
Gender Identity and Transgender Issues in Healthcare

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Important Information

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Today's Roadmap

- Protections under the ACA's nondiscrimination provision
 - OCR actions
- CMS current and proposed protections
- The Joint Commission standards affecting the LGBT community
- Recent challenges to gender identity protections
- Best practices and recommendations for treating transgender patients

Scenario - Not an Uncommon Situation

- A woman walks into your office/clinic/hospital, giving the name of Lisa Doe. Her driver's license, however, identifies her as Robert Doe and indicates her gender is “male.”
- Lisa indicates that she wishes to see a doctor for a physical examination and specifically wants to obtain a mammogram.
- Staff ask which name and gender pronouns they should use when talking to or about the patient, which name they should use in the patient's medical record (or on the armband), whether they can ask the patient about her biological sex if it is relevant to her diagnosis and treatment, and how to address the patient's transgender status in the medical record.
- The staff's discomfort with the situation is evident to Lisa, who becomes visibly defensive.
- **What is required and what are best practices?**

The ACA's Nondiscrimination Provision

- Section 1557 of the ACA states: “[A]n individual shall not, [on the basis of **race, color, national origin, sex, age, or disability**] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under [the Affordable Care Act].”

(42 USC §18116)



The ACA's Nondiscrimination Provision

- Section 1557 prohibits exclusion, discrimination or denials in healthcare.
- The central purpose of Section 1557 is to expand access to care and coverage, and to eliminate discriminatory barriers to access to health care.
- Section 1557 also expressly recognizes that discrimination based on race, color, national origin, age, disability and sex are prohibited in other civil rights statutes. (42 USC §18116)

HHS Final Rules

- On May 18, 2016, HHS Office for Civil Rights (OCR) issued final regulations implementing Section 1557 of the ACA. (45 CFR § §92.1 – 92.303)
- These regulations apply, in part, to “every health program or activity, any part of which receives federal financial assistance from HHS, as well as HHS administered health programs and activities.” (45 CFR § 92.2(a))
- “Covered entities” include health plans, insurers, hospitals, and physicians, and any other providers receiving federal funding (including Medicaid and Medicare Parts A, C and D payments). (45 CFR §92.4)

HHS Final Rules

- The final rules specifically prohibit discrimination based on:
 - an individual's sex;
 - pregnancy, childbirth, or related medical conditions;
 - gender identity; and
 - sex stereotyping.
- HHS provisions apply to transgender individuals because "on the basis of sex" is defined by the regulations to include gender identity and sex stereotyping.

HHS Regulations

- HHS regulations protect transgender individuals in two key ways:
 1. Via expansive prohibitions on sex discrimination, which is then defined to include gender identity and sex stereotyping; and
 2. Via explicit protections accorded specifically to transgender individuals in the healthcare setting.
- While these regulations have been preliminarily enjoined by a Texas court, we recommend continued compliance since similar requirements could be imposed through other regulations and the injunction may not be upheld.

Discrimination Based on Sex

This means:

1. Women must be treated equally with men in the health care they receive and the insurance they obtain.
2. Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping.
3. A covered entity may not, in providing or administering health-related insurance or other health related coverage, deny, cancel, limit, or refuse to issue or renew a health-related insurance policy or other health related coverage, or impose additional cost-sharing or other limitations or restrictions on the basis of sex.

Discrimination Based on Sex

4. Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
5. Individuals must be treated consistent with their gender identity, including access to facilities.
6. Providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender.
 - The health services sought, however, must be medically appropriate.
 - For example, nothing in the new rules would require a covered entity to provide a traditional prostate exam to an individual who does not have a prostate, regardless of that individual's gender identity.

