 2) Maintain the **General Exclusion** language for the 2015 plan year.

Let your contract specialist know by June 30, 2014 which option you are proposing and include the brochure text if applicable. Consistent with other benefit and rate negotiations, provide your contract specialist with all required information and necessary justification.

For questions or additional information, please contact your contract specialist.

Sincerely

John O'Brien
Director
Healthcare and Insurance

PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE¹

American Medical Association

Resolution: Removing Financial Barriers to Care for Transgender Patients (2008)

An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID... Therefore, be it RESOLVED, that the AMA supports public and private health insurance coverage for treatment of gender identity disorder.

http://www.tgender.net/taw/ama_resolutions.pdf

Resolution H-185.950: Removing Financial Barriers to Care for Transgender Patients (2008)

Our AMA supports public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician. (Res. 122; A-08)

<http://www.ama-assn.org/resources/doc/PolicyFinder/policyfiles/HnE/H-185.950.HTM>

American Psychiatric Association

Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012)

The American Psychiatric Association:

1. Recognizes that appropriately evaluated transgender and gender variant individuals can benefit greatly from medical and surgical gender transition treatments.
2. Advocates for removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment.
3. Opposes categorical exclusions of coverage for such medically necessary treatment when prescribed by a physician.

¹ Compiled by Lambda Legal. For more information, contact Dru Levasseur, Transgender Rights Attorney, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005, (212) 809-8585 (telephone), (212) 809-0055 (fax), dlevasseur@lambdalegal.org.

www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf

Position Statement on Discrimination Against Transgender and Gender Variant Individuals (2012)

Being transgender gender or variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression... Thus, this position statement is relevant to the APA because discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender variant individuals.

The American Psychiatric Association:

1. Supports laws that protect the civil rights of transgender and gender variant individuals.
2. Urges the repeal of laws and policies that discriminate against transgender and gender variant individuals.
3. Opposes all public and private discrimination against transgender and gender variant individuals in such areas as health care, employment, housing, public accommodation, education, and licensing.
4. Declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons.

www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf

American Psychological Association

Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination (2008)

As stated in the Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination, the APA “opposes all public and private discrimination on the basis of actual or perceived gender identity and expression and urges the repeal of discriminatory laws and policies” and “calls upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals and encourages psychologists to take a leadership role in working against discrimination towards transgender and gender variant individuals[.]”

The “APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments.”

<http://www.apa.org/about/policy/transgender.aspx>

American Academy of Family Physicians

Resolution No. 1004 (2012)

In 2007, an AAFP Commission declared that the association has a policy opposing any form of patient discrimination and stated its opposition to the exclusion of transgender health care. In 2012, the organization released a new resolution: “RESOLVED, That the American Academy of Family Physicians (AAFP) support efforts to require insurers to provide coverage for comprehensive care of [transgender] individuals including medical care, screening tests based on medical need rather than gender, mental health care, and, when medically necessary, gender reassignment surgery.”

http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf

American Academy of Physician Assistants

Non-Discrimination Statement² (Adopted 2000; amended 2004, 2006, 2007 and 2008)

“Physician assistants should not discriminate against classes or categories of patients in the delivery of needed health care. Such classes and categories include...gender identity.”

American College of Nurse Midwives

Transgender/Transsexual/Gender Variant Health Care (2012)

The American College of Nurse-Midwives (ACNM) supports efforts to provide transgender, transsexual, and gender variant individuals with access to safe, comprehensive, culturally competent health care and therefore endorses the 2011 World Professional Association for Transgender Health (WPATH) Standards of Care.³

² Please see “Ethical Conduct for the Physician Assistant Profession” (Adopted 2000, amended 2004, 2006, 2007, and 2008) and “Comprehensive Health Care Reform” (Adopted 2005 and amended 2010). Thanks to Diane Bruessow for this compilation.

³ Thanks to Andre Wilson of Jamison Green & Associates for making us aware of this organization statement.

National Association of Social Workers

Transgender and Gender Identity Issues Policy Statement (2008)

NASW supports the rights of all individuals to receive health insurance and other health coverage without discrimination on the basis of gender identity, and specifically without exclusion of services related to transgender or transsexual transition...in order to receive medical and mental health services through their primary care physician and the appropriate referrals to medical specialists, which may include hormone replacement therapy, surgical interventions, prosthetic devices, and other medical procedures.

<http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf>

World Professional Association for Transgender Health

Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (2008)

WPATH found that decades of experience with the Standards of Care show gender transitions and related care to be accepted, good medical practice and effective treatment. In a 2008 clarification, WPATH stated:

[S]ex reassignment, properly indicated and performed as provided by the Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria. Sex reassignment plays an undisputed role in contributing toward favorable outcomes, and comprises Real Life Experience, legal name and sex change on identity documents, as well as medically necessary hormone treatment, counseling, psychotherapy, and other medical procedures...

The medical procedures attendant to sex reassignment are not ‘cosmetic’ or ‘elective’ or for the mere convenience of the patient. These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition.

<http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>

National Commission on Correctional Health Care

Position Statement: Transgender Health Care in Correctional Settings (2009)

The health risks of overlooking the particular needs of transgender inmates are so severe that acknowledgment of the problem and policies that assure appropriate and responsible provision of health care are needed....

Because prisons, jails, and juvenile justice facilities have a responsibility to ensure the physical and mental health and well-being of transgender people in their custody, correctional health staff should manage these inmates in a manner that respects the biomedical and psychological aspects of a gender identity disorder (GID) diagnosis.

<http://www.ncchc.org/transgender-health-care-in-correctional-settings>

American Public Health Association

The Need for Acknowledging Transgender[ed] Individuals within Research and Clinical Practice (1999)

The APHA issued a policy statement concluding that transgender[ed] “individuals are not receiving adequate health care, information, or inclusion within research studies because of discrimination by and/or lack of training of health care providers and researchers; therefore...”

The APHA therefore “Urges researchers and health care workers to be sensitive to the lives of transgender[ed] individuals and treat them with dignity and respect, and not to force them to fit within rigid gender norms. This includes referring to them as the gender with which they identify;

Urges researchers, health care workers, the National Institutes of Health, and the Centers for Disease Control and Prevention to be aware of the distinct health care needs of transgender[ed] individuals; and

Urges the National Institutes of Health and the Centers for Disease Control and Prevention to make available resources, including funding for research, that will enable a better understanding of the health risks of transgender[ed] individuals, especially the barriers they experience within health care settings...”

<http://www.apha.org/advocacy/policy/policysearch/default.htm?id=204>

American College of Obstetricians and Gynecologists

The American College of Obstetricians and Gynecologists, *Committee Opinion No. 512: Health Care for Transgender Individuals*, 118 OBSTETRICS AND GYNECOLOGY 1454 (2011).

Transgender individuals face harassment, discrimination, and rejection within our society. Lack of awareness, knowledge, and sensitivity in health care communities eventually leads to inadequate access to, underutilization of, and disparities within the health care system for this population. Although the care for these patients is often managed by a specialty team, obstetrician-gynecologists should be prepared to assist or refer transgender individuals with routine treatment and screening as well as hormonal and surgical therapies. The American College of Obstetricians and Gynecologists opposes discrimination on the basis of gender identity and urges public and private health insurance plans to cover the treatment of gender identity disorder.

<http://www.ncfr.org/news/acog-releases-new-committee-opinion-transgender-persons>

Revised July 2, 2013

AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES

Resolution: 122
(A-08)

Introduced by: Resident and Fellow Section, Massachusetts Medical Society, California
Medical Association, Medical Society of the State of New York

Subject: Removing Financial Barriers to Care for Transgender Patients

Referred to: Reference Committee A

1 Whereas, The American Medical Association opposes discrimination on the basis of
2 gender identity¹ and
3

4 Whereas, Gender Identity Disorder (GID) is a serious medical condition recognized as
5 such in both the Diagnostic and Statistical Manual of Mental Disorders (4th Ed., Text
6 Revision) (DSM-IV-TR) and the International Classification of Diseases (10th Revision),²
7 and is characterized in the DSM-IV-TR as a persistent discomfort with one's assigned
8 sex and with one's primary and secondary sex characteristics, which causes intense
9 emotional pain and suffering;³ and
10

11 Whereas, GID, if left untreated, can result in clinically significant psychological distress,
12 dysfunction, debilitating depression and, for some people without access to appropriate
13 medical care and treatment, suicidality and death;⁴ and
14

15 Whereas, The World Professional Association For Transgender Health, Inc. ("WPATH")
16 is the leading international, interdisciplinary professional organization devoted to the
17 understanding and treatment of gender identity disorders,⁵ and has established
18 internationally accepted Standards of Care⁶ for providing medical treatment for people
19 with GID, including mental health care, hormone therapy and sex reassignment surgery,
20 which are designed to promote the health and welfare of persons with GID and are
21 recognized within the medical community to be the standard of care for treating people
22 with GID; and
23

24 Whereas, An established body of medical research demonstrates the effectiveness and
25 medical necessity of mental health care, hormone therapy and sex reassignment
26 surgery as forms of therapeutic treatment for many people diagnosed with GID;⁷ and
27

28 Whereas, Health experts in GID, including WPATH, have rejected the myth that such
29 treatments are "cosmetic" or "experimental" and have recognized that these treatments
30 can provide safe and effective treatment for a serious health condition;⁷ and
31

32 Whereas, Physicians treating persons with GID must be able to provide the correct
33 treatment necessary for a patient in order to achieve genuine and lasting comfort with
34 his or her gender, based on the person's individual needs and medical history;⁸ and
35

36 Whereas, The AMA opposes limitations placed on patient care by third-party payers
37 when such care is based upon sound scientific evidence and sound medical opinion;^{9, 10}
38 and

Whereas, Many health insurance plans categorically exclude coverage of mental health, medical, and surgical treatments for GID, even though many of these same treatments, such as psychotherapy, hormone therapy, breast augmentation and removal, hysterectomy, oophorectomy, orchiectomy, and salpingectomy, are often covered for other medical conditions; and

Whereas, The denial of these otherwise covered benefits for patients suffering from GID represents discrimination based solely on a patient's gender identity; and

Whereas, Delaying treatment for GID can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health and strain the health care system; therefore be it

RESOLVED, That the AMA support public and private health insurance coverage for treatment of gender identity disorder (Directive to Take Action); and be it further

RESOLVED, That the AMA oppose categorical exclusions of coverage for treatment of gender identity disorder when prescribed by a physician (Directive to Take Action).

Fiscal Note: No significant fiscal impact.

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3. DSM-IV-TR, 575-79
4. Id. at 578-79.
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8. The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders, at 18.
 9. Id.
 10. AMA Policy H-120.988

Relevant AMA policy

H-65.983 Nondiscrimination Policy

The AMA opposes the use of the practice of medicine to suppress political dissent wherever it may occur. (Res. 127, A-83; Reaffirmed: CLRPD Rep. 1, I-93; Reaffirmed: CEJA Rep. 2, A-05)

H-65.992 Continued Support of Human Rights and Freedom

Our AMA continues (1) to support the dignity of the individual, human rights and the sanctity of human life, and (2) to oppose any discrimination based on an individual's sex, sexual orientation, race, religion, disability, ethnic origin, national origin or age and any other such reprehensible policies. (Sub. Res. 107, A-85; Modified by CLRPD Rep. 2, I-95; Reaffirmation A-00; Reaffirmation A-05)

H-180.980 Sexual Orientation as Health Insurance Criteria

The AMA opposes the denial of health insurance on the basis of sexual orientation. (Res. 178, A-88; Reaffirmed: Sub. Res. 101, I-97)

H-120.988 Patient Access to Treatments Prescribed by Their Physicians

The AMA confirms its strong support for the autonomous clinical decision-making authority of a physician and that a physician may lawfully use an FDA approved drug product or medical device for an unlabeled indication when such use is based upon

sound scientific evidence and sound medical opinion; and affirms the position that, when the prescription of a drug or use of a device represents safe and effective therapy, third party payers, including Medicare, should consider the intervention as reasonable and necessary medical care, irrespective of labeling, should fulfill their obligation to their beneficiaries by covering such therapy, and be required to cover appropriate "off-label" uses of drugs on their formulary. (Res. 30, A-88; Reaffirmed: BOT Rep. 53, A-94; Reaffirmed and Modified by CSA Rep. 3, A-97; Reaffirmed and Modified by Res. 528, A-99; Reaffirmed: CMS Rep. 8, A-02; Reaffirmed: CMS Rep. 6, A-03; Modified: Res. 517, A-04)

Position Statement on Access to Care for Transgender and Gender Variant Individuals

Approved by the Board of Trustees, July 2012

Approved by the Assembly, May 2012

"Policy documents are approved by the APA Assembly and Board of Trustees. These are position statements that define APA official policy on specific subjects." – *APA Operations Manual*.

Issue: Significant and long-standing medical and psychiatric literature exists that demonstrates clear benefits of medical and surgical interventions to assist gender variant individuals seeking transition. However, private and public insurers often do not offer, or may specifically exclude, coverage for medically necessary treatments for gender transition. Access to medical care (both medical and surgical) positively impacts the mental health of transgender and gender variant individuals.

The APA's vision statement includes the phrase: "Its vision is a society that has available, accessible quality psychiatric diagnosis and treatment," yet currently, transgender and gender variant individuals frequently lack available and accessible treatment. In addition, APA's values include the following points:

- best standards of clinical practice
- patient-focused treatment decisions
- scientifically established principles of treatment
- advocacy for patients

Transgender and gender variant individuals currently lack access to the best standards of clinical practice, frequently do not have the opportunity to pursue patient-focused treatment decisions, do not receive scientifically established treatment and could benefit significantly from APA's advocacy.

APA Position:

Therefore, the American Psychiatric Association:

1. Recognizes that appropriately evaluated transgender and gender variant individuals can benefit greatly from medical and surgical gender transition treatments.
2. Advocates for removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment.
3. Opposes categorical exclusions of coverage for such medically necessary treatment when prescribed by a physician.

Authors: Jack Drescher, M.D., Ellen Haller, M.D., APA Caucus of Lesbian, Gay and Bisexual Psychiatrists.

Background to the Position Statement

Transgender and gender variant people are frequently denied medical, surgical and psychiatric care related to gender transition despite significant evidence that appropriately evaluated individuals benefit from such care. It is often asserted that the DSM (and ICD) diagnoses provide the only pathways to insurance reimbursement for transgender individuals seeking medical assistance. However, to date, the APA has issued no treatment guidelines for gender identity disorder (GID) in either children or adults. This omission is in contrast to an increasing proliferation of APA practice guidelines for other DSM diagnoses (1).

