

CHAPTER VIII

Transition-Related Health Care

The kinds of health care associated with gender transition have too often been misunderstood as cosmetic, experimental or simply unnecessary. Yet there is medical consensus that hormone therapy and gender-affirming surgery are *medically necessary* for many transgender people. It's quite clear now that a person's gender identity—one's inner sense of being male or female—is deep-seated and cannot be changed. Therefore, this transition-related health care can be crucial.

The courts have come a long way on this issue in recent years, citing decades of medical data to find in more and more cases that not providing transition-related health care as readily as other medically necessary treatment is discrimination.

The problem is that most public and private insurance companies are still behind the times. Many cite cost, even though that hasn't turned out to be an issue at all for the growing number of employers now providing coverage. Often the real hesitation is a mixture of anti-transgender prejudice and ideas about such care that are out of sync with modern medical thinking.

The language used by doctors and the courts in this area can be frustrating, because it generally relies on technical terms such as gender dysphoria, a mental health diagnosis that describes the extreme distress some people experience when their bodies don't match their gender identity. Some people feel that this diagnosis unnecessarily stigmatizes transgender people and encourages mistreatment of them. Whatever term is used, however, it is not fair for health care policies to have different standards for treating transgender people who have medical

needs associated with transition than for treating someone with diabetes who needs vital care. In both cases, a doctor makes an individualized assessment to determine if treatment is warranted—if it is, both patients should get the recommended care.

This fact sheet explains the medical community's current framework for understanding transition-related care as medically necessary and how Lambda Legal and other advocates are applying this in the legal domain to challenge denial of such care as discrimination. Also highlighted are ways that private industry and municipal government have begun to follow the medical mainstream by dropping barriers to health care for transgender people and setting standards for a more equitable future.

MY STORY A STRUGGLE, A STEP FORWARD AND THEN INSURANCE SAYS "NO"

ROMAN RIMER

"I have memories as a child of wanting to be male-bodied, but I was meant to be the way I was. I struggled a lot.

"I never enjoyed having breasts. I remember once in college I went to be fitted for a bra in a store and I couldn't stop crying. I couldn't really figure out why; I just assumed there was something wrong with me or I was too emotional.

"I bound my chest for a while and then I had surgery. My insurance company said they would cover 70 percent of a double mastectomy if there was a history of breast cancer—which was the case—but not for gender-affirming surgery. I got a letter in the mail, saying, 'We don't cover this.'"



FAQ

Answers to Common Questions about Transition-Related Care

Q: What exactly is gender dysphoria?

A: Gender dysphoria is a medical diagnosis defined by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), the American Psychiatric Association's handbook of official diagnoses, as "[T]he distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." The World Health Organization recognizes gender dysphoria (formerly called gender identity disorder or GID) as "characterized by a persistent and intense distress about assigned sex together with a desire to be, or insistence that one is, of the other sex."

The American Medical Association (AMA) established in a 2008 resolution that gender dysphoria (then GID) is a "serious medical condition" with symptoms including "distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death."¹

Q: Do all transgender people have gender dysphoria?

A: No they do not, because not every transgender person experiences the distress associated with gender dysphoria.

DEFINITION

"MEDICAL NECESSITY" EXPLAINED

Why all the focus on the term "medical necessity"? It's a technical term used by the insurance industry describing treatment that a physician considers to be vital for a particular patient.

According to the AMA, health care is medically necessary when "a prudent physician" selects it "for the purpose of preventing, diagnosing or treating an illness, injury, disease or its symptoms in a manner that is: (1) in accordance with generally accepted standard of medical practice; (2) clinically appropriate in terms of type, frequency, extent, site, and duration; and (3) not primarily for the convenience of the patient, physician, or other health care provider."

Q: What is the treatment for gender dysphoria?

A: The treatment for gender dysphoria involves some combination of "triadic therapy": hormone therapy, gender-affirming surgery and/or Real Life Experience (living for a period of time in accordance with your gender identity). Each patient must be evaluated on a case-by-case basis, with expert medical judgment required for both reaching a diagnosis and determining treatment. There is no set formula for gender transition.

These treatment protocols are outlined in the Standards of Care published by the World Professional Association for Transgender Health (WPATH), which keeps the public up to date on the "professional consensus about the psychiatric, psychological, medical, and surgical management of gender dysphoria."

Q: Can gender-affirming surgery and/or hormone therapy be considered "medically necessary" by doctors for people with gender dysphoria?