Discrimination Based on Sex

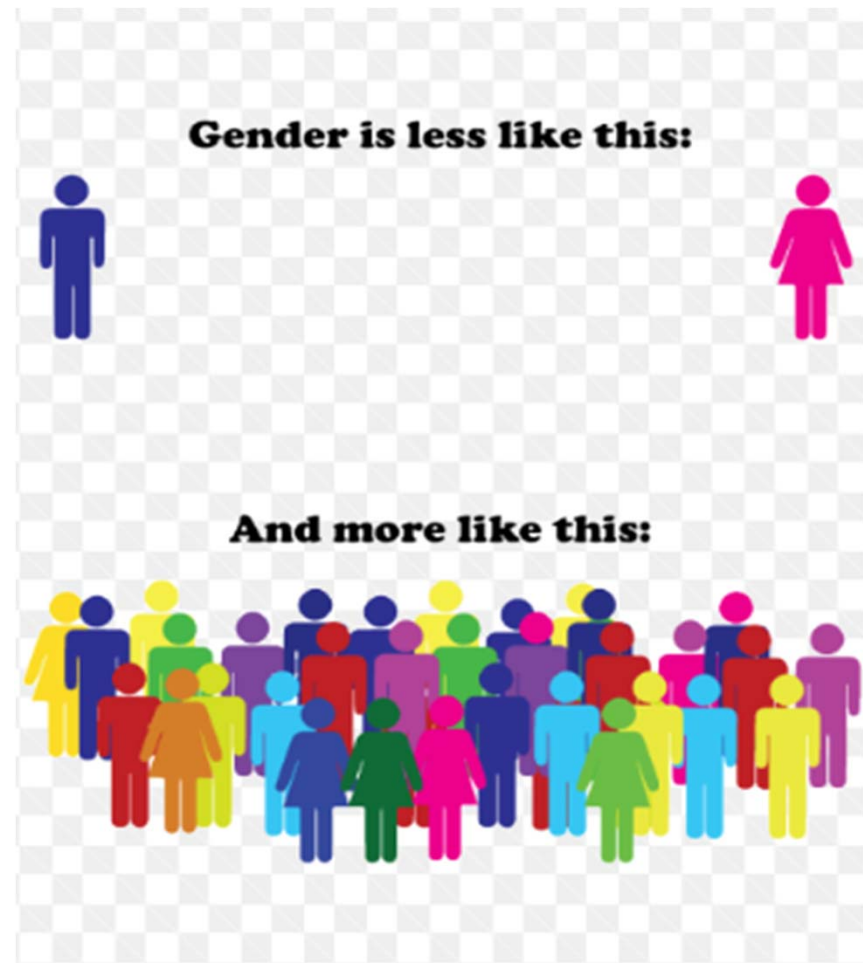
7. Sex-specific health programs or activities are permissible only if the entity can demonstrate an “exceedingly persuasive” justification, that is, that the sex-specific health program or activity is substantially related to the achievement of an important health-related or scientific objective.
 - Examples may include research that requires either two X chromosomes or an X and Y chromosome.
 - Beware – OCR will evaluate sex-specific health programs or activities strenuously. Only those programs that have a legitimate reason for excluding an individual on the basis of sex will likely pass muster.

Discrimination Based on Sex

8. The final rule does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557. (*See* 81 Fed.Reg. 31390.)
 - However, OCR will evaluate complaints that allege sex discrimination related to an individual's sexual orientation to determine if they involve the sorts of stereotyping that can be addressed under the new nondiscrimination rules.
 - The new rules indicate that OCR anticipates that the law will continue to evolve on this issue, that it will enforce Section 1557 in light of those developments, and will consider issuing further guidance on this issue as appropriate.

Gender Identity

- The final rules define “gender identity” as an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned birth. (45 CFR § 92.4)
- A "transgender individual" is an individual whose gender identity is different from the sex assigned to that person at birth. (45 CFR § 92.4)



Sex Stereotyping

- The new rules prohibit discrimination on the basis of “sex stereotyping,” which is defined as stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others such as behavior, clothing, hairstyles, activities, voice, mannerisms, and body characteristics.
- The final rules add an additional reference not found in the proposed rule that clarifies that sex stereotypes include gender expectations related to the appropriate role of a certain sex.
 - OCR adopts the position that sex stereotypes encompass not only stereotypes concerning the biological differences between the sexes, but also include stereotypes concerning gender norms.
 - “Sex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or female...the gender identity spectrum includes an array of possible gender identities beyond male and female.” (81 Fed. Reg. 31392).