The absence of a formal APA opinion about treatment of a diagnosis of its own creation has contributed to an ongoing problem of many health care insurers and other third party payers claiming that hormonal treatment and sex reassignment surgery (SRS) are “experimental treatments,” “elective treatments,” or “not medically necessary,” and, therefore, not reimbursable or covered under most insurance plans. The lack of consistency in how a transgender condition is defined by some institutions further marginalizes these individuals based on their subjective, surgical and hormonal status (2). In addition, treatment is not always accessible to wards of governmental agencies, such as transgender and gender variant individuals in foster care and prison systems. In other words, the presence of the GID diagnosis in the DSM has not served its intended purpose of creating greater access to care—one of the major arguments for diagnostic retention (1).

Lack of access to care adversely impacts the mental health of transgender and gender variant people, and both hormonal and surgical treatment have been shown to be efficacious in these individuals (3-7). Practice guidelines have been developed based on peer-reviewed scientific studies and are published and available for clinicians to access (3, 8, 9). The American Medical Association and the American Psychological Association both have position statements stating the critical importance of access to care for transgender and gender variant individuals (10, 11).

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Position Statement on Discrimination Against Transgender and Gender Variant Individuals

Approved by the Board of Trustees, July 2012

Approved by the Assembly, May 2012

"Policy documents are approved by the APA Assembly and Board of Trustees. These are position statements that define APA official policy on specific subjects." – *APA Operations Manual*.

Issue: Being transgender gender or variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression. As a result, transgender and gender variant persons face challenges in their marriage, adoption and parenting rights, are regularly discharged from uniformed services or are rejected from enlisting due to their gender identity, and have difficulty revising government identity documents. Incarcerated transgender and gender variant persons suffer risks to their personal safety and lack of access to comprehensive healthcare. Further, transgender and gender variant individuals may be inappropriately assigned space in gender-segregated facilities such as inpatient psychiatric units and residential treatment programs. Transgender and gender variant people are frequently harassed and discriminated against when seeking housing or applying to jobs or schools and are often victims of violent hate crimes.

The APA declares in its vision statement that it is, "the voice and conscience of modern psychiatry." Thus, this position statement is relevant to the APA because discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender variant individuals. In addition, APA's values include "advocacy for patients." Speaking out firmly and professionally against discrimination and lack of equal civil rights is a critical advocacy role that the APA is uniquely positioned to take.

APA Position:

Therefore, the American Psychiatric Association:

1. Supports laws that protect the civil rights of transgender and gender variant individuals
2. Urges the repeal of laws and policies that discriminate against transgender and gender variant individuals.
3. Opposes all public and private discrimination against transgender and gender variant individuals in such areas as health care, employment, housing, public accommodation, education, and licensing.
4. Declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons.

Authors: Jack Drescher, M.D., Ellen Haller, M.D., APA Caucus of Lesbian, Gay and Bisexual Psychiatrists.

Background to the Position Statement

In 1973, the American Psychiatric Association removed the diagnosis of homosexuality from the DSM-II (1, 2) and issued a position statement of support of gay and lesbian civil rights (3). In subsequent years, APA continued to expand its public positions regarding gay and lesbian civil rights. In 1990, APA issued a statement opposing “exclusion and dismissal from the armed services on the basis of sexual orientation” (4). In 1992, APA called on “all international health organizations, psychiatric organizations, and individual psychiatrists in other countries to urge the repeal in their own countries of legislation that penalizes homosexual acts by consenting adults in private” (5).

In 2000, following Vermont’s passage of civil union laws, APA endorsed “the legal recognition of same-sex unions and their associated legal rights, benefits and responsibilities” (6). In 2002, APA approved a position statement supporting “initiatives which allow same-sex couples to adopt and co-parent children and supports all the associated legal rights, benefits, and responsibilities which arise from such initiatives” (7).

In 2005, after Massachusetts’ 2004 legalization of marriage equality, APA issued a statement supporting “the legal recognition of same-sex civil marriage with all rights, benefits and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities” (8).

In contrast to its strong affirmation of lesbian and gay civil rights since the 1973 decision to remove homosexuality from the DSM, APA has not issued position statements in support of transgender civil rights. The APA Committee on Gay, Lesbian, and Bisexual Issues often functioned as the default clearinghouse for queries to the APA about trans issues.

Gender variant and transgender individuals must cope with multiple unique challenges. They face significant discrimination, prejudice and hatred and the potential for victimization from violent hate crimes (9). In the workplace, bias may impact transgender people as part of the application process or during their employment precipitated by the individual coming out as transgender (either on their own or by being “outed” by others), or transitioning while an employee. These individuals also need to navigate numerous expensive and complex legal issues such as changing their identity documents including, in part, their social security, driver’s license, and passport (10). They often experience discrimination when accessing non-gender transition-related health care and are denied numerous basic civil rights and protections (11). Gender variant and transgender people have no federal protection against discrimination on the basis of their gender identity or expression in public accommodations, housing, credit, education, or federally-funded programs.

The mental health of gender variant and transgender people is hypothesized to be adversely impacted by discrimination and stigma. For example, gender-based discrimination and victimization were found to be independently associated with attempted suicide in a population of transgender individuals, 32% of whom had histories of trying to kill themselves (12). And, in the largest survey to date of gender variant and transgender people with an N of 6,450, 41% reported attempting suicide (13).

Other organizations, including the American Medical Association and the American Psychological Association, have endorsed strong policy statements deploring the discrimination experienced by gender variant and transgender individuals and calling for laws to protect their civil rights (14, 15).

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Transgender, Gender Identity, & Gender Expression Non-Discrimination

Adopted by the American Psychological Association Council of Representatives August, 2008.

Whereas transgender and gender variant people frequently experience prejudice and discrimination and psychologists can, through their professional actions, address these problems at both an individual and a societal level;

Whereas the American Psychological Association opposes prejudice and discrimination based on demographic characteristics including gender identity, as reflected in policies including the Hate Crimes Resolution (Paige, 2005), the Resolution on Prejudice Stereotypes and Discrimination (Paige, 2007), APA Bylaws (Article III, Section 2), the Ethical Principles of Psychologists and Code of Conduct (APA 2002, 3.01 and Principle E);

Whereas transgender and other gender variant people benefit from treatment with therapists with specialized knowledge of their issues (Lurie, 2005; Rachlin, 2002), and that the Ethical Principles of Psychologists and Code of Conduct state that when scientific or professional knowledge ...is essential for the effective implementation of their services or research, psychologists have or obtain the training....necessary to ensure the competence of their services..." (APA 2002, 2.01b);

Whereas discrimination and prejudice against people based on their actual or perceived gender identity or expression detrimentally affects psychological, physical, social, and economic well-being (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Resolution on Prejudice Stereotypes and Discrimination, Paige, 2007; Riser et al., 2005; Rodriguez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

Whereas transgender people may be denied basic non-gender transition related health care (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; GLBT Health Access Project, 2000; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Riser et al., 2005; Rodriguez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

Whereas gender variant and transgender people may be denied appropriate gender transition related medical and mental health care despite evidence that appropriately evaluated individuals benefit from gender transition treatments (De Cuypere et al., 2005; Kuiper & Cohen-Kettenis, 1988; Lundstrom, et al., 1984; Newfield, et al., 2006; Pfafflin & Junge, 1998; Rehman et al., 1999; Ross & Need, 1989; Smith et al., 2005);

Whereas gender variant and transgender people may be denied basic civil rights and protections (Minter, 2003; Spade, 2003) including: the right to civil marriage which confers a social status and important legal benefits, rights, and privileges (Paige, 2005); the right to obtain appropriate identity documents that are consistent with a post-transition identity; and the right to fair and safe and harassment-free institutional environments such as care facilities, treatment centers, shelters, housing, schools, prisons and juvenile justice programs;

Whereas transgender and gender variant people experience a disproportionate rate of homelessness (Kammerer et al., 2001), unemployment (APA, 2007) and job discrimination (Herbst et al., 2007), disproportionately report income below the poverty line (APA, 2007) and experience other financial disadvantages (Lev, 2004);

Whereas transgender and gender variant people may be at increased risk in institutional environments and facilities for harassment, physical and sexual assault (Edney, 2004; Minter, 2003; Peterson et al., 1996; Witten & Eyler, 2007) and inadequate medical care including denial of gender transition treatments such as hormone therapy (Edney, 2004; Peterson et al., 1996; Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Newfield et al., 2006; Riser et al., 2005; Rodriguez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

Whereas many gender variant and transgender children and youth face harassment and violence in school environments, foster care, residential treatment centers, homeless centers and juvenile justice programs (D'Augelli, Grossman, & Starks, 2006; Gay Lesbian and Straight Education Network, 2003; Grossman, D'Augelli, & Slater, 2006);

Whereas psychologists are in a position to influence policies and practices in institutional settings, particularly regarding the implementation of the Standards of Care published by the World Professional Association of Transgender Health (WPATH, formerly known as the Harry Benjamin International Gender Dysphoria Association) which recommend the continuation of

gender transition treatments and especially hormone therapy during incarceration (Meyer et al., 2001);

Whereas psychological research has the potential to inform treatment, service provision, civil rights and approaches to promoting the well-being of transgender and gender variant people;

Whereas APA has a history of successful collaboration with other organizations to meet the needs of particular populations, and organizations outside of APA have useful resources for addressing the needs of transgender and gender variant people;

Therefore be it resolved that APA opposes all public and private discrimination on the basis of actual or perceived gender identity and expression and urges the repeal of discriminatory laws and policies;

Therefore be it further resolved that APA supports the passage of laws and policies protecting the rights, legal benefits, and privileges of people of all gender identities and expressions;

Therefore be it further resolved that APA supports full access to employment, housing, and education regardless of gender identity and expression;

Therefore be it further resolved that APA calls upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals and encourages psychologists to take a leadership role in working against discrimination towards transgender and gender variant individuals;

Therefore be it further resolved that APA encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender for transgender people who permanently socially transition to another gender role;

Therefore be it further resolved that APA supports access to civil marriage and all its attendant benefits, rights, privileges and responsibilities, regardless of gender identity or expression;

Therefore be it further resolved that APA supports efforts to provide fair and safe environments for gender variant and transgender people in institutional settings such as supportive living environments, long-term care facilities, nursing homes, treatment facilities, and shelters, as well as custodial settings such as prisons and jails;

Therefore be it further resolved that APA supports efforts to provide safe and secure educational environments, at all levels of education, as well as foster care environments and juvenile justice programs, that promote an understanding and acceptance of self and in which all youths, including youth of all gender identities and expressions, may be free from discrimination, harassment, violence, and abuse;

Therefore be it further resolved that APA supports the provision of adequate and necessary mental and medical health care treatment for transgender and gender variant individuals;

Therefore be it further resolved that APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments;

Therefore be it further resolved that APA supports access to appropriate treatment in institutional settings for people of all gender identities and expressions; including access to appropriate health care services including gender transition therapies;

Therefore be it further resolved that APA supports the creation of educational resources for all psychologists in working with individuals who are gender variant and transgender;

Therefore be it further resolved that APA supports the funding of basic and applied research concerning gender expression and gender identity;

Therefore be it further resolved that APA supports the creation of scientific and educational resources that inform public discussion about gender identity and gender expression to promote public policy development, and societal and familial attitudes and behaviors that affirm the dignity and rights of all individuals regardless of gender identity or gender expression;

Therefore be it further resolved that APA supports cooperation with other organizations in efforts to accomplish these ends.

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Find this article at:

<http://www.apa.org/about/policy/transgender.aspx>

Transgender, Gender Identity, & Gender Expression Non-Discrimination

Adopted by the American Psychological Association Council of Representatives August, 2008.

Whereas transgender and gender variant people frequently experience prejudice and discrimination and psychologists can, through their professional actions, address these problems at both an individual and a societal level;

Whereas the American Psychological Association opposes prejudice and discrimination based on demographic characteristics including gender identity, as reflected in policies including the Hate Crimes Resolution (Paige, 2005), the Resolution on Prejudice Stereotypes and Discrimination (Paige, 2007), APA Bylaws (Article III, Section 2), the Ethical Principles of Psychologists and Code of Conduct (APA 2002, 3.01 and Principle E);

Whereas transgender and other gender variant people benefit from treatment with therapists with specialized knowledge of their issues (Lurie, 2005; Rachlin, 2002), and that the Ethical Principles of Psychologists and Code of Conduct state that when scientific or professional knowledge ...is essential for the effective implementation of their services or research, psychologists have or obtain the training....necessary to ensure the competence of their services..." (APA 2002, 2.01b);

Whereas discrimination and prejudice against people based on their actual or perceived gender identity or expression detrimentally affects psychological, physical, social, and economic well-being (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Resolution on Prejudice Stereotypes and Discrimination, Paige, 2007; Riser et al., 2005; Rodriguez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

Whereas transgender people may be denied basic non-gender transition related health care (Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; GLBT Health Access Project, 2000; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Riser et al., 2005; Rodriguez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

Whereas gender variant and transgender people may be denied appropriate gender transition related medical and mental health care despite evidence that appropriately evaluated individuals benefit from gender transition treatments (De Cuypere et al., 2005; Kuiper & Cohen-Kettenis, 1988; Lundstrom, et al., 1984; Newfield, et al., 2006; Pfafflin & Junge, 1998; Rehman et al., 1999; Ross & Need, 1989; Smith et al., 2005);

Whereas gender variant and transgender people may be denied basic civil rights and protections (Minter, 2003; Spade, 2003) including: the right to civil marriage which confers a social status and important legal benefits, rights, and privileges (Paige, 2005); the right to obtain appropriate identity documents that are consistent with a post-transition identity; and the right to fair and safe and harassment-free institutional environments such as care facilities, treatment centers, shelters, housing, schools, prisons and juvenile justice programs;

Whereas transgender and gender variant people experience a disproportionate rate of homelessness (Kammerer et al., 2001), unemployment (APA, 2007) and job discrimination (Herbst et al., 2007), disproportionately report income below the poverty line (APA, 2007) and experience other financial disadvantages (Lev, 2004);

Whereas transgender and gender variant people may be at increased risk in institutional environments and facilities for harassment, physical and sexual assault (Edney, 2004; Minter, 2003; Peterson et al., 1996; Witten & Eyler, 2007) and inadequate medical care including denial of gender transition treatments such as hormone therapy (Edney, 2004; Peterson et al., 1996; Bockting et al., 2005; Coan et al., 2005; Clements-Nolle, 2006; Kenagy, 2005; Kenagy & Bostwick, 2005; Nemoto et al., 2005; Newfield et al., 2006; Riser et al., 2005; Rodriguez-Madera & Toro-Alfonso, 2005; Sperber et al., 2005; Xavier et al., 2005);

Whereas many gender variant and transgender children and youth face harassment and violence in school environments, foster care, residential treatment centers, homeless centers and juvenile justice programs (D'Augelli, Grossman, & Starks, 2006; Gay Lesbian and Straight Education Network, 2003; Grossman, D'Augelli, & Slater, 2006);

Whereas psychologists are in a position to influence policies and practices in institutional settings, particularly regarding the implementation of the Standards of Care published by the World Professional Association of Transgender Health (WPATH, formerly known as the Harry Benjamin International Gender Dysphoria Association) which recommend the continuation of

gender transition treatments and especially hormone therapy during incarceration (Meyer et al., 2001);