A: Yes, doctors have found such treatments to be medically necessary for many people. The AMA's 2008 resolution recognized "an established body of medical research" that "demonstrates the effectiveness and medical necessity of mental health care, hormone therapy, and gender-affirming surgery as forms of therapeutic treatment for many patients diagnosed with [gender dysphoria]." Similar policy statements have been issued by a range of medical organizations, including the American Psychological Association, the American Academy of Family Physicians, the National Association of Social Workers and WPATH.

Courts have repeatedly ruled that these treatments may be medically necessary and have recognized gender dysphoria as a legitimate medical condition constituting a "serious medical need" (see Lambda Legal's victory in *Fields v. Smith*,³ next page). Courts have also found that psychotherapy alone can be insufficient treatment for gender dysphoria, and that for some people, gender-affirming surgery may be the *only* effective treatment.⁴

Q: Health insurance plans that exclude services related to gender transition often say they are "cosmetic" or "experimental." Is this true?

A: The myth that transition-related care is "cosmetic" or "experimental" is discriminatory and out of touch with current medical thinking. The AMA and WPATH have specifically rejected these arguments, and courts have affirmed their conclusion. For instance, in *O'Donnabhain v. Commissioner*, a case brought by Gay and Lesbian Advocates and Defenders (GLAD), the Internal Revenue Service lost its claim that such

1. AMA Resolution 122, A-08: <http://www.uclgbtia.org/AMA-TransInsuranceResolution.pdf> 2. For more information on the Standards of Care: http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf 3. *Fields v. Smith*, 2010 U.S. Dist. LEXIS 78914 (E.D. Wis. July 9, 2010) 4. In re *Heilig*, 372 Md. 692 (Md. 2003)

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treatments were cosmetic and experimental when a transgender woman deducted her gender-affirming surgery procedures as a medical expense.

Q: Is it true that some health plans won’t cover gender dysphoria but will pay for the same treatments, as long as they are not related to gender transition?

A: Yes: Psychotherapy, hormone therapy, breast augmentation or removal, hysterectomy and a range of other procedures are frequently covered for non-gender-dysphoria-related medical conditions, but are often denied if related to gender transition.

Such exclusions leave no room for individual medical assessments of the kind recommended by the AMA and other professional medical organizations. They also may be unconstitutional because they deny care to a group of people based on who they are.

For people who are incarcerated, courts have called these sorts of blanket policies “deliberate indifference” and ruled that they violate the Eighth Amendment prohibition against cruel and unusual punishment.⁶

Q: Wouldn’t it be expensive for insurance companies to cover transition-related health care?

A: Some employers worry that covering transition-related health care will raise the cost of insurance premiums, but data show that is not the case. While the cost is prohibitive for many individuals, it’s negligible when an insurance plan takes it on because gender dysphoria is negligible when an insurance plan is able to allocate the costs.

For example, San Francisco, which became the first U.S. city to provide insurance coverage for gender-dysphoria-related care in 2001, quickly learned that the change would not cost municipal employees anything at all. After four years, during which time the city paid out only 11 gender-dysphoria-related claims, the surcharge that employees had been paying to cover the policy change was reduced to zero. There simply was no need to take in the extra money, because the cost of covering these claims was so insignificant.⁷

Not treating gender dysphoria, on the other hand, can be quite a strain on the health care system. According to the AMA, “Delaying treatment for [gender dysphoria] can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illness, depression, and substance abuse problems.”

PRISON

TRANSITIONING BEHIND BARS

People who need transition-related care while in prison are often at the mercy of outmoded treatment policies, on top of being vulnerable to harassment by prisons officials or fellow inmates. **Under these extreme conditions, many inmates injure themselves, some going so far as to “self-treat” by attempting to perform surgery to remove their own genitals.**

But many transgender incarcerated people have been successful in demonstrating their need for health care behind bars by arguing that this lack of care violates the Eighth Amendment’s prohibition of cruel and unusual punishment. In *Fields v. Smith*, for instance, Lambda Legal represented transgender women incarcerated in Wisconsin who had been on hormone therapy for years before the state legislature passed a law in 2006 banning transition-related care for inmates in state prisons. **The withdrawal symptoms and horrible physical and mental effects that inevitably followed this change in policy were devastating to these women.**

A U.S. District Court found in the inmates’ favor in a 2010 ruling that the law violated the Eighth Amendment because “[t]he decision of whether or not certain treatment or a particular type of surgery is ‘medically necessary’ rests with the individual recipient’s physician.” The court also ruled that the Wisconsin law violated the equal protection clause of the Fourteenth Amendment because incarcerated people with gender dysphoria were denied many of the exact same medical treatments given to prisoners with other diagnoses. **The court said transgender people should have the same access as similarly situated non-transgender people to an individual assessment of their medical and psychological needs, as well as to the appropriate treatment options.** In 2011, the 7th Circuit Court of Appeals upheld this ruling, stating that the law violated the Eighth Amendment.

