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September 7, 2018

**VIA ELECTRONIC SUBMISSION**

Michael Shores, Director  
Office of Regulation Policy and Management  
Office of the Secretary  
Department of Veterans Affairs  
810 Vermont Ave. NW  
Washington, DC 20420

RE: **VA-2018-VACO-0001-0498:**  
**Notice of Petition for Rulemaking and Request for**  
**Comments—Exclusion of Gender Alterations from**  
**the Medical Benefits Package**

Dear Mr. Shores:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and underserved people. We appreciate the opportunity to comment on the proposed amendments to the Department of Veterans Affairs' ("VA") medical regulations governing provision of "gender alterations" in its medical benefits package, published in the Federal Register on July 9, 2018.

NHeLP strongly believes the VA should amend its regulations to remove the provision that excludes gender-affirming care from its medical benefits package.

**I. Medical decisions for transgender Veterans should be made by medical professionals based on current standards of care.**

There is [consensus in the medical community](#) that gender-affirming surgical procedures are safe, effective, and medically necessary for many transgender individuals.<sup>i</sup> The regulation excluding gender-affirming surgical care from the VA's benefits package directly conflicts with the widely accepted [Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People](#).<sup>ii</sup>

The federal government itself has previously acknowledged that gender-affirming care is medically necessary. According to the [Substance Abuse and Mental Health Services Administration \(SAMHSA\)](#), effective, integrated care for LGBTQ patients should be affirmative and patient-centered.<sup>iii</sup> The Department of Health and Human Services' Departmental Appeals Board then [issued a decision in 2014](#) that overturned the previous National Coverage Determination that excluded surgical treatments for transgender Medicare enrollees, stating that the "coverage exclusion is no longer reasonable."<sup>iv</sup> The [spring 2016](#) and [fall 2016](#) Unified Agenda and Regulatory Plan for the VA also stated, "surgical procedures are now widely accepted in the medical community as medically necessary treatment for gender dysphoria."<sup>v</sup>

All eligible veterans deserve medically necessary care, and the process to determine what is medically necessary is for medical professionals.

## **II. Denying gender-affirming care will lead to significant mental health and physical health challenges for transgender Veterans.**

An estimated [134,000 Veterans identify as transgender](#).<sup>vi</sup> Transgender veterans, like all veterans, navigate a wide variety of mental health stressors during and after their service. These stressors contribute to the high rates of veteran suicide referenced by the VA in this Request for Comments. The discrimination and lack of access to necessary care faced by many transgender people leads to higher rates of [depression, anxiety, minority stress, suicide,](#) and [serious psychological distress](#) among transgender individuals than their cisgender peers.<sup>vii</sup> There is also a [proven causal relationship](#) between a lack of gender-affirming care and the well-being of transgender people.<sup>viii</sup> In fact, the 2015 U.S. Transgender Survey, which included transgender veterans, found that [39 percent of respondents were currently experiencing serious psychological distress and 40 percent had attempted suicide](#) at least once in their lifetime, compared to 5 percent and 4.6 percent of the general U.S. population (respectively).<sup>ix</sup> Being denied medically necessary health care by the VA, an important source of health care used by [over 9 million Veterans](#) and [at least 2 percent of transgender individuals \(comparable to the 3 percent of the U.S. general population that accesses care through the VA\)](#), and the [stigma associated with that exclusion](#), would only exacerbate gender dysphoria faced by transgender veterans.<sup>x</sup> Gender-affirming care is essential to the mental health of transgender veterans.

The denial of gender-affirming care also harms the physical health of transgender veterans. Prolonged exposure to stigma and stress lead to poor health outcomes on both [individual](#) and [population](#) levels.<sup>xi</sup> As such, compared with transgender individuals who are able to access gender-affirming care, individuals who lack access to these services are more likely to experience poor physical health outcomes, including gastrointestinal-related diagnoses.<sup>xii</sup> In addition, many transgender individuals face mistreatment by their providers, which also has a negative effect on health outcomes. The 2015 U.S. Transgender Survey found that [33 percent of transgender people](#) who visited with a health care provider in the year prior to the survey had at least one negative experience related to their gender identity, such as being refused treatment by the provider because the patient was transgender.<sup>xiii</sup> Consequently, [23 percent of respondents](#) did not see a provider for needed health care in the past year because of fears of mistreatment or discrimination for being transgender.<sup>xiv</sup> Meanwhile, nearly [one-third \(31 percent\) of survey respondents](#) reported that none of their health care providers knew that they

were transgender.<sup>xv</sup> Avoiding care, be it routine care or care related to a gender transition, poses a significant risk to the health of the patient. Because of all of these factors and more, populations that face widespread discrimination and stigma are [more likely than their peers](#) to report poor overall health.<sup>xvi</sup>