Whereas psychological research has the potential to inform treatment, service provision, civil rights and approaches to promoting the well-being of transgender and gender variant people;

Whereas APA has a history of successful collaboration with other organizations to meet the needs of particular populations, and organizations outside of APA have useful resources for addressing the needs of transgender and gender variant people;

Therefore be it resolved that APA opposes all public and private discrimination on the basis of actual or perceived gender identity and expression and urges the repeal of discriminatory laws and policies;

Therefore be it further resolved that APA supports the passage of laws and policies protecting the rights, legal benefits, and privileges of people of all gender identities and expressions;

Therefore be it further resolved that APA supports full access to employment, housing, and education regardless of gender identity and expression;

Therefore be it further resolved that APA calls upon psychologists in their professional roles to provide appropriate, nondiscriminatory treatment to transgender and gender variant individuals and encourages psychologists to take a leadership role in working against discrimination towards transgender and gender variant individuals;

Therefore be it further resolved that APA encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender for transgender people who permanently socially transition to another gender role;

Therefore be it further resolved that APA supports access to civil marriage and all its attendant benefits, rights, privileges and responsibilities, regardless of gender identity or expression;

Therefore be it further resolved that APA supports efforts to provide fair and safe environments for gender variant and transgender people in institutional settings such as supportive living environments, long-term care facilities, nursing homes, treatment facilities, and shelters, as well as custodial settings such as prisons and jails;

Therefore be it further resolved that APA supports efforts to provide safe and secure educational environments, at all levels of education, as well as foster care environments and juvenile justice programs, that promote an understanding and acceptance of self and in which all youths, including youth of all gender identities and expressions, may be free from discrimination, harassment, violence, and abuse;

Therefore be it further resolved that APA supports the provision of adequate and necessary mental and medical health care treatment for transgender and gender variant individuals;

Therefore be it further resolved that APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals and calls upon public and private insurers to cover these medically necessary treatments;

Therefore be it further resolved that APA supports access to appropriate treatment in institutional settings for people of all gender identities and expressions; including access to appropriate health care services including gender transition therapies;

Therefore be it further resolved that APA supports the creation of educational resources for all psychologists in working with individuals who are gender variant and transgender;

Therefore be it further resolved that APA supports the funding of basic and applied research concerning gender expression and gender identity;

Therefore be it further resolved that APA supports the creation of scientific and educational resources that inform public discussion about gender identity and gender expression to promote public policy development, and societal and familial attitudes and behaviors that affirm the dignity and rights of all individuals regardless of gender identity or gender expression;

Therefore be it further resolved that APA supports cooperation with other organizations in efforts to accomplish these ends.

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Find this article at:

<http://www.apa.org/about/policy/transgender.aspx>



Resolution No. 1004

2012 National Conference of Special Constituencies—Sheraton Kansas City Hotel at Crown Center

1 Transgender Care

2
3 Submitted by: Laura Ellis, MD, FAAFP, GLBT
4 Werner Brammer, MD, FAAFP, GLBT
5 Bruce Echols, MD, FAAFP, GLBT
6 Andrew Goodman, MD, GLBT
7

8 WHEREAS, Gender Identity Disorder is a medically recognized condition, and
9

10 WHEREAS, persons with Gender Identity Disorder who are not provided care can suffer serious
11 psychological and physical issues including suicide, and
12

13 WHEREAS, care for Gender Identity Disorder is lifelong and multifaceted including surgical,
14 hormonal, and psychological support and
15

16 WHEREAS, this care is expensive and out of reach of many people, and
17

18 WHEREAS, many insurers specifically exclude transgender care, and
19

20 WHEREAS, the American Academy of Family Physicians (AAFP) has already resolved that
21 employers and health plans should not discriminate by actual or perceived gender in the
22 provision of prescription drugs and devices, elective sterilization procedures, and diagnostic
23 testing (2011 COD), now, therefore, be it
24

25 RESOLVED, That the American Academy of Family Physicians (AAFP) support efforts to
26 require insurers to provide coverage for comprehensive care of transgendered individuals
27 including medical care, screening tests based on medical need rather than gender, mental
28 health care, and, when medically necessary, gender reassignment surgery.



POSITION STATEMENT

Transgender/Transsexual/Gender Variant Health Care

The American College of Nurse-Midwives (ACNM) supports efforts to provide transgender, transsexual, and gender variant individuals with access to safe, comprehensive, culturally competent health care and therefore endorses the 2011 World Professional Association for Transgender Health (WPATH) Standards of Care.

It is the position of ACNM that midwives

Exhibit respect for patients with nonconforming gender identities and do not pathologize differences in gender identity or expression;
Provide care in a manner that affirms patients' gender identities and reduces the distress of gender dysphoria or refer to knowledgeable colleagues;
Become knowledgeable about the health care needs of transsexual, transgender, and gender nonconforming people, including the benefits and risks of gender affirming treatment options;
Match treatment approaches to the specific needs of patients, particularly their goals for gender expression and need for relief from gender dysphoria;
Have resources available to support and advocate for patients within their families and communities (schools, workplaces, and other settings).

To facilitate these goals, ACNM is committed to

- Work toward the incorporation of information about gender identity, expression, and development in all midwifery educational programs;
- Make available educational materials that address the identities and health care needs of gender variant individuals in order to improve midwives' cultural competence in providing care to this population;
- Support legislation and policies that prohibit discrimination based on gender expression or identity;
- Support measures to ensure full, equal, and unrestricted access to health insurance coverage for all care needed by gender variant individuals.

Background

Gender variant people face multiple barriers to accessing health care and suffer disproportionate disparities in health outcomes. Gender variant individuals experience higher rates of discrimination in housing, education, and employment and lower rates of health insurance coverage than the general population.¹ As many as one-fourth of gender variant people avoid

health care services due to concerns about discrimination and harassment.² HIV infection within the gender variant community is 4 times the rate of the general population; rates of drug, alcohol, and tobacco use, and depression and suicide attempts are also higher.^{2,3} These outcomes disproportionately affect gender variant people of color.

When gender variant individuals are able to obtain health insurance, most find that their insurance providers specifically exclude gender affirming therapies (eg hormonal or surgical procedures), deny basic preventative care services on the basis of gender identity, and refuse to cover sex-specific services due to perceived gender incongruence (eg a man with a cervix may be refused coverage for a pap smear).⁴⁻⁶ Few legal recourses exist because gender identity and expression are excluded from federal and most state non-discrimination protections.

In addition, the under-reported and under-researched reproductive health care needs of gender variant individuals are of particular interest to midwives. Qualitative studies and anecdotal evidence confirm that gender variant individuals desire parenting roles and can and do create biological families.⁷

Midwifery Practice and the Gender Variant Patient

As many as half of gender variant individuals report having to educate their health care providers about their health care needs, but gender variant people do not by default have unique or complicated health issues. Most members of this community require the same primary, mental, and sexual health care that all individuals need.⁸ The most important thing all midwives can do to improve the health care outcomes of gender variant individuals is to use their skills to provide care that is welcoming and accessible.

Musculoskeletal, cardiovascular, breast, and pelvic care for individuals who have undergone hormonal and/or surgical therapy is typically straightforward but in some cases requires additional training. Similarly, administration of hormone therapy for gender affirmation is appropriate for primary care providers, including certified nurse-midwives/certified midwives (CNMs®/CMs®) who have undergone appropriate training. The World Professional Association for Transgender Health (WPATH) “strongly encourages the increased training and involvement of primary care providers in the area of feminizing/masculinizing hormone therapy.”⁹ Seeking hormone therapy is the entryway to health care for many gender variant individuals. According to WPATH, “medical visits relating to hormone maintenance provide an opportunity to deliver broader care to a population that is often medically underserved.”⁹

CNMs/CMs should seek to provide evidence-based, welcoming, and accessible care for gender variant individuals in accordance with ACNM Standard of Practice VIII¹⁰ and their state regulatory bodies.

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Note. The term “gender variant” is used throughout this document to reflect a broad range of gender non-conforming identities, expressions, and experiences. This term is used as an umbrella term for all individuals whose gender expression or identity differs from the sex assigned at birth.

Source: Task Force on Gender Bias; Clinical Standards and Documents Section DOSP

Developed: November 2012

Board of Directors Approved: December 2012

Transgender Health Care in Correctional Settings

[◀ Back to Position Statements](#)

INTRODUCTION

Transgender people face an array of risks to their health and well-being during incarceration, and are often targets of physical assault and emotional abuse. They are commonly placed in correctional facilities according to their genitals and/or sex assigned at birth, regardless of their gender presentation. The health risks of overlooking the particular needs of transgender inmates are so severe that acknowledgment of the problem and policies that assure appropriate and responsible provision of health care are needed.

The term transgender refers to a person who identifies with or expresses a gender identity that does not match traditional ideas about the sex assigned to the person at birth. Transgender women are people who were assigned the sex of male at birth and who now identify as women. Transgender men are people who were assigned the sex of female at birth and who now identify as men. Transgender people may identify as men, women, neither, both, or another gender. They can be of any race, sexual orientation, age, religion, body type, socioeconomic background, or national origin.

The National Commission on Correctional Health Care publishes Standards for prisons, jails, and juvenile justice facilities that address board-approved recommendations for an adequate health care delivery system, including issues such as patient confidentiality, discharge planning, health professional qualifications, medication availability and delivery, and staff training. Position statements are intended to provide information on the management of specific problems not addressed in the Standards.

POSITION STATEMENT

Because prisons, jails, and juvenile justice facilities have a responsibility to ensure the physical and mental health and well-being of transgender people in their custody, correctional health staff should manage these inmates in a manner that respects the biomedical and psychological aspects of a gender identity disorder (GID) diagnosis. The National Commission on Correctional Health Care recommends that the following principles guide correctional health professionals in addressing the needs of transgender inmates:

Health Management

1. The management of medical (e.g., medically necessary hormone treatment) and surgical (e.g., genital reconstruction) transgender issues should follow accepted standards developed by professionals with expertise in transgender health. Determination of treatment necessary for transgender patients should be on a case-by-case basis. Ideally, correctional health staff should be trained in transgender health care issues. Alternatively, they should

have access to other professionals with expertise in transgender health care to help determine appropriate management and provide training in transgender issues.

2. Because inmate-patients may be under different stages of care prior to incarceration, there should be no blanket administrative or other policies that restrict specific medical treatments for transgender people. Policies that make treatments available only to those who received them prior to incarceration or that limit GID treatment to psychotherapy should be avoided. Policies that attempt to “freeze” gender transition at the stage reached prior to incarceration are inappropriate and out of step with medical standards, and should be avoided.

3. Diagnosed transgender patients who received hormone therapy prior to incarceration should have that therapy continued without interruption pending evaluation by a specialist, absent urgent medical reasons to the contrary. Transgender inmates who have not received hormone therapy prior to incarceration should be evaluated by a health care provider qualified in the area of transgender health to determine their treatment needs. When determined to be medically necessary for a particular inmate, hormone therapy should be initiated and sex reassignment surgery considered on a case-by-case basis. Regular laboratory monitoring should be conducted according to community medical standards.

4. Treatment for genital self-harm or for complications arising from prior surgery or from self-treatment should be provided when medically necessary.

5. Correctional health care providers should provide patient education materials to help transgender patients cope with their diagnosis and treatment.

6. Psychotherapy such as “reparative” therapy or attempts to alter gender identity should not be employed. Reparative therapy inappropriately portrays GID as a mental illness and not a medical condition.

Patient Safety

7. In matters of housing, recreation, and work assignments, custody staff should be aware that transgender people are common targets for violence. Accordingly, appropriate safety measures should be taken regardless of whether the person is placed in male or female housing areas.

Discharge Planning

8. Transgender inmates receiving hormone therapy should receive a sufficient supply upon release to last until a community provider assumes care. Referrals should be made to community-based organizations with sensitive and inclusive services for transgender people.

9. Correctional policies for management of transgender inmates should be developed and implemented in partnership with local transgender communities, particularly current and former inmates, and transgender service providers when possible.

**Adopted by the National Commission on Correctional Health Care Board of Directors
October 18, 2009**

NOTES

1. Standards of Care for Gender Identity Disorders, available from the World Professional Association for



The American College of Obstetricians and Gynecologists

Women's Health Care Physicians

COMMITTEE OPINION

Number 512 • December 2011

Committee on Health Care for Underserved Women

This information should not be construed as dictating an exclusive course of treatment or procedure to be followed.

Health Care for Transgender Individuals

ABSTRACT: Transgender individuals face harassment, discrimination, and rejection within our society. Lack of awareness, knowledge, and sensitivity in health care communities eventually leads to inadequate access to, underutilization of, and disparities within the health care system for this population. Although the care for these patients is often managed by a specialty team, obstetrician–gynecologists should be prepared to assist or refer transgender individuals with routine treatment and screening as well as hormonal and surgical therapies. The American College of Obstetricians and Gynecologists opposes discrimination on the basis of gender identity and urges public and private health insurance plans to cover the treatment of gender identity disorder.

The Spectrum of Transgender Identity

Transgender is a broad term used for people whose gender identity or gender expression differs from their assigned sex at birth (Box 1) (1). However, there is no universally accepted definition of the word “transgender” because of the lack of agreement regarding what groups of people are considered “transgender.” In addition, definitions often vary by geographic region and by individual (2). The American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, considers transgender individuals to be individuals with a disturbance in sexual or gender identity. Any combination of sexual and gender identity is possible for transgender individuals (Box 2). The diagnosis of gender identity disorder is only established for individuals with clinically significant distress and functional impairment caused by the persistent discomfort with one's assigned sex and primary and secondary sex characteristics. If untreated, gender identity disorder can result in psychologic dysfunction, depression, suicidal ideation, and even death (3).

Prevalence rates of transgender populations are not clearly established; however, studies suggest that transgender individuals constitute a small but substantial population (4). Additional research is needed among this population as outlined by the Institute of Medicine Report, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2).

The social and economic marginalization of transgender individuals is widespread. Harassment, discrim-

ination, and rejection occur frequently within an individual's own family and affect educational, employment, and housing opportunities.

Transgender individuals, particularly young transgender individuals, are disproportionately represented in the homeless population (5). Once homeless, individuals may be denied access to shelters because of their gender or are placed in inappropriate housing. Subsequently, many homeless transgender individuals turn to survival sex (the exchange of sex for food, clothing, shelter, or other basic needs), which increases the risk of exposure to sexually transmitted infections and becoming victims of violence (6). In one small study, 35% of male-to-female transgender individuals tested positive for human immunodeficiency virus (HIV), 20% were homeless, and 37% reported physical abuse (7).

Barriers to Health Care

Within the medical community, transgender individuals face significant barriers to health care. This includes the failure of most health insurance plans to cover the cost of mental health services, cross-sex hormone therapy, or gender affirmation surgery. This barrier exists despite evidence that such treatments are safe and effective and that cross-gender behavior and gender identity issues are not an issue of choice for the individual and cannot be reversed with psychiatric treatment (8). With medical and psychiatric care that affirms transgender identity, the transgender individual can lead an enhanced, functional life (9).