5. *DeLonta v. Clarke*, 2013 U.S. Dist. LEXIS 122872. 6. See *Barrett v. Coplan*, 292 F.Supp.2d 281, 285 (D.N.H. 2003); *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, * 21 (D.N.J. Sept. 25, 2006); *Bismark v. Lang*, No. 2:02-cv-FtM-29SPC, 2006 WL 1119189, *19 (M.D. Fla. April 26, 2006); *Kosilek v. Maloney*, 221 F.Supp. 2d 156, 186 (D.Mass. 2002). 7. B. Sears and C. Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies* (Updated), Los Angeles: The Williams Institute, available at: <http://williamsinstitute.law.ucla.edu/research/workplace/economic-motives-for-adopting-lgbt-related-workplace-policies>; California Department of Insurance, “Economic Impact Assessment” (2012), available at <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.

Q: Do some employers and insurance companies cover gender dysphoria?

A: Yes, a growing number of employers—including major firms such as Nike, Microsoft and Google—are leading the way in this area by removing outmoded and discriminatory exclusions of transition-related health care and offering trans-inclusive coverage as part of diversity initiatives. In 2004, only 1% of Fortune 100 companies provided insurance coverage of transition-related health care compared to 56% of Fortune 100 companies in 2012.

For more information, go to <http://www.hrc.org/resources/entry/finding-insurance-for-transgender-related-healthcare>.

Q: How does the Affordable Care Act protect the rights of people with gender dysphoria?

A: When the Affordable Care Act was enacted, the law's antidiscrimination provisions created an important new tool to combat anti-LGBT and especially anti-transgender discrimination in health care. In a letter dated July 12, 2012, the Office of Civil Rights (OCR) in the federal Department of Health and Human Services (HHS) responded to a letter signed by Lambda Legal and the New Beginning Initiative confirming that the HHS prohibition against sex discrimination “extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity...[and] also prohibits sexual harassment and discrimination regardless of actual or perceived sexual orientation or gender identity of the individuals involved.”

This means that transgender and gender-nonconforming individuals cannot be discriminated against in any way by programs or activities administered by HHS or any entity established under the ACA. Complaints can be filed with the OCR, which will investigate such complaints as sex discrimination.

This has prompted a number of states (CA, CO, CT, IL, MD, NY, OR, VT and WA) and the District of Columbia to issue “insurance bulletins” reminding private insurers that it is against state law and the Affordable Care Act (ACA) to allow discrimination against transgender policy holders.

Q: Do Medicare and Medicaid cover gender dysphoria?

A: Yes and no. On May 30, 2014, an HHS review board ruled that transgender people receiving Medicare may no longer be automatically denied coverage for gender-affirming

TIPS

ADVOCATING FOR INSURANCE COVERAGE OF YOUR MEDICAL NEEDS

1

If you are denied insurance coverage for transition-related health care, consider taking these steps:

2

Get a copy of your health insurance policy to see if there is any discriminatory exclusion language. If so, find out what the process is to appeal a denial of coverage. You will likely need to provide written documentation from your doctor that this treatment is deemed medically necessary for you.

Use official statements from any of the following five medical organizations (links to them online are available at www.lambdalegal.org/publications/trans-insurance) as backup for your argument that transition-related care is not cosmetic or elective and should be covered:

3

American Academy of Family Physicians
American Medical Association
American Psychological Association
National Association of Social Workers
World Professional Association for Transgender Health

Contact Lambda Legal's Help Desk (toll-free: 866-542-8336 or www.lambdalegal.org/help)

surgeries. This does not affect Medicaid, where coverage rules are primarily at the state level, but five states (CA, DC, MA, OR and VT) do cover transgender medical services, including gender reassignment surgery, as a standard benefit in their government health plans for lower-income and disabled persons.

DIAGNOSIS?

“GID” IS NOW OFFICIALLY “GENDER DYSPHORIA”

In 2013, gender dysphoria replaced the diagnosis of gender identity disorder (GID) in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the American Psychiatric Association (APA) manual used by clinicians and researchers to diagnose and classify mental conditions.

The APA explained that “Replacing ‘disorder’ with ‘dysphoria’ in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is ‘disordered.’”

The APA said it was concerned that completely “removing the condition as a psychiatric diagnosis—as some had suggested—would jeopardize access to care... Many of the treatment options for this condition include counseling, cross-sex hormones, gender reassignment surgery, and social and legal transition to the desired gender. To get insurance coverage for the medical treatments, individuals need a diagnosis.”