Examples of OCR Investigations

- The following are examples of OCR enforcement efforts under Section 1557:
 - ❖ Hospital policy automatically assigned a male spouse as the grantor (sole financially responsible party) when a female spouse received medical services. When a male spouse received services, however, his female spouse would not automatically be assigned as the guarantor. Policy revised to ensure equal treatment.
 - ❖ Complaint from the male victim of domestic violence that he was subjected to rude comments by hospital staff. Abuse protocol revised and training for staff on identifying and assisting abuse victims.
 - ❖ Wellness program denied a transgender individual mammograms because she transitioned from male-to-female rather than female-to-male. Policy based on CDC guidelines. Guidelines revised to allow mammograms to transgender women who have taken or are taking hormones.

Examples of OCR Investigations

- ❖ Insurance company denied transgender individual gender reassignment surgery on the basis that it was cosmetic surgery. Policy changed so that requests for gender reassignment surgery are determined on the basis of medical necessity.
- ❖ Man who received transportation services to his doctors' appointments from a private medical transportation service complained that multiple drivers harassed him because of his feminine gender expression. Staff received training on how to avoid sex stereotyping and the usage of appropriate terminology.
- ❖ Medical center received multiple complaints from transgender individuals about procedures, including questioning in public waiting rooms regarding the gender listed on their patient forms and not allowing transgender individuals to change their gender in medical records without documentation of a completed gender reassignment surgery. Policy changed and training provided to staff.

CMS Current Protections

- CMS's Conditions of Participation (CoPs) for hospitals address non-discrimination on the basis of gender identity with respect to visitation.
 - CoPs provide that hospitals shall "not restrict, limit or otherwise deny visitation privileges on multiple bases, including gender identity."
 - CoPs for critical access hospitals are the same.

CMS Proposed Protections

- In June 2016, CMS proposed another rule under Section 1557 of the ACA, entitled *Hospital and Critical Access Hospitals (CAH) Changes to Promote Innovation, Flexibility, and Improvement In Patient Care*. (42 CFR § 482.13(h)(3))
- This rule would require hospitals and CAHs to "establish and implement a policy prohibiting discrimination" on several specified bases, including gender identity.
- CMS's reasoning is that "discriminatory behavior can affect perceived and actual access to and effectiveness of healthcare delivery."

CMS Proposed Protections

- CMS proposes to add a new section 482.13 (i) to the Patient Rights section of the hospital CoPs to prohibit discrimination and require written policies prohibiting discrimination, including on the basis of gender identity.
 - Would apply equally to see CAHs.
- The comment period for the proposed rule closed on August 15, 2016, and a final rule has not yet been issued.
 - There has been no indication as yet of the new administration's intention with respect to the proposed new rule.

The Joint Commission

- TJC is an organization that surveys and credits various health care organizations, including hospitals, nursing homes, physician's offices, and home health care providers which comply with its standards.
- Standard RI.01.01.01's Element of Performance states "the hospital prohibits discrimination based on age, race, ethnicity, religion, culture, language, physical or mental disability, socioeconomic status, sex, sexual orientation, and gender identity or expression."
 - Other standards require that patients be treated in a dignified and respectful manner and in ways that respect the patient's culture and personal values, beliefs, and preferences.