Box 1. Transgender Definitions

Transsexual—an individual who strongly identifies with the other sex and seeks hormones or gender-affirmation surgery or both to feminize or masculinize the body; may live full-time in the crossgender role.*

Crossdresser—an individual who dresses in the clothing of the opposite sex for reasons that include a need to express femininity or masculinity, artistic expression, performance, or erotic pleasure, but do not identify as that gender. The term “transvestite” was previously used to describe a crossdresser, but it is now considered pejorative and should not be used.†

Bigendered—individuals who identify as both or alternatively male and female, as no gender, or as a gender outside the male or female binary.†

Intersex—individuals with a set of congenital variations of the reproductive system that are not considered typical for either male or female. This includes newborns with ambiguous genitalia, a condition that affects 1 in 2,000 newborns in the United States each year.‡

Female-to-male—refers to someone who was identified as female at birth but who identifies and portrays his gender as male. This term is often used after the individual has taken some steps to express his gender as male, or after medically transitioning through hormones or surgery. Also known as FTM or transman.†

Male-to-female—refers to someone who was identified as male at birth but who identifies and portrays her gender as female. This term is often used after the individual has taken some steps to express her gender as female, or after medically transitioning through hormones or surgery. Also known as MTF or transwoman.†

*The health of lesbian, gay, bisexual, and transgender people: building a foundation for better understanding. Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities, Board on the Health of Select Populations, Institute of Medicine of the National Academies. Washington, DC: National Academies Press; 2011. Available at: http://www.nap.edu/openbook.php?record_id=13128&page=R1. Retrieved August 8, 2011.

† Fenway Health. Glossary of gender and transgender terms. Boston (MA): Fenway Health; 2010. Available at: http://www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf. Retrieved July 22, 2011.

‡ Dreger AD. “Ambiguous sex”—or ambivalent medicine? Ethical issues in the treatment of intersexuality. *Hastings Cent Rep* 1998; 28:24–35.

Box 2. Sexual Identity and Gender Identity Definitions

Sex—designation of a person at birth as male or female based on anatomy and biology.*

Gender identity—a person’s innate identification as a man, woman, or something else that may or may not correspond to the person’s external body or assigned sex at birth.*

Gender expression—how individuals present themselves socially, including clothing, hairstyle, jewelry, and physical characteristics, including speech and mannerisms. This may not be the same gender in all settings.*

Sexual orientation—a person’s physical, romantic, emotional, and/or spiritual attraction to individuals of the same (lesbian or gay), different (heterosexual), or both (bisexual) biologic sexes. Sexual orientation does not define the real-life sexual practices and behaviors of an individual.*

Sexual behavior—the sexual encounters and behaviors of the individual. This is likely to be the most important factor in assessing the risk of sexually transmitted infections. Sexual behavior differs from sexual orientation; for example, not all individuals who engage in same-sex behaviors view themselves as gay, lesbian, or bisexual.

Legal sex—sex as stated on legal identifications, forms, and documents. Transgender individuals may adopt a second name other than their legal name with which they may prefer to be addressed. Transgender persons should be asked for their preferred name, even if it differs from their legal name and sex. State regulations vary and it may be difficult or impossible for a transgender individual to meet that state’s requirements to change their legal sex.†

*Fenway Health. Glossary of gender and transgender terms. Boston (MA): Fenway Health; 2010. Available at: http://www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf. Retrieved July 22, 2011.

† This is a significant issue for transgender individuals. Some states have adopted progressive laws that do not require gender-affirmation surgery or an original birth certificate; instead, these laws allow individuals to change their legal sex with a letter from their health care providers stating that the individuals live their lives as this gender. See the National Center for Transgender Equality (www.transequality.org) and the Transgender Law and Policy Institute (www.transgenderlaw.org) for more information, including descriptions of state laws.

The consequences of inadequate treatment are staggering. Fifty-four percent of transgender youth have attempted suicide and 21% resort to self-mutilation. More than 50% of persons identified as transgender have used injected hormones that were obtained illegally or used outside of conventional medical settings. Additionally, such individuals frequently resort to the illegal and dangerous use of self-administered silicone injections to

spur masculine or feminine physiologic changes (5). The American College of Obstetricians and Gynecologists, therefore, urges public and private health insurance plans to cover the treatment of gender identity disorder.

Caring for Transgender Individuals

Obstetrician–gynecologists should be prepared to assist or refer transgender individuals for routine treatment

and screening as well as hormonal and surgical therapies. Basic preventive services, like sexually transmitted infection testing and cancer screening, can be provided without specific expertise in transgender care. Hormonal and surgical therapies for transgender patients may be requested, but should be managed in consultation with health care providers with expertise in specialized care and treatment of transgender patients (see Resources). Physical and emotional issues for transgender individuals and the effects of aging, as in all other individuals, affect the health status of this population and should be addressed. Health care providers who are morally opposed to providing care to this population should refer them elsewhere for care. For more information, a resource guide on health care for transgender individuals is available at www.acog.org/departments/dept_notice.cfm?recno=18&bulletin=5825.

Creating a Welcoming Environment

Health care providers' discomfort when treating transgender individuals may alienate patients and result in lower quality or inappropriate care as well as deter them from seeking future medical care (10). Excellent resources exist to facilitate the provision of culturally competent care for transgender patients (10). Adding a "transgender" option to check boxes on patient visit records can help to better capture information about transgender patients, and could be a sign of acceptance to that person (10). Questions should be framed in ways that do not make assumptions about gender identity, sexual orientation, or behavior. It is more appropriate for clinicians to ask their patients which terms they prefer (1). Language should be inclusive, allowing the patient to decide when and what to disclose. The adoption and posting of a nondiscrimination policy can also signal health care providers and patients alike that all persons will be treated with dignity and respect. Assurance of confidentiality can allow for a more open discussion, and confidentiality must be ensured if a patient is being referred to a different health care provider. Training staff to increase their knowledge and sensitivity toward transgender patients will also help facilitate a positive experience for the patient (10). It is important to prepare now to treat a future transgender patient. Additional guidelines for creating a welcoming office environment for transgender patients have been developed by the Gay and Lesbian Medical Association and can be found at http://www.glma.org/_data/n_0001/resources/live/GLMA%20guidelines%202006%20FINAL.pdf.

Gender Transition: World Professional Association for Transgender Health Guidelines

The World Professional Association for Transgender Health is a multidisciplinary professional society representing the specialties of medicine, psychology, social

sciences, and law. Their published clinical guidelines about the psychiatric, psychologic, medical, and surgical management of gender identity disorders are widely used by specialists in transgender health care (11), but are not universally accepted by all members of the transgender health community because critics consider them to be overly restrictive and inflexible.

The World Professional Association for Transgender Health guidelines describe the transition from one gender to another in three stages: 1) living in the gender role consistent with gender identity; 2) the use of cross-sex hormone therapy after living in the new gender role for at least 3 months; 3) gender-affirmation surgery after living in the new gender role and using hormonal therapy for at least 12 months. Additional clinical guidelines have been published by the Endocrine Society (12).

Female-to-Male Transgender Individuals

Hormones

Methyltestosterone injections every 2 weeks are usually sufficient to suppress menses and induce masculine secondary sex characteristics (13). Before receiving androgen therapy, patients should be screened for medical contraindications and have periodic laboratory testing, including hemoglobin and hematocrit to evaluate for polycythemia, liver function tests, and serum testosterone level assessments (goal is a mid normal male range of 500 microgram/dL), while receiving the treatment.

Surgery

Hysterectomy, with or without salpingo-oophorectomy, is commonly part of the surgical process. An obstetrician-gynecologist who has no specialized expertise in transgender care may be asked to perform this surgery, and also may be consulted for routine reasons such as dysfunctional bleeding or pelvic pain. Reconstructive surgery should be performed by a urologist, gynecologist, plastic surgeon, or general surgeon who has specialized competence and training in this field.

Screening

Age-appropriate screening for breast cancer and cervical cancer should be continued unless mastectomy or removal of the cervix has occurred. For patients using androgen therapy who have not had a complete hysterectomy, there may be an increased risk of endometrial cancer and ovarian cancer (13).

Male-to-Female Transgender Individuals

Hormones

Estrogen therapy results in gynecomastia, reduced hair growth, redistribution of fat, and reduced testicular volume. All patients considering therapy should be screened for medical contraindications. After surgery, doses of estradiol, 2–4 mg/d, or conjugated equine estrogen, 2.5 mg/d, are often sufficient to keep total testosterone levels to normal female levels of less than 25 ng/dL. Nonoral therapy

also can be offered. It is recommended that male-to-female transgender patients receiving estrogen therapy have an annual prolactin level assessment and visual field examination to screen for prolactinoma (13).

Surgery

Surgery usually involves penile and testicular excision and the creation of a neovagina (14). Reported complications of surgery include vaginal and urethral stenosis, fistula formation, problems with remnants of erectile tissue, and pain. Vaginal dilation of the neovagina is required to maintain patency. Other surgical procedures that may be performed include breast implants and nongenital surgery, such as facial feminization surgery.

Screening

Age-appropriate screening for breast and prostate cancer is appropriate for male-to-female transgender patients. Opinion varies regarding the need for Pap testing in this population. In patients who have a neocervix created from the glans penis, routine cytologic examination of the neocervix may be indicated (15). The glans are more prone to cancerous changes than the skin of the penile shaft, and intraepithelial neoplasia of the glans is more likely to progress to invasive carcinoma than is intraepithelial neoplasia of other penile skin (14).

Conclusion

Obstetrician-gynecologists should be prepared to assist or refer transgender individuals. Physicians are urged to eliminate barriers to access to care for this population through their own individual efforts. An important step is to identify the sexual orientation and gender identity status of all patients as a routine part of clinical encounters and recognize that many transgender individuals may not identify themselves. The American College of Obstetricians and Gynecologists urges health care providers to foster nondiscriminatory practices and policies to increase identification and to facilitate quality health care for transgender individuals, both in assisting with the transition if desired as well as providing long-term preventive health care.

Resources

Select clinics with expertise in treating transgender individuals:

Fenway Community Health
www.fenwayhealth.org

University of Minnesota, Center for Sexual Health
www.phs.umn.edu/clinic/home.html

Callen-Lorde Community Health Center
www.callen-lorde.org

Tom Waddell Health Center
www.sfdph.org/dph/comupg/oservices/medSvs/hlthCtrs/TransgenderHlthCtr.asp

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

DECISION

On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND¹

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

¹ The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"),² the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.³

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,⁴ she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

² It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a "joint employment" relationship may exist where both the Agency and the "staffing firm" may be deemed employers. The Commission makes no determination at this time as to whether or not a "joint employment" relationship exists in this case as this issue is not presently before us.

³ On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency's Personnel Security Branch had received Complainant's completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he "hope[d] to finish your investigation the first of next week."

⁴ In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency's EEO Counselor on May 5, 2011. However, the EEO Counselor's report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.⁵ Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at <http://www.justice.gov/jmd/ps/chpt4-1.html> (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

⁵ The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination -- one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim “based on sex (female)” as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC’s Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant’s complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of “my sex, gender identity (transgender woman) and on the basis of sex stereotyping.” In response to her complaint, the Agency stated that claims of gender identity discrimination “cannot be adjudicated before the [EEOC].” See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency’s communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII’s sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint’s procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC’s responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government’s efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination *based on . . . sex . . .*" 42 U.S.C. § 2000e-16(a) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." *See Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in *Price Waterhouse* agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230–31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201–02; see also Price Waterhouse, 490 U.S. at 254–55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.⁶

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

⁶ There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.⁷ And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

⁷ See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' - i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201–02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner “considered herself a transsexual and that she planned to seek sex reassignment surgery in the future.” *Id.* at 1202. According to the court, the guard had targeted the transgender prisoner “only after he discovered that she considered herself female[,]” and the guard was “motivated, at least in part, by [her] gender”—that is, “by her assumption of a feminine rather than a typically masculine appearance or demeanor.” *Id.* On these facts, the Ninth Circuit readily concluded that the guard’s attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure “to conform to socially-constructed gender expectations.” *Id.* at 1201–02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females – i.e., “as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity” – is actionable discrimination “because of sex.” *Id.* (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank’s refusal to give a loan application to a biologically-male plaintiff dressed in “traditionally feminine attire” because his “attire did not accord with his male gender” stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f).

Similarly, in Smith v. City of Salem, the plaintiff was “biologically and by birth male.” 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). *Id.* Smith’s co-workers began commenting that her appearance and mannerisms were “not masculine enough.” *Id.* Smith’s employer later subjected her to numerous psychological evaluations, and ultimately suspended her. *Id.* at 569–70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, “both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual.” *Id.* at 571 (emphasis added).

The district court rejected Smith’s efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on “transsexuality.” *Id.* The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court’s conclusion:

cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574–75.⁸

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320–21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); see also Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

⁸ See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011).⁹

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter “for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.” *Id.* at 305. In any case, Schroer was “entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping” *Id.*¹⁰

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

⁹ But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4–5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

¹⁰ The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is “literally discrimination ‘because of . . . sex.’” Schroer, 577 F. Supp. 2d at 308; see also *id.* at 306–07 (analogizing to cases involving discrimination based on an employee’s religious conversion, which undeniably constitutes discrimination “because of . . . religion” under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII’s prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,¹¹ by a desire to protect people of a certain gender,¹² by assumptions that disadvantage men,¹³ by gender stereotypes,¹⁴ or by the desire to accommodate other people’s prejudices or discomfort.¹⁵ While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, “sex stereotyping” is not itself an independent cause of action. As the Price Waterhouse Court

¹¹ See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination “because of sex”); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (“A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”).

¹² See Int’l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

¹³ See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

¹⁴ See, e.g., Price Waterhouse, 490 U.S. at 250-52.

¹⁵ See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that “assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black” nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer’s foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

noted, while “stereotyped remarks can certainly be *evidence* that gender played a part” in an adverse employment action, the central question is always whether the “employer actually relied on [the employee’s] gender in making its decision.” *Id.* at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee’s parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer’s actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new “class” of people covered under Title VII—for example, the “class” of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318–19 (noting that “all persons, whether transgender or not” are protected from discrimination and “[a]n individual cannot be punished because of his or her perceived gender non-conformity”).

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination therefore violates Title VII.¹⁶

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0610)

The Agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request. A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

¹⁶ The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that “[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination “because of . . . sex” under Title VII.” EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Nov. 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

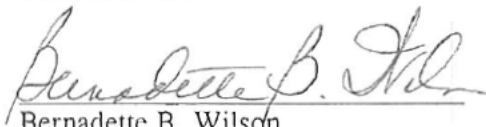
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:



Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

April 20 2012
Date

(2008)

Diane J. SCHROER, Plaintiff,
v.
James H. BILLINGTON, Librarian of Congress, Defendant.