Meanwhile, [extensive peer-reviewed research](#) demonstrates that gender-affirming care substantially improves the well-being of transgender individuals, including higher confidence and self-esteem, improved relationship satisfaction and quality of life, and reduced depression, anxiety, substance abuse, and suicidality.<sup>xvii</sup> As such, many major [medical associations](#), such as the American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, American College of Obstetricians and Gynecologists, and American Academy of Family Physicians have recognized that access to gender-affirming care improves the health and well-being of transgender people.<sup>xviii</sup>

## Conclusion

In summary, the VA should not continue to exclude gender-affirming care from its medical benefits package. The exclusion of gender-affirming care directly contradicts established medical practice guidelines and undermines the ability of health facilities to provide medically necessary and high quality care. Further, it increases barriers to care for transgender veterans, undermines the relationships between VA providers and their transgender patients, and establishes a negative precedent by allowing the VA to ignore established medical guidelines.

The Request for Comments refers to the language in 38 C.F.R. § 17.38, which states that “[c]are referred to in the ‘medical benefits package’ will be provided to individuals only if it is determined by appropriate healthcare professionals that the care is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice.”<sup>xix</sup> It is clear that, for some transgender people, gender-affirming surgical procedures are indeed necessary “to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice.”<sup>xx</sup> Therefore, gender-affirming care should not be excluded from the VA’s medical benefits package.

Equal access to necessary medical services is an important right that should not be denied to one specific group of veterans.

We appreciate your consideration of our comments. If you have questions about these comments, please contact Rachel Holtzman ([holtzman@healthlaw.org](mailto:holtzman@healthlaw.org)) or Jennifer Lav ([lav@healthlaw.org](mailto:lav@healthlaw.org) or 202-289-7661).

Sincerely,



Elizabeth G. Taylor  
Executive Director

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- <sup>i</sup> Lambda Legal, *Professional Organization Statements Supporting Transgender People in Health Care* (Aug. 2018), [https://www.lambdalegal.org/sites/default/files/publications/downloads/resource\\_trans-professional-statements\\_08-22-2018.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_08-22-2018.pdf) (last visited Sept. 5, 2018) [hereinafter Lambda Legal].
- <sup>ii</sup> World Professional Organization for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Version (2011), [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf).
- <sup>iii</sup> SAMHSA, *Resources for Culturally Appropriate Integrated Services for LGBT Individuals* (July 2014), [https://www.integration.samhsa.gov/about-us/LGBT\\_Webinar\\_PPT\\_-\\_FINAL.pdf](https://www.integration.samhsa.gov/about-us/LGBT_Webinar_PPT_-_FINAL.pdf).
- <sup>iv</sup> *NCD 140.3, Transsexual Surgery*, Health and Human Services, Dep't Appeals Bd., Docket No. 14 A-13-87, Decision No. 2576, at 1 (May 30, 2014).
- <sup>v</sup> Unified Agenda and Regulatory Plan for the VA, Spring 2016 (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2900-AP69>), Fall 2016 (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=2900-AP69>).
- <sup>vi</sup> Nat'l Ctr. for Transgender Equality, Issues, Military & Veterans, <https://transequality.org/issues/military-veterans>.
- <sup>vii</sup> Cornell Univ., *What does the scholarly research say about the effect of gender transition on transgender well-being?*, <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/> (last visited Sept. 5, 2018) [hereinafter Cornell].; Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey 5* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter 2015 U.S. Transgender Survey].
- <sup>viii</sup> Cornell, *supra* note 7.
- <sup>ix</sup> 2015 U.S. Transgender Survey, *supra* note 7.
- <sup>x</sup> VA, Veterans Health Administration, About VHA, <https://www.va.gov/health/aboutvha.asp>; 2015 U.S. Transgender Survey, *supra* note 7; Jaclyn M. White Hughto, Sari L. Reisner & John E. Pachankis, *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms and Interventions*, 147 SOC SCI MED. 222 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689648/>.
- <sup>xi</sup> Arline T. Geronimus, Margaret T. Hicken, Jay