The Joint Commission

- To provide guidance for implanting these standards, JTC issued the LGBT Field Guide in 2011.
- To address the provision of care, treatment, and services to the LGBT population, TJC suggested the following:
 - **Creating a welcoming environment that is inclusive of these patients;**
 - **Promptly post the hospital's nondiscrimination policy or patient bill of rights;**
 - **Ensure that waiting rooms and other common areas reflect and be inclusive of LGBT patients and families;**

The Joint Commission

- Create or designate unisex or single-stall restrooms;
- Ensure that visitation policies are implemented in a fair and nondiscriminatory manner;
- Foster an environment that supports and nurtures all patients and families;
- Avoid assumptions about sexual orientation and gender identity (including on the basis of appearance);
- Facilitate disclosure of sexual orientation and gender identity but be aware that disclosure is an individual's process;

The Joint Commission

- Use forms that contain inclusive, gender-neutral language that allows for self-identification;
- Use neutral inclusive language in interviews and when talking with all patients;
- Listen to and reflect patient's choices of language when describing their own sexual orientation and how the patients refer to their relationships or partner;
- Provide information and guidance for the specific health concerns facing lesbian and bisexual women, gay and bisexual men, and transgender people.

Recent Challenges to Gender Identity Protections


- On the eve of the effective date of the new HHS regulations (final rules) based on Section 1557 of the ACA, the United States District Court for the Northern District of Texas issued a nation-wide preliminary injunction stopping HHS from enforcing the Section 1557 regulations' prohibition against discrimination with respect to pregnancy and gender identity.
 - *Franciscan Alliance v. Burwell* (Civil Action No. 7:16-cv-00108-0)
 - The court found that the gender identity and termination of pregnancy provisions of the final rules contradict existing law, exceed statutory authority and, as applied to religious entities, likely violate the Religious Freedom Restoration Act (RFRA).
 - To date, there is been no further action by the Court (likely because of efforts to repeal and replace ACA).

Recent Challenges to Gender Identity Protections

- There are two other cases pending in North Dakota also seeking to stop the enforcement of the final rules and enjoining enforcement of Section 1557.
- The ACA's future is in doubt given efforts to repeal and replace it.
 - Even if the ACA is not repealed, HHS Secretary Tom Price can undo many of the regulations adopted under Section 1557.
- President Trump has rescinded Pres. Obama's bathroom bill, which allowed students to use the bathroom consistent with their gender identity.
 - The Supreme Court was set to hear a case brought under that bathroom bill – *G.G. v. Gloucester County School Board* – but recently withdrew it from its docket on the basis of Pres. Trump's order.
 - Matter will likely now be decided on a state-by-state basis.

Effect of Challenges

- In light of the 2016 election and vows to repeal and replace the ACA (including the provisions in Section 1557), the preliminary injunction granted in *Franciscan Alliance*, other legal actions, and recent Executive Orders, knowing what is required of providers is difficult to ascertain.
- The TJC standards and recommendations, however, are likely to remain in effect for those health care providers that TJC accredits.
- HHS and other entities may seek to enforce protections via other statutes, including Title VIII of the Civil Rights Act.
- Likewise, many providers are unlikely to undo the nondiscrimination procedures that they have put in place to address gender identity issues.
- **The safest approach is to comply with existing regulations and guidance.**



No matter who is in the White House or the prevailing politics of the moment, most commentators believe that gender identity and transgender protections are here to stay. Numerous agencies and industry groups have drafted explicit protections for transgender patients. Equally important, patients of all types will increasingly expect providers to be sensitive to gender identity issues.

BOTTOM LINE

Best Practices – Patient Identification

- Returning to our scenario, staff should initially refer to the patient by the name provided (as a women). If in doubt, ask the patient his/her preferred name and pronoun. That name/pronoun should then be used throughout the encounter.
- Providers should have a process for recording a legal name change of a transgender person just as it would for marital, adoption, or other name changes.
 - Best practice is use the same approach for unofficial name changes.
 - Providers should also of a process for recording and using a patient's preferred name and pronoun.