Civil Action No. 05-1090 (JR).

United States District Court, District of Columbia.

September 19, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JAMES ROBERTSON, District Judge.

Diane Schroer claims that she was denied employment by the Librarian of Congress because of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Evidence was taken in a bench trial on August 19-22, 2008.

Facts

Diane Schroer is a male-to-female transsexual. Although born male, Schroer has a female gender identity—an internal, psychological sense of herself as a woman. Tr. at 37. In August 2004, before she changed her legal name or began presenting as a woman, Schroer applied for the position of Specialist in Terrorism and International Crime with the Congressional Research Service (CRS) at the Library of Congress. The terrorism specialist provides expert policy analysis to congressional committees, members of Congress and their staffs. Pl.Ex. 1. The position requires a security clearance.

Schroer was well qualified for the job. She is a graduate of both the National War College and the Army Command and General Staff College, and she holds masters degrees in history and international relations. During Schroer's twenty-five years of service in the U.S. Armed Forces, she held important command and staff positions in the Armored Cavalry, Airborne, Special Forces and Special Operations Units, and in combat operations in Haiti and Rwanda. Tr. at 22-31. Pl.Ex. 9. Before her retirement from the military in January 2004, Schroer was a Colonel assigned to the U.S. Special Operations Command, serving as the director of a 120-person classified organization that tracked and targeted high-threat international terrorist organizations. In this position, Colonel Schroer analyzed sensitive intelligence reports, planned a range of classified and conventional operations, and regularly briefed senior military and government officials, including the Vice President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. Tr. 32-33. At the time of her military retirement, Schroer held a Top Secret, Sensitive Compartmented Information security clearance, and had done so on a continuous basis since 1987. Tr. at 33. After her retirement, Schroer joined a private consulting firm, Benchmark International, where, when she applied for the CRS position, she was working as a program manager on an infrastructure security project for the National Guard. Tr. at 36.

When Schroer applied for the terrorism specialist position, she had been diagnosed with gender identity disorder and was working with a licensed clinical social worker, Martha Harris, to develop a medically appropriate plan for transitioning from male to female. Tr. at 36-38. The transitioning process was guided by a set of treatment protocols formulated by the leading organization for the study and treatment of gender identity disorders, the Harry Benjamin International Gender Dysphoria Association. Pl.Ex. 45; Tr. at 193. Because she had not yet begun presenting herself as a woman on a full-time basis, however, she applied for the position as "David J. Schroer," her legal name at the time. In October 2004, two months after submitting her application, Schroer was invited to interview with three members of the CRS staff—Charlotte Preece, Steve Bowman, and Francis Miko. Preece, the Assistant Director for Foreign Affairs, Defense and Trade, was the selecting official for the position. Tr. at 103. Schroer attended the interview dressed in traditionally masculine attire—a sport coat and slacks with a shirt and tie.

Tr. at 45.

Schroer received the highest interview score of all eighteen candidates. Pl.Ex. 18. In early December, Preece called Schroer, told her that she was on the shortlist of applicants still in the running, and asked for several writing samples and an updated list of references. Tr. at 49. After receiving these updated materials, the members of the selection committee unanimously recommended that Schroer be offered the job. Tr. at 105. In mid-December, Preece called Schroer, offered her the job, and asked, before she processed the administrative paper work, whether Schroer would accept it. Tr. at 108. Schroer replied that she was very interested but needed to know whether she would be paid a salary comparable to the one she was currently receiving in the private sector. The next day, after Preece confirmed that the Library would be able to offer comparable pay, Schroer accepted the offer, and Preece began to fill out the paperwork necessary to finalize the hire. *Id.*

Before Preece had completed and submitted these documents, Schroer asked her to lunch on December 20, 2004. Schroer's intention was to tell Preece about her transsexuality. She was about to begin the phase of her gender transition during which she would be dressing in traditionally feminine clothing and presenting as a woman on a full-time basis. She believed that starting work at CRS as a woman would be less disruptive than if she started as a man and later began presenting as a woman. Tr. at 53.

When Schroer went to the Library for this lunch date, she was dressed in traditionally masculine attire. Before leaving to walk to a nearby restaurant, Preece introduced her to other staff members as the new hire who would soon be coming aboard. Preece also gave Schroer a short tour of the office, explaining where her new colleagues' offices were and describing Schroer's job responsibilities. Tr. at 56. As they were sitting down to lunch, Preece stated that they were excited to have Schroer join CRS because she was "significantly better than the other candidates." *Id.* Schroer asked why that was so, and Preece explained that her skills, her operational experience, her ability creatively to answer questions, and her contacts in the military and in defense industries made her application superior. Tr. at 56; 110.

About a half hour into their lunch, Schroer told Preece that she needed to discuss a "personal matter." Tr. at 57. She began by asking Preece if she knew what "transgender" meant. Preece responded that she did, and Schroer went on to explain that she was transgender, that she would be transitioning from male to female, and that she would be starting work as "Diane." Preece's first reaction was to ask, "Why in the world would you want to do that?" Tr. at 57, 110. Schroer explained that she did not see being transgender as a choice and that it was something she had lived with her entire life. Preece then asked her a series of questions, starting with whether she needed to change Schroer's name on the hiring documentation. Schroer responded that she did not because her legal name, at that point, was still David. Schroer went on to explain the Harry Benjamin Standards of Care and her own medical process for transitioning. She told Preece that she planned to have facial feminization surgery in early January and assured her that recovery from this surgery was quick and would pose no problem for a mid-January start date. In the context of explaining the Benjamin Standards of Care, Schroer explained that she would be living full-time as a woman for at least a year before having sex reassignment surgery. Such surgery, Schroer explained, could normally be accomplished during a two-week vacation period and would not interfere with the requirements of the job. Tr. at 59.

Preece then raised the issue of Schroer's security clearance, asking what name ought to appear on hiring documents. Schroer responded that she had several transgender friends who had retained their clearances while transitioning and said that she did not think it would be an issue in her case. Schroer also mentioned that her therapist would be available to answer any questions or provide additional background as needed. Tr. at 60. Because Schroer expected that there might be some concern about her appearance when presenting as a woman, she showed Preece three photographs of herself, wearing traditionally feminine professional attire. Although Preece did not say it to Schroer, her reaction on seeing these photos was that Schroer looked like "a man dressed in women's clothing." Tr. at 112. Preece did not ask Schroer whether she had told her references or anyone at Benchmark of her transition.

Although Schroer initially thought that her conversation with Preece had gone well, she thought it "ominous" that Preece ended it by stating "Well, you've given me a lot to think about. I'll be in touch." Tr. at 63.

Preece did not finish Schroer's hiring memorandum when she returned to the Library after lunch. See Pl.Ex. 23.^[1] Instead, she went to speak with Cynthia Wilkins, the personnel security officer for the Library of Congress. Preece told Wilkins that she had just learned that the candidate she had planned to recommend for the terrorism specialist position would be transitioning from

male to female and asked what impact that might have on the candidate's ability to get a security clearance. Tr. at 120. Wilkins did not know and said that she would have to look into the applicable regulations. Preece told Wilkins that the candidate was a 25-year military veteran. She did not recall whether or not she mentioned that Schroer currently held a security clearance. Preece did not provide, and Wilkins did not ask for, the sort of information—such as Schroer's full name and social security number—that would have allowed Wilkins access to information on Schroer's clearance history. Had Preece requested her to do so, Wilkins had the ability to access Schroer's complete investigative file through a centralized federal database. Tr. at 272, 279-82.

Preece testified that at this point, without waiting to hear more from Wilkins, she was leaning against hiring Schroer. Tr. at 121-22. She said that Schroer's transition raised five concerns for her. First, she was concerned about Schroer's ability to maintain her contacts within the military. Specifically, Preece thought that some of Schroer's contacts would no longer want to associate with her because she is transgender. Tr. at 113. At no point after learning of Schroer's transition, however, did Preece discuss the continuing viability of her contacts with Schroer, nor did she raise this concern with any of Schroer's references, all of whom in fact knew that she was transitioning. Tr. at 51, 114. Second, Preece was concerned with Schroer's credibility when testifying before Congress. When CRS specialists testify before Congress, they typically provide Members with brief biographical statements to give them credibility. Preece was concerned "that everyone would know that [Schroer] had transitioned from male to female because only a man could have her military experiences." Tr. at 114. Preece thought that this would be an obstacle to Schroer's effectiveness. Tr. at 115. Third, Preece testified that she was concerned with Schroer's trustworthiness because she had not been up front about her transition from the beginning of the interview process. Tr. at 117. Preece did not, however, raise this concern to Schroer during their lunch. Fourth, Preece thought that Schroer's transition might distract her from her job. Although Preece seems to have connected this concern to Schroer's surgeries, she did not ask for additional information about them or otherwise discuss the issue further with Schroer. Tr. at 118. Finally, Preece was concerned with Schroer's ability to maintain her security clearance. In Preece's mind, "David Schroer" had a security clearance, but "Diane Schroer" did not. Even before speaking with Wilkins, Preece "strongly suspected" that David's clearance simply would not apply to Diane. Tr. at 117. She had this concern, but she did not ask Schroer for any information on the people she knew who had undergone gender transitions while retaining their clearances. *Id.*

After her lunch with Schroer, Preece also relayed the details of her conversation to a number of other officials at CRS, including Daniel Mulholland, the Director of CRS, and Gary Pagliano, one of the defense section heads, whose reaction was to ask Preece if she had a good second candidate for the job. Later the same afternoon, Preece received an email from one of the Library's lawyers, setting up a meeting for the next morning to discuss the terrorism specialist position. Tr. at 123. That evening, as Preece thought about the issue, she was puzzled by the idea that "someone [could] go[] through the experience of Special Forces [and] decide that he wants to become a woman." Tr. at 124. Schroer's background in the Special Forces made it harder for Preece to think of Schroer as undergoing a gender transition. *Id.*

The next morning, on December 21, 2004, at nine o'clock, Preece met with Kent Ronhovde, the Director of the Library of Congress, Wilkins, and two other members of the CRS staff from workforce development. Tr. at 124. Preece described her lunch conversation with Schroer and stated that Schroer had been, but no longer was, her first choice for the position. Tr. at 126. As Preece recalls the meeting, Wilkins stated that she was unable to say one way or another whether Diane Schroer would be able to get a security clearance. *Id.* at 126. Preece testified that Wilkins proposed that Schroer would have to have a "psychological fitness for duty examination," after which the Library would have to decide whether to initiate a full background investigation. Wilkins testified that she was not familiar with such an "examination" and likely would not have used such a phrase, Tr. at 290-91, but she confirmed that she told the meeting that she would not approve a waiver for Schroer so that she could start working before the clearance process was complete. Wilkins made this decision without having viewed Schroer's application, her resume, or her clearance status and history. Tr. at 127. Preece understood the substance of Wilkins' comments to be that David's security clearance was not relevant to Diane, and that Diane would need a separate clearance. She assumed that that process could take up to a year.

At no point during the meeting did Preece express a continuing interest in hiring Schroer. She did not suggest that Wilkins pull and review David Schroer's security file to confirm her own assumption that the security clearance process would be a lengthy one. No one in the meeting asked whether the organization currently holding Schroer's clearance knew of her transition. There was no discussion of whether anyone else at the Library had dealt with a similar situation. Tr. at 128-29.

By the end of the meeting, Preece had made up her mind that she no longer wanted to recommend Schroer for the terrorism specialist position. Tr. at 131. Preece testified that the security clearance was the critical, deciding factor because of "how long it would take." She also testified, however, that she would have leaned against hiring Schroer even if she had no concerns regarding the security clearance, because her second candidate, John Rollins, presented "fewer complications"—because, unlike Schroer, he was not transitioning from male to female. Tr. at 133-34.

Later that day, Preece circulated a draft of what she proposed to tell Schroer to those who had participated in the meeting. The email stated:

David. I'm calling to let you know that I am not going forward with my recommendation to hire you for the terrorism position. In light of what you told me yesterday, I feel that you are putting me and CRS in an awkward position for a number of reasons as you go through this transition period. I am primarily concerned that you could not likely be brought on in a timeframe that is needed for me to fill the position. Our Personnel Security Office has told me that the background investigation process that will be required for you to start work could be lengthy. I am also concerned that the past contacts I had counted on you to bring to the position may not now be as fruitful as they were in the past. Finally I have concerns that the transition that you are in the process of might divert your full attention away from the mission of CRS.

I could be wrong on any one of these complicated factors, but taken together I do not have a high enough degree of confidence to recommend you for the position. Having said that, I very much appreciate your candor and your courage. I wish you the best and want to let you know that you should feel free to[] apply for future positions at the Library.

Pl.Ex. 19. Preece was then called into the General Counsel's office for a meeting at eleven o'clock. Afterward, Preece circulated a revised email with the header "Draft per discussion with General Coun[sel]." Pl.Ex. 20. It read:

David, Given the level and the complexities of the position, I don't think this is a good fit. This has been a difficult decision, but given the immediate needs of Congress, I've decided not to go forward with the recommendation.

(Listen. If needed say) That's all I'm prepared to say at this time.

Id. Later that same afternoon, Preece called Schroer to rescind the job offer. She said, "Well, after a long and sleepless night, based on our conversation yesterday, I've determined that you are not a good fit, not what we want." Tr. at 63. Schroer replied that she was very disappointed. Preece ended the conversation by thanking Schroer for her honesty. Tr. at 64; 138. Preece then called John Rollins, who had a lower total interview score than Schroer, see Pl.Ex. 18, and offered him the position. He accepted.

Since January 2005, Schroer has lived full-time as a woman. Tr. at 66. She has changed her legal name to Diane Schroer and obtained a Virginia driver's license and a United States Uniformed Services card reflecting her name change and gender transition. Pl.Ex. 7.

Analysis

It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The "ultimate question" in every Title VII case is whether the plaintiff has proved that the defendant intentionally discriminated against her because of a protected characteristic. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The Library argues that it had a number of non-discriminatory reasons for refusing to hire Schroer, including concerns about her ability to maintain or timely receive a security clearance, her trustworthiness, and the potential that her transition would distract her from her job. The Library also argues that a hiring decision based on transsexuality is not unlawful discrimination under Title VII.

After hearing the evidence presented at trial, I conclude that Schroer was discriminated against because of sex in violation of

Title VII. The reasons for that conclusion are set forth below, in two parts. First, I explain why, as a factual matter, several of the Library's stated reasons for refusing to hire Schroer were not its "true reasons, but were ... pretext[s] for discrimination," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Second, I explain why the Library's conduct, whether viewed as sex stereotyping or as discrimination literally "because of ... sex," violated Title VII.

I.

None of the five assertedly legitimate reasons that the Library has given for refusing to hire Schroer withstands scrutiny.

A. Security clearance concerns were pretextual

Preece has claimed that her primary concern was Schroer's ability to receive a security clearance in a timely manner. It is uncontested that the ability to maintain or receive security clearance is a requirement for the terrorism specialist position. In light of the inquiry that the Library actually made into Schroer's clearance history and the specific facts affecting her case, however, I conclude that this issue was a pretext for discrimination.

Kenneth Lopez, the Library's Director of Security and Emergency Preparedness, and Wilkins' supervisor, testified about the clearance process for new employees. Lopez explained that, in appropriate circumstances, the Library recognizes as a matter of reciprocity the security clearance held by an individual at a prior government agency. Tr. at 247. The three general requirements for reciprocity are that the previous investigation was undertaken in a timely manner, that the investigation had an adequate scope,^[2] and that there has not been a significant break in service. When new information that might raise security concerns about a candidate otherwise eligible for reciprocity is raised, the Library evaluates that information before making a decision as to whether to grant reciprocity. Tr. at 251. That there is new information does not necessarily mean that a new, full-scale investigation is needed. Tr. at 285.

When the candidate does not have a valid, prior clearance, the Library may nonetheless grant a waiver so that the person may start work, conditionally employed, before the security investigation has been completed. A waiver is not needed for someone holding a current clearance of appropriate scope. Tr. at 256.

Although Preece knew that Schroer held a security clearance, she did not provide Wilkins with any of the information that might have been needed to see whether reciprocity would apply. Wilkins had the ability to access Schroer's entire security file, but she did not do so—because she was not asked to.

Without any specific information about Schroer—including whether she might have already addressed any issues arising out of her gender transition with the current holder of her security clearance (Benchmark)—Wilkins performed the most general kind of research. She looked into the Adjudication Guidelines and the Adjudication Desk Reference for information about transsexuality and found two potentially relevant guidelines.^[3] The first was the sexual behavior guideline, which provides that sexual behavior that causes an individual to be vulnerable to blackmail or coercion may be cause for a security concern. Tr. at 276. Wilkins acknowledged, however, that an individual who has disclosed her transsexuality would not present blackmail concerns. Tr. at 277. The other potentially relevant guideline deals with security concerns raised by emotional, mental or personality disorders. Psychological disorders, including gender identity disorder, are not *per se* disqualifying but are to be evaluated as part of the person's entire background. Tr. at 257. Lopez testified when an employee discloses such a disorder, the proper procedure is for the personnel security officer to consult with the Library's Health Services. After interviewing the candidate and, potentially, his or her mental health providers, a Health Services officer determines whether or not the information raises a security concern. For an individual already holding a clearance, if Health Services is satisfied that the disorder raises no security concerns, the personnel security office proceeds to grant reciprocity. Tr. at 253.

The Library made no effort to determine whether Schroer's previous clearance would receive reciprocal recognition or to determine whether the agency previously holding Schroer's clearance already knew of, and had already investigated any concerns related to Schroer's gender identity disorder. Wilkins stated that she would not approve a waiver without determining whether reciprocity might apply, and therefore without determining whether a waiver actually would have been required. Without

being given a concrete time frame by Wilkins, and without speaking to anyone in Health Services, Preece simply "assumed" that it would take a year before Schroer would be fully cleared. This assumption was connected to no specific information about Schroer or her clearance history, and was not informed by the Library's own procedures for adjudicating possible security issues arising from a psychological disorder.^[4]

The Library's statements about the time pressures that they were operating under to fill the position with someone with a full security clearance, as opposed to a provisional waiver, are not credible. The terrorism specialist opening was first posted in August. Schroer was not interviewed until October and did not receive an offer until mid-December. The person who previously held the job, Audrey Cronin, worked for six months during 2003 before receiving her clearance. Tr. at 438; Pl. Ex. 64. Cronin's first performance evaluation, completed after eight months on the job, in no way reflected that her work had been impaired by the fact that she had lacked a clearance during three quarters of the period under evaluation. Pl.Ex. 65. John Rollins, who ultimately filled the position denied to Schroer, did not receive his final clearance until "several months" after he began working at CRS. Tr. at 304.

B. Trustworthiness and distraction concerns were pretextual

The Library's professed concerns with Schroer's trustworthiness and ability to focus on the job were also pretextual. At trial, the Library conceded as undisputed that Schroer "had no other co-morbidities or stressors that would have prevented her from performing the duties of the terrorism specialist, or that would have presented any issue regarding her stability, judgment, reliability or ability to safeguard classified information." Tr. at 349. Preece's stated concern with Schroer's trustworthiness was belied by the fact that she thanked Schroer for her honesty in the course of rescinding the job offer. If Preece had really been concerned with Schroer's ability to focus on her work responsibilities, she could have raised the matter directly and asked Schroer additional questions about her planned surgeries, asked her current employer and references about Schroer's ability to focus, or spoken with Schroer's therapist, as Schroer had offered. Preece did none of those things.

C. Credibility and contacts concerns were facially discriminatory

The Library's final two proffered legitimate non-discriminatory reasons— that Schroer might lack credibility with Members of Congress, and that she might be unable to maintain contacts in the military—were explicitly based on her gender non-conformity and her transition from male to female and are facially discriminatory as a matter of law. Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices. See Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1270 (8th Cir.1981) (firing employee in response to racially charged, unverified customer complaint is direct evidence of racial discrimination by employer); cf. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir.1981) ("stereotypic impressions of male and female roles do not qualify gender as a [bona fide occupational qualification]"); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.1971) (same). In any event, the Library made no effort to discern if its concern was actually a reasonable one, as it easily could have done by contacting any of the high-ranking military officials that Schroer listed as references. Pl.Ex. 5.

II.

Schroer contends that the Library's decision not to hire her is sex discrimination banned by Title VII, advancing two legal theories. The first is unlawful discrimination based on her failure to conform with sex stereotypes. The second is that discrimination on the basis of gender identity is literally discrimination "because of ... sex."

A. Sex stereotyping

Plaintiff's sex stereotyping theory is grounded in the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In that case, a female senior manager was denied partnership in a large accounting firm in part because she was perceived to be too "macho" for a woman. *Id.* at 235, 109 S.Ct. 1775. Her employer

advised that she would improve her chances at partnership if she would "take `a course at charm school'" and would "'walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.'" *Id.* Justice Brennan observed that it did not "require expertise in psychology to know that, if an employee's flawed `interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Id.* at 255, 109 S.Ct. 1775. In ruling for the plaintiff, the Court held that Title VII reaches claims of discrimination based on "sex stereotyping." *Id.* at 250-51, 109 S.Ct. 1775 (plurality opinion); *id.* at 258-261, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, J., concurring). "In the specific context of sex stereotyping," the Court explained, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250, 109 S.Ct. 1775.

After *Price Waterhouse*, numerous federal courts have concluded that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII. See, e.g., *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir.2005) ("[A] plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir.2001) (Title VII claim is stated when "the harasser was acting to punish the victim's noncompliance with gender stereotypes"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir.2001) (male plaintiff stated a Title VII claim where he was harassed "for walking and carrying his tray `like a woman'—i.e., for having feminine mannerisms"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity."); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir.1997) ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he ... does not meet his coworkers' idea of how men are to appear and behave, is harassed `because of his sex'"), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

Following this line of cases, the Sixth Circuit has held that discrimination against transsexuals is a form of sex stereotyping prohibited by *Price Waterhouse* itself:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination that would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in discrimination, because the discrimination would not occur but for the victim's sex.

...

[D]iscrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior.

Smith v. Salem, 378 F.3d 566, 574-75 (6th Cir.2004); see also *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.2005). In my 2006 memorandum denying the Library's motion to dismiss, in this case, I expressed reservations about the Sixth Circuit's broad reading of *Price Waterhouse*. I explained that "[n]either the logic nor the language of *Price Waterhouse* establishes a cause of action for sex discrimination in every case of sex stereotyping." *Schroer v. Billington*, 424 F.Supp.2d 203, 208 (D.D.C.2006). I held that what *Price Waterhouse* actually recognized was a Title VII action for *disparate treatment*, as between men and women, based on sex stereotyping. Accordingly, I concluded that "[a]dverse action taken on the basis of an employer's gender stereotype that does not impose unequal burdens on men and women does not state a claim under Title VII." *Id.* at 209. While I agreed with the Sixth Circuit that a plaintiff's transsexuality is not a bar to a sex stereotyping claim, I took the position that "such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions." *Id.* at 211. In other words, "a *Price-Waterhouse* claim could not be supported by facts showing that [an adverse employment action] resulted *solely* from [the plaintiff's] disclosure of her gender dysphoria." *Schroer v. Billington*, 525 F.Supp.2d 58, 63 (D.D.C.2007).

That was before the development of the factual record that is now before me.

My conclusion about a disparate treatment requirement relied heavily on the panel decision in Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004). That decision was later affirmed *en banc*. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109 (9th Cir.2006). The defendant in *Jespersen* had instituted a company-wide "Personal Best" grooming policy, which, in addition to gender-neutral standards of fitness and professionalism, required women to wear stockings and colored nail polish, to wear their hair "teased, curled, or styled," and to wear make-up. 392 F.3d at 1077. The policy also prohibited men from wearing makeup, nail polish, or long hair. Plaintiff Darlene Jespersen was fired for refusing to wear makeup, which she testified made "her feel sick, degraded, exposed and violated," "forced [] to be feminine," and "dolloped up" like a sexual object. *Id.* Despite the subjective, gender-related toll that the policy exacted from Jespersen, the Ninth Circuit held that firing her for non-compliance with the policy did not violate Title VII, since, in that court's judgment, the "Personal Best" policy imposed equally burdensome, although gender-differentiated, standards on men and women.

In her post-trial briefing, Schroer convincingly argues that *Jespersen's* disparate treatment requirement ought not apply in this case. Unlike *Jespersen*, this case does not involve a generally applicable, gender-specific policy, requiring proof that the policy itself imposed unequal burdens on men and women. Instead, Schroer argues that her *direct evidence* that the Library's hiring decision was motivated by sex stereotypical views renders proof of disparate treatment unnecessary.^[5]

Schroer's case indeed rests on direct evidence, and compelling evidence, that the Library's hiring decision was infected by sex stereotypes. Charlotte Preece, the decisionmaker, admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing. Tr. at 112-13. In conversations Preece had with colleagues at the Library after her lunch with Schroer, she repeatedly mentioned these photographs. Tr. at 120-21, 172-73. Preece testified that her difficulty comprehending Schroer's decision to undergo a gender transition was heightened because she viewed David Schroer not just as a man, but, in light of her Special Forces background, as a particularly masculine kind of man. Tr. at 124. Preece's perception of David Schroer as especially masculine made it all the more difficult for her to visualize Diane Schroer as anyone other than a man in a dress. *Id.* Preece admitted that she believed that others at CRS, as well as Members of Congress and their staffs, would not take Diane Schroer seriously because they, too, would view her as a man in women's clothing. Tr. at 112-15, 132-34.

What makes Schroer's sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII. See Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir.1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir.1977); Doe v. U.S. Postal Service, 1985 U.S. Dist. LEXIS 18959, 1985 WL 9446, *2 (D.D.C. 1985). Take Preece's testimony regarding Schroer's credibility before Congress. As characterized by Schroer, the Library's credibility concern was that she "would not be deemed credible by Members of Congress and their staff because people would perceive her to be a woman, and would refuse to believe that she could possibly have the credentials that she had." [Dkt. 67 at 7]. Plaintiff argues that this is "quintessential sex stereotyping" because Diane Schroer is a woman and does have such a background. *Id.*^[6] But Preece did not testify that she was concerned that Members of Congress would perceive Schroer simply to be a woman. Instead, she testified that "everyone would know that [Schroer] had transitioned from male to female because only a man could have her military experiences." Tr. at 114.

Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. One or more of Preece's comments could be parsed in each of these three ways. While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse-type* claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself.

B. Discrimination because of sex

Schroer's second legal theory is that, because gender identity is a component of sex, discrimination on the basis of gender

identity is sex discrimination. In support of this contention, Schroer adduced the testimony of Dr. Walter Bockting, a tenured associate professor at the University of Minnesota Medical School who specializes in gender identity disorders. Dr. Bockting testified that it has long been accepted in the relevant scientific community that there are nine factors that constitute a person's sex. One of these factors is gender identity, which Dr. Bockting defined as one's personal sense of being male or female.^[7] Tr. at 210.

The Library adduced the testimony of Dr. Chester Schmidt, a professor of psychiatry at the Johns Hopkins University School of Medicine and also an expert in gender identity disorders. Dr. Schmidt disagreed with Dr. Bockting's view, of the prevailing scientific consensus and testified that he and his colleagues regard gender identity as a component of "sexuality" rather than "sex." According to Dr. Schmidt, "sex" is made up of a number of facets, each of which has a determined biologic etiology. Dr. Schmidt does not believe that gender identity has a single, fixed etiology. Tr. at 372, 400-04.

The testimony of both experts—on the science of gender identity and the relationship between intersex conditions and transsexuality—was impressive. Resolving the dispute between Dr. Schmidt and Dr. Bockting as to the proper scientific definition of sex, however, is not within this Court's competence. More importantly (because courts render opinions about scientific controversies with some regularity), deciding whether Dr. Bokting or Dr. Schmidt is right turns out to be unnecessary.

The evidence establishes that the Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination "because of... sex."

Analysis "must begin ... with the language of the statute itself" and "[i]n this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)).

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.

In Ulane v. Eastern Airlines, the Seventh Circuit held that discrimination based on sex means only that "it is unlawful to discriminate against women because they are women and against men because they are men." The Court reasoned that the statute's legislative history "clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." 742 F.2d 1081, 1085 (7th Cir.1981). The Ninth Circuit took a similar approach, holding that Title VII did not extend protection to transsexuals because Congress's "manifest purpose" in enacting the statute was only "to ensure that men and women are treated equally." Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir.1977). More recently, the Tenth Circuit has also held that because "sex" under Title VII means nothing more than "male and female," the statute only extends protection to transsexual employees "if they are discriminated against because they are male or because they are female." Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1222 (10th Cir.2005).

The decisions holding that Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of "judge-supposed legislative intent over clear statutory text." Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 127 S.Ct. 1534, 1551, 167 L.Ed.2d 449 (2007) (Scalia, J., dissenting).^[8] In their holdings that discrimination based on changing one's sex is not discrimination because of sex, Ulane, Holloway, and Etsitty essentially reason "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L.Ed. 226 (1892). This is no longer a tenable approach to statutory construction. See Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 473, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring). Supreme Court decisions

subsequent to *Ulane* and *Holloway* have applied Title VII in ways Congress could not have contemplated. As Justice Scalia wrote for a unanimous court:

Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

For Diane Schroer to prevail on the facts of her case, however, it is not necessary to draw sweeping conclusions about the reach of Title VII. Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach "has been eviscerated by *Price Waterhouse*," *Smith*, 378 F.3d at 573—the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination "because of ... sex."