Best Practices – Medical Record

- The medical record, however, should note that the patient is transgender so that medically appropriate care is provided.
- The best practice is to note the patient's birth gender in the medical record but use the patient's preferred name/pronoun for all other charting. For example, "X is a transgender female" and then proceed to use the feminine pronoun throughout the remainder of the note.
 - This approach allows for accurate information in determining medical treatment while remaining sensitive to the patient's gender identity (and avoiding complaints of discrimination to the Office of Civil Rights).

Best Practices – Medical Record

- If the patient objects, the best practice is to explain the need for a complete medical history in order to determine the patient's course of care.
- Please note that there is no specific prohibition against providers using the patient's legal (non-preferred) name in the medical record.
 - However, if the provider uses the patient's legal name rather than the patient's preferred name the best practice is for staff to explain that this is the provider's/clinic's policy upfront.

Best Practices – Treatment Decisions

- With respect to treatment decisions, remember that covered entity health plans may not limit or deny coverage of a claim, require additional cost sharing on the part of the patient, or otherwise restrict coverage
 - for any health services specifically related to gender transition if that results in discrimination, or
 - for any services that are "ordinarily or exclusively available to individuals of one sex" because an individual's sex assigned at birth or gender identity differs from the one to which such services are ordinarily or exclusively available.

Best Practices – Treatment Decisions

- This means that, for example, a covered entity may not deny a transgender man coverage for ovarian cancer.
- Procedures intended to assist in an individual's transition not based on discrimination are more difficult to determine.
 - For example, if a plan covers hysterectomies for cancer, but denies them for treating gender dysphoria – even when the provider says that it is medically necessary to treat that dysphoria – OCR may scrutinize the coverage policy.
- Accordingly, if a covered entity covers certain types of elective procedures that are beyond those strictly identified as medically necessary or appropriate, it must apply the same standards to its coverage of comparable procedures related to gender transition.

Best Practices – Treatment Decisions

- With respect to medically necessary treatment, providers should consider both the patient's gender at birth and any other additional factors that may affect the patient's health.
 - Returning to our hypothetical patient, Lisa Doe, a provider would typically not be required to perform a mammogram since she was male at birth.
 - However, if the patient received hormone therapy, thus putting her at higher risk for breast cancer, mammography is appropriate.

Best Practices - Bathrooms

- It is possible that requiring our hypothetical patient to use the men's restroom rather than the woman's could constitute sex discrimination.
 - Although the regulations do not expressly require bathroom availability, they incorporate by reference a regulation issued under Title IX of the Education Amendments of 1972 and the Preamble discusses favorably Title IX cases requiring schools to allow individuals to use the bathroom consistent with their gender identity.
- **However**, the new administration has rescinded Pres. Obama's order on this issue and the Supreme Court recently reversed its position and will not hear the case of *G.G. v. Gloucester County School Board*.
- Best practice is to provide at least one individual bathroom that is not gender specific.

Questions?

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The screenshot shows a web browser window displaying the website <https://www.hollandhart.com/healthcare>. The browser's address bar and menu bar are visible at the top. The website's navigation menu on the left includes links for "people", "practices", "firm", "locations", "news & resources", "blogs", "careers", "diversity & inclusion", and "community". The main content area is titled "Healthcare" and features an "Overview" section with text about the firm's expertise in healthcare law. A blue arrow labeled "Webinars" points to a section titled "View our blog and webinar recordings that cover HIPAA, antitrust, compliance, and more!". Another blue arrow labeled "Articles and Forms" points to a "Publications" section, which includes a link for "HIPAA Privacy Rule Modified to Permit Covered Entities to Make Certain Limited Disclosures to the National Instant Criminal Background System" by Teresa Locke, and another link for "Physician Timeshare Arrangements: New Stark Option for Sharing Space with Visiting Specialists and Others" by Kim Stanger. The right sidebar contains a "Contact" section with photos of Kim C. Stanger and Blaine J. Benard, and a "View Professionals" section with a list of related practices. The Windows taskbar at the bottom shows the system clock at 6:16 PM on 1/30/2016.

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