In 2007, a bill that would have banned employment discrimination on the basis of sexual orientation and gender identity was introduced in the House of Representatives. See H.R.2015, 110 Cong., 1st Sess. (2007). Two alternate bills were later introduced: one that banned discrimination only on the basis of sexual orientation, H.R. 3685, 110 Cong., 1st Sess. (2007), and another that banned only gender identity discrimination, H.R. 3686, 110 Cong., 1st Sess. (2007). None of those bills was enacted.

The Library asserts that the introduction and non-passage of H.R.2015 and H.R. 3686 shows that transsexuals are not currently covered by Title VII and also that Congress is content with the status quo. However, as Schroer points out, another reasonable interpretation of that legislative non-history is that some Members of Congress believe that the *Ulane* court and others have interpreted "sex" in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation. As the Supreme Court has explained,

[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (internal citations and quotation marks omitted).

Conclusion

In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.

The Clerk is directed to set a conference to discuss and schedule the remedial phase of this case.

[1] Her partial, draft memorandum had begun:

I recommend Mr. David Schroer for the position of Specialist in Terrorism and International Crime in the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service. His qualifications and experience make[] him the best qualified candidate from among the other 8 applicants on the final referral list.

Mr. Schroer has extensive experience as a practitioner and strategic planner in counterterrorism. Since 1986 he was involved in leading counterterrorism and counterinsurgency operations around the world.

[2] "Scope" goes to the thoroughness of the prior investigation based on the level of clearance. Someone who holds only a "Secret" level

clearance will not have had as thorough an investigation as someone holding a "Top Secret" clearance. Tr. at 254-55.

[3] Wilkins testified that these guidelines and reference materials implement Executive Order 10450, 18 Fed.Reg. 2489 (1953), and Executive Order 12968, 60 Fed.Reg. 40245 (1995). Tr. at 263.

[4] The Library has never argued that Title VII's jurisdictional exemption regarding security clearances, 42 U.S.C. § 2000e-2(g), applies in this case, and, unlike in Department of Navy v. Egan, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), Schroer is not challenging the denial of a security clearance. She asserts, rather, that the Library's failure to follow its own procedures establishes pretext.

[5] For example, in Oncale v. Sundowner Offshore Services, Inc., the male plaintiff complaining of sexual harassment in violation of Title VII had been "forcibly subjected to sex-related, humiliating actions" and had been "physically assaulted ... in a sexual manner" by other male co-workers. 523 U.S. 75, 77, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The Supreme Court did not require Oncale to show that he had been treated worse than women would have been treated, but only that "he suffered discrimination *in comparison to other men.*" Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067 (9th Cir.2002) (en banc) (emphasis in original).

[6] Plaintiff also presented the testimony of Dr. Kalev Sepp, Deputy Assistant Secretary of Defense for Special Operations, that women have served in the Special Forces since the 1970s. *Id.* at 98-99.

[7] The other eight factors, according to Dr. Bockting, are chromosomal sex, hypothalamic sex, fetal hormonal sex, pubertal hormonal sex, sex of assignment and rearing, internal morphological sex, external morphological sex, and gonads.

[8] Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or based on friendships that cross racial lines. See, e.g., McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1118 (9th Cir.2004).

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Enough With the Bathrooms: Stigma, Stereotypes and Barriers to Trans Equality

Recently, attempts to effectively implement the right to non-discrimination for trans people in the United States has been met with fear-mongering about inappropriate use of public bathrooms.

In [Maryland](#), a lawmaker reportedly expressed concerns that predators and pedophiles might enter women's bathrooms if that state passes a bill, currently under consideration, to prohibit discrimination based on gender identity. In [Arizona](#), some parents were worried about trans children choosing the most appropriate bathroom for themselves, lest this "infringe" on other children's "privacy." And opponents of a non-discrimination law in [California](#), already in effect, are gathering signatures to have the law repealed, because, they say, it violates the rights of those students who may be uncomfortable sharing a bathroom with a person who is trans.

In fact, integrated public bathroom use seems to be the top objection raised in the United States to advancing equal rights for trans people, especially children. There are 3 main reasons for this.

First, there is a general discomfort among many Americans with co-ed social interaction as anything other than (straight) "courting." Over the age of 5, co-ed sleepovers are seen as inappropriate by many, and school dances as early as 5th grade push the notion that you really should only show up with a "date" of the opposite gender. What children take away from these overly gendered (and hetero-centric) rules of interaction is anyone's guess, but it is clear that many parents view co-ed friendships with suspicion.

Secondly, there is a common conflation of nudity and sex in US media and public discourse. It is telling that the discomfort around trans people's public bathroom use is about potential sexual interactions rather than actually using the toilets.

As a logical proposition, the argument that bathroom use must be strictly divided on the basis of genitalia in order to prevent public sex has always confused me. For starters, experience shows that such interactions can and do happen without any connection to trans people. Most of us remember the 2007 bathroom stall [incident](#) that ultimately had Senator Larry Craig of Idaho resign, and news of straight couples having [sex in public](#) bathrooms surface with monotonous regularity. Moreover, it would be impossible to police genitalia-based bathroom use without engaging in precisely the kind of "peeping Tom" activity those opposed to non-discrimination protections for trans people claim inevitably would follow the adoption of such measures.

Third, and most importantly, the linkage between trans equality and public bathroom use surfaces the stereotyped notion of trans people as somehow over-sexed, "perverted" or perhaps just "making it up." I

have previously [written](#) about the comment reportedly made by a lawyer who was arguing against a 6-year-old trans girl's right to use the girl's bathroom at her school, with reference to the notion that the girl might be lying about her gender identity and really just want to see other girls go to the bathroom. Unfortunately, such preconceived notions about trans people just making it up or being over-sexed are [not](#) isolated to this case.

To be clear: gender identity is not about sex, it is about who we are. The founder of the website "[We Happy Trans](#)," Jen Richards, recently wrote a great [piece](#) about the fact that the trans community is as diverse as any other. Shocking, I know (not). The truth of the matter is that everyone has a right to non-discrimination, and that trans people pretty much [everywhere](#) face unique barriers to exercising this right because of stigma, stereotypes and legal obstacles to changing gender markers.

It is ridiculous that one of those barriers consistently should be someone else's discomfort with sharing a bathroom with people whose genitalia may or may not look like their own. Especially because the main point of those opposed to non-discrimination measures is that no one should be looking at anyone else's genitalia in the first place.

I say, enough with the bathrooms. No one should not have to pay for someone else's prudish illogic.

Follow Marianne Mollmann on Twitter: www.twitter.com/cluelesscamper

15 Experts Debunk Right-Wing Transgender Bathroom Myth

[Research](#) March 20, 2014 10:01 AM EDT >>> LUKE BRINKER & CARLOS MAZA

Experts in 12 states -- including law enforcement officials, government employees, and advocates for victims of sexual assault -- have debunked the right-wing myth that sexual predators will exploit transgender non-discrimination laws to sneak into women's restrooms, calling the myth baseless and "beyond specious."



Media Outlets Have Promoted Myths About Sexual Assault To Attack Transgender Non-Discrimination Laws

Media Outlets Have Promoted "Urban Myth" About Restroom Sexual Assault In Trans-Inclusive Jurisdictions. According to Gay Star News' Jane Fae, transphobic bathroom myths have been promoted by news outlets that fail to fact-check unsubstantiated stories about alleged sexual assaults:

Have you heard the one about the trans woman who went into a female changing room and exposed herself to all and sundry?

No: that's not joke, so much as persistent urban myth. However, thanks to an unhappy combination of reactionary and transphobic groups in the United States, and newspapers with a less than whole-hearted commitment to fact-checking, this is one trope that looks set to run and run.

[...]

Early opposition, primarily from religious groups in bizarre alliance with some radical feminists, led to the circulation of scary video clips: one depicted the supposed nightmare scenario of a young girl entering a toilet, to be followed moments later by a mustachioed man in a dress. Since, however, this was mostly preaching to the converted, the campaign appears to have gone mainstream, with an increasingly regular drip-feed of stories of the kind highlighted above.

The transphobic tendency is often aided and abetted by journalists who don't check the stories. [Gay Star News, [1/9/14](#)]

DC Trans Coalition: Conservatives Use "Bathroom Panic" To Defeat Transgender Non-Discrimination Laws. According to the DC Trans Coalition:

All over the world, anti-trans bigots try to convince the public that trans people are somehow a "threat" in public bathrooms. We've seen it in New Hampshire, in Gainesville, FL and close to home in Montgomery County, Md: Our opponents stereotype trans people as sexual predators and try to use "bathroom panic" to defeat legislation that would protect our ability to gain employment and live safe lives. [DC Trans Coalition, accessed [3/18/14](#)]

Fox News Has Promoted Harassment Fears About Transgender Access To Restrooms. Fox News has repeatedly invoked fears of sexual assault and misbehavior in restrooms to attack equal access to public accommodations for transgender people, including a fake story about a transgender student harassing females in her school's restroom. [*Equality Matters*, [6/5/13](#), [2/27/13](#), [8/14/13](#), [10/15/13](#)]

Conservative Media Outlets Have Promoted Bogus Bathroom Stories. Numerous conservative media outlets, including The Daily Caller, WND, and the Media Research Center, have similarly promoted the myth that sexual predators will exploit trans-inclusive restrooms to prey upon women. [*Equality Matters*, [8/19/13](#), [8/22/13](#), [2/3/14](#)]

Experts From 12 States Debunk, Condemn Transgender Bathroom Myths

Colorado

State Law Has Prohibited Discrimination In Public Accommodations Since 2008. In 2008, Colorado expanded its Anti-Discrimination Act, which prohibits discrimination in public accommodations, to include sexual orientation and gender identity as a protected class. [*The Denver Post*, [5/29/08](#)]

Coalition Against Sexual Assault: Opponents Of Protections Are Creating "Unsubstantiated Fear." Alexa M. Priddy, director of training and communications at the Colorado Coalition Against Sexual Assault, reported no problems as a result of her state's non-discrimination law. In an email to *Media Matters*, she wrote:

Denying equal rights is yet another form of discrimination against transgender

individuals, which is pervasive within our society and institutions. Such criticisms of this law and ads [that] invoke what we see as "trans panic," an attempt to create fear of transgender people and a false label of trans individuals as sexual predators.

CCASA would love to see the real focus be on the realities that transgender people are far too often targeted for sexual violence, and if they seek support through victim services or the criminal justice system in the aftermath, they often face continued discrimination from the very people who are there to help. Sexual assault is already an under-reported crime, and we see this increase with marginalized communities. We want to focus on creating safety for transgender survivors and not on creating unsubstantiated fear. [Email exchange, 3/8/14]

Connecticut

State Law Has Prohibited Discrimination In Public Accommodations Since 2011. In 2011, Connecticut Gov. Dannel Malloy signed into law legislation prohibiting discrimination in public accommodations based on gender identity or expression. [*Bay Windows*, [7/6/11](#)]

State Commission On Human Rights: "Unaware Of Any Sexual Assault." In an email to *Media Matters*, Jim O'Neill, legislative liaison and spokesman for the Connecticut Commission on Human Rights in Opportunities, reported no problems as a result of the state's non-discrimination law:

I am unaware of any sexual assault as the result of the CT gender identity or expression law. I'm pretty sure it would have come to our attention. [Email exchange, 3/6/14]

Hawaii

State Law Has Prohibited Discrimination In Public Accommodations Since 2006. In 2006, Hawaii expanded its non-discrimination laws to prohibit discrimination in public accommodations on the basis of sexual orientation and gender identity. [Hawaii Civil Rights Commission, accessed [3/12/14](#)]

State Civil Rights Commission: Non-Discrimination Law "Has Not Resulted In Increase[d] Sexual Assault Or Rape." William Hoshijo, executive director of the Hawaii Civil Rights Commission, told *Media Matters* in an email:

In Hawai'i, the protection against discrimination in public accommodations on the basis of sex, including gender identity or expression, has not resulted in increase sexual assault or rape in women's restrooms. The HCRC is not aware of any incidents of sexual assault or rape causally related or attributed to the prohibition against discrimination on the basis of gender identity or expression. (In contrast to anecdotal reports of transgender students being harassed and bullied in school restrooms when forced to use an assigned restroom inconsistent with their gender identity.) [Email exchange, 3/6/14]

Iowa

State Law Has Prohibited Discrimination In Public Accommodations Since 2007. In 2007, the Iowa Civil Rights Act was expanded to prohibit discrimination on the basis of sexual orientation and gender identity in public accommodations. [Iowa Civil Rights Commission, accessed [3/14/14](#)]

Des Moines Police Department: "We Have Not Seen That." In an interview with *Media Matters*, Des Moines Police Department spokesman Jason Halifax stated that he hadn't seen cases of sexual assault related to the state's non-discrimination ordinance:

We have not seen that. I doubt that's gonna encourage the behavior. If the behavior's there, [sexual predators are] gonna behave as they're gonna behave no matter what the laws are. [Phone interview, 3/13/14]

Maine

State Law Has Prohibited Discrimination In Public Accommodations Since 2005. In 2005, Maine adopted legislation prohibiting discrimination in public accommodations on the basis of gender identity and sexual orientation. [GLAD, [2/25/14](#)]

State Human Rights Commission: "No Factual Basis" For Sexual Assault Fears. In an email to *Media Matters*, Executive Director Amy Sneirson of the Maine Human Rights Commission said that the state's non-discrimination law hadn't led to increased sexual assault or rape:

I know that this concern persists but I personally have not seen any factual basis for it.

I am not aware of any increased sexual assault or rape in women's restrooms as a result of Maine's 2005 adoption of protections in the Maine Human Rights Act for sexual orientation (which, in Maine, includes "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression"). [Email exchange, 3/7/14]

Massachusetts

Cambridge Has Prohibited Discrimination In Public Accommodations Since 1997. In 1997, the city of Cambridge expanded its non-discrimination ordinance to prohibit discrimination against transgender people in public accommodations. [National Gay and Lesbian Task Force, [July 2008](#)]

Cambridge Police Superintendent: "No Incidents" Of Transgender Protections Being Abused. Police Superintendent Christopher Burke told *Media Matters* in an email:

Back in 1984 Cambridge enacted an ordinance that established the Human Rights Commission. The purpose of the ordinance was to protect the human rights of all citizens of the City. In 1997 this ordinance was amended to specifically include gender identity and expression. Much like the Transgender Equal Rights Bill proposal, the City of Cambridge sought to offer protection to

transgender individuals from being harassed, fired from a job, denied access to a public place, or denied or evicted from housing. Since this 1997 amendment there have been no incidents or issues regarding persons abusing this ordinance or using them as a defense to commit crimes. **Specifically, as was raised as a concern if the bill were to be passed, there have been no incidents of men dressing up as women to commit crimes in female bathrooms and using the city ordinance as a defense.** [Email exchange, 3/7/14, emphasis added]

State Victims' Advocacy Group: Fears About Transgender Protections Are "Beyond Specious." Toni Troop, spokeswoman for the statewide sexual assault victims organization Jane Doe Inc., told *Media Matters* in an email:

The argument that providing transgender rights will result in an increase of sexual violence against women or men in public bathrooms is beyond specious. The only people at risk are the transgender men and women whose rights to self-determination, dignity and freedom of violence are too often denied. We have not heard of any problems since the passage of the law in Massachusetts in 2011, nor do we expect this to be a problem. While cases of stranger rape and sexual violence occur, sexual violence is most often perpetrated by someone known to the victim and not a stranger in the bush or the bathroom. [Email exchange, 3/7/14, emphasis added]

Minnesota

State Law Has Prohibited Discrimination In Public Accommodations Since 1993. In 1993, Minnesota amended its Human Rights Act to prohibit discrimination against transgender people in public accommodations. [OutFront Minnesota, accessed [3/13/14](#)]

Minneapolis Police Department: Fears About Sexual Assault "Not Even Remotely" A Problem. Minneapolis police spokesman John Elder told *Media Matters* in an interview that sexual assaults stemming from Minnesota's 1993 transgender non-discrimination law have been "not even remotely" a problem. Based on his experience, the notion of men posing as transgender women to enter women's restrooms to commit sex crimes "sounds a little silly," Elder said. According to Elder, a police department inquiry found "nothing" in the way of such crimes in the city. [Phone interview, 3/11/14]

Nevada

State Law Has Prohibited Discrimination In Public Accommodations Since 2011. In 2011, Nevada enacted three transgender non-discrimination laws, including a law explicitly prohibiting discrimination in public accommodations. [National Gay and Lesbian Task Force, [6/2/11](#)]

Las Vegas Police Department: No Problems Since Passage Of Non-Discrimination Law. Asked whether Nevada's 2011 gender identity law had fueled a rise in sex crimes, Las Vegas Police Department spokesman Jesse Roybal told *Media Matters*, "the answer would be no." After the department's lieutenant for sexual assault ran a check of crimes since 2011, Roybal told *Media Matters* that the department had not "had any incidents involving transgender suspects." [Phone interview, 3/6/14, 3/11/14]

New Mexico

State Law Has Prohibited Discrimination In Public Accommodations Since 2003. In 2003, New Mexico amended its Human Rights Act to prohibit discrimination on the basis of sexual orientation and gender identity in public accommodations. [The Williams Institute, [September 2009](#)]

Albuquerque Police Department: "Unaware Of Any Cases Of Assault" Due To Non-Discrimination Law. Officer Tasia Martinez, Public Information Officer for the Albuquerque Police Department, told *Media Matters* in an email:

We are unaware of any cases of assault in our city as a result of transgendered [sic] accommodations. [Email exchange, 3/13/14]

Oregon

State Law Has Prohibited Discrimination In Public Accommodations Since 2007. In 2007, Oregon enacted the Oregon Equality Act, which prohibits discrimination in public accommodations on the basis of sexual orientation and gender identity. [Lambda Legal, accessed [3/13/14](#)]

Bureau of Labor And Industries: "Zero Allegations" Of Assault Due To 2007 Law. Oregon Bureau of Labor and Industries spokesman Charlie Burr told *Media Matters* in an email:

The Oregon Equality Act protects the rights of LGBT Oregonians in employment, housing and public places and has done so without any incidents of LGBT assaults on women in public restrooms that we're aware of. Our agency has encountered zero allegations of LGBT assault related to this public accommodation protection. [Email exchange, 3/7/14]

Portland Police Department: "I Have Never Heard Of Any Issues Like This." Portland Police Department spokesman Peter Simpson wrote in an email to *Media Matters*:

I have never heard of any issues like this in Portland. We have a very low rate of sexual assault/rape crimes here overall. [Email exchange, 3/7/14]

Rhode Island

State Law Has Prohibited Discrimination In Public Accommodations Since 2001. In 2001, Rhode Island explicitly prohibited discrimination on the basis of gender identity or expression in public accommodations. [GLAD, [2/25/14](#)]

State Commission for Human Rights: No Increase In Sex Crimes Due To Non-Discrimination Law. Rhode Island Commission for Human Rights Executive Director Michael D. Evora told *Media Matters* in an email:

The Commission for Human Rights has not taken in any cases alleging gender identity discrimination in respect to bathroom usage in public facilities since the law was amended to prohibit such discrimination. In addition, we are not aware

of any affect the passage of the law has had on incidents of assault in public restrooms. [Email exchange, 3/7/14]

Vermont

State Law Has Prohibited Discrimination In Public Accommodations Since 2007. In 2007, Vermont explicitly prohibited discrimination on the basis of gender identity in public accommodations. [GLAD, [3/4/14](#)]

State Human Rights Commission: "We Are Not Aware" Of Any Problems From Non-Discrimination Law. In an email to *Media Matters*, the Vermont Human Rights Commission's Karen Richards said:

I have only been here a short time so was checking with my staff to find out if they were aware of any issues. ... We are not aware of any other issues or problems similar to this caused by prohibiting discrimination against those who are transgendered. [Email exchange, 3/7/14]

Montpelier Police Department: No Complaints. Montpelier Police Chief Tony Facos responded to an email inquiry about whether the state's non-discrimination law had led to incidents of rape or sexual assault in women's restrooms, stating, "We do not have any complaints related to this issue." [Email exchange, 3/10/14]

Florida's Vicious Anti-Trans Bathroom Bill Easily Survives Its First Vote

By Mark Joseph Stern



LGBTQ people and supporters protest in Florida in 2012.

Photo by Joe Raedle/Getty Images

Florida's **stunningly malicious anti-trans bill** passed its **first major legislative hurdle** on Wednesday, sailing out of the House Civil Rights Subcommittee with a 9-to-4 vote. (Yes, a subcommittee with that name actually approved this thing.) Republicans unanimously and enthusiastically supported the bill; Democrats unanimously and vigorously opposed it. When I first wrote about the proposed measure in February, a number of Floridians wrote me predicting it would quietly die in subcommittee without ever receiving a vote. After Wednesday's vote, the bill's passage into law suddenly seems like a distinct possibility.

How did we get to this point? The Florida **measure** isn't just some garden variety anti-trans proposal; it is a gross denial of trans people's basic humanity. Should it become law, trans people will be barred from using the public bathroom of their true gender—including those in schools and workplaces—and face up to a year in prison if they try. Arguably worse, an "owner of public accommodations, a school, or a place of employment" who *allows* a trans person to use the correct public bathroom is liable for a civil suit. In other words, the bill doesn't just target trans people; it also targets their allies, forcing them to risk fines should they make a simple act of trans accommodation.

Top Comment

It's like Florida rounded up all its worst anonymous internet commenters and promoted them to the legislature. [More...](#)
-Jack Pumpkin

The bill's sponsor, Republican Rep. Frank Artiles, **claims** he proposed it in response to Miami's new nondiscrimination ordinance, which broadly protects trans rights. According to Artiles, the Miami ordinance lets men legally enter women's restrooms and locker rooms in order to assault them. "All they have to say," Artiles explained on Wednesday, "is, 'I feel like a woman today.'"

There is some profound irony in this cruelly mocking comment. Although straight cisgender men **do not actually** use trans rights measures as an excuse to assault women, trans people do face a constant threat of **discrimination, harassment, and violence**. They experience these perils in large part because mendacious legislators like Artiles insist on perpetuating misconceptions and outright lies that encourage the view that

552 Comments

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trans people are aberrant molesters and freaks. Artilles’ bill will not actually protect any innocent women, but it will contribute to a toxic atmosphere that assures bigots that they are within their rights to **attack and bully trans people**. Florida House Republicans think Artilles’ bill protects civil rights. But it is overwhelmingly clear that this revolting measure does precisely the opposite.

NEWS & POLITICS

PROPUBLICA

MARCH 7 2015 9:30 AM

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MARCH 6 2015 1:17 PM

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L.V. Anderson

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ARTS

BROW BEAT

MARCH 8 2015 2:00 PM

In surprise vote, Kentucky Senate panel approves limits on transgender students' choices

FRANKFORT — Without providing much notice, the Senate Education Committee on Monday night revisited a bill that would require transgender students to use the bathroom that matches their biological sex or to seek special accommodations, such as a unisex bathroom.

The bill failed to get out of committee Thursday because it did not have the necessary seven votes to be sent to the full Senate.

But the panel approved Senate Bill 76 on an 8-1 vote on Monday night, minutes after Senate President Robert Stivers, R-Manchester, told reporters he didn't know whether the bill was on the committee's agenda.

Since Friday, the committee had posted its agenda for Monday as "pending." Usually, a committee will list the bills it is going to consider on its agenda so the public will know what it is doing.

The Republican-led Senate is expected to approve SB 76 and send it to the Democratic-controlled House.

House Speaker Greg Stumbo, D-Prestonsburg, said Monday night that the House "would look at it" but that he had not thought much about it.

Chris Hartman, director of the Fairness Campaign, said the Senate was "prioritizing discrimination." He called the panel's actions "ludicrous, willful, and mean-spirited" and contended the bill violated federal laws governing equal treatment of male and female students.

He said he did not know the committee would revisit the bill, which is backed by The Family Foundation of Kentucky, until "about 30 seconds before they did it. No agenda of bills was ever posted for public consideration."

Hartman noted that two members were absent from Thursday's committee meeting and three members were not present Monday, including Democrat Gerald Neal and Republican Julie Raque Adams, both of Louisville. They voted against the bill on Thursday.

Senate Education Committee chairman Mike Wilson, R-Bowling Green, said he listed the committee's agenda as pending "because we had several House bills that were up in the air. We really didn't know what all would be considered."

Told that Stivers said he didn't even know whether the committee would take up SB 76 on Monday night, Wilson said, "Well, that's just one of those things. But this was not a rush job. We heard from opponents of

the bill last week, and some members wanted to hear from other students."

Testifying against the bill Monday were David Kelty and his daughter Christina Kelty, a sophomore at Louisville Atherton High School.

They said some students did not feel comfortable going to the bathroom with a transgender student.

"You are putting the rights of transgender students above the rights of other students" said Christina Kelty.

That prompted Sen. Reginald Thomas, D-Lexington, to say that at one time in America's history, some parents did not want their children in the bathroom with students of a different color.

"I don't think that's the same," David Kelty responded.

The bill stems from a controversy last year at Atherton, where a transgender student who was born male identified as a female and wanted to use the girls' bathrooms and locker rooms.

A controversy arose, and the school eventually adopted a policy of letting students use bathrooms based on their gender identity. The decision was backed by the school's site-based council and a Jefferson County Public Schools appeals committee.

The sponsor of the bill, Sen. C.B. Embry Jr., R-Morgantown, said his measure allows all students to have their privacy.

Henry Brousseau, a 16-year-old transgender student at Louisville Collegiate School, and his mother, Dr. Karen Berg, testified at last week's committee meeting but not at Monday's.

Brousseau told the committee that he has identified himself as a male for three years but has been forced to use girls' bathrooms at times.

Brousseau said Monday he was "extremely disappointed" by the committee's vote.

His mother said they did not know the committee would revisit the bill Monday. "We were just told they sometimes do things like this," Berg said.

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Rep. Debbie Riddle

Texas Bill Would Jail Those Whose Chromosomes Don't Match the Restroom They're Using

By Mitch Kellaway

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Following in the footsteps of Republican Florida lawmaker Frank Artiles, who this month introduced a bill intended to criminalize trans

peoples' presence in public, in single-sex restrooms, and in locker rooms, a Texas legislator has gone one step further: she's proposed policing people's genders — right down to the DNA level.

House Bill 1748, introduced Friday by Texas Rep. Debbie Riddle, suggests anyone over the age of 13 in a public facility of "a gender that is not the same gender as the individual's gender" should be convicted of a class-A misdemeanor, and spend up to one year in jail and be fined \$4,000, according to LGBT news site *Towleroad*. Riddle's proposed law carves out exemptions for custodians, those helping children, or those responding to a medical emergency.

Building managers who "repeatedly allow" trans people to use the bathroom that accords with their gender identity would, however, face up to two years in jail and a maximum \$10,000 fine under the proposed law.

Like the law proposed in Florida, Riddle's proposal ignores the fact that trans people are at higher risk of facing harassment or violence in public bathrooms than nontrans (cisgender) individuals. That has drawn outrage from trans advocates, along with the bill's proposed approach to determining someone's "actual" gender, based on DNA information not easily or pragmatically available.

If passed, the law could tighten how Texas defines gender, not only singling out transgender people, but those who have chromosomes that don't fit the strict definition laid out in the bill, like intersex individuals. The bill reads:

For the purpose of this section, the gender of an individual is the gender established at the individual's birth or the gender established by the individual's chromosomes. A male is an individual with at least one X chromosome and at least one Y chromosome, and a female is an individual with at least one X chromosome and no

Y chromosomes. If the individual's gender established at the individual's birth is not the same as the individual's gender established by the individual's chromosomes, the individual's gender established by the individual's chromosomes controls under this section.

Akin to a proposed law targeting trans school children introduced by Kentucky legislator C.B. Embry, Jr., last month that could award classmates \$2,500 every time they "found" a trans student in a school restroom, some say that Riddle's law would make citizens feel a heightened authority — and perhaps make some staff members feel an unwanted duty — to kick trans and gender-nonconforming people out of restrooms.

Referring to this group as "bathroom cops," trans journalist Lexi Cannes stated on her news blog *State of Trans*, "This is another in a string of ridiculous bathroom bills, each with a particular twist — in this case, the jailing of individuals who find themselves newly deputized as bathroom cops but unwilling to perform that duty."

The New York City-based Transgender Legal Defense and Education Fund slammed the proposed legislation in Texas and Florida, calling them "outrageous and intolerable" examples of "unjust" "discrimination."

"Bills like these target transgender people for harm by criminalizing the simple act of using a bathroom," said TLDEF executive director Michael Silverman in a Tuesday statement. "They are an end run around non-discrimination ordinances in local areas that protect transgender people from discrimination in public accommodations. Lawmakers who sponsor this kind of mean-spirited legislation purport to be looking out for public safety. But in reality, they are creating unsafe conditions by putting transgender people at great risk for harassment and violence."

If passed, HB 1748 would go into effect in September.

Contributor:
Mitch Kellaway

Source URL: <http://www.advocate.com/politics/transgender/2015/02/24/texas-bill-would-jail-those-whose-chromosomes-dont-match-restroom-th>

Links:

- [1] <http://www.advocate.com/>
- [2] <http://www.advocate.com/politics/transgender/2015/02/16/florida-lawmaker-fine-or-jail-trans-people-using-wrong-bathroom>
- [3] <http://www.legis.state.tx.us/tlodocs/84R/billtext/html/HB01748I.htm>
- [4] <http://www.towleroad.com/2015/02/texas-lawmaker-wants-to-make-it-a-crime-for-transgender-people-to-use-public-restrooms.html>
- [5] <http://thinkprogress.org/lgbt/2013/06/26/2216781/transgender-bathroom-study/>
- [6] <http://www.advocate.com/politics/transgender/2015/01/18/kentucky-lawmaker-fine-schools-2500-every-time-trans-student-uses-wr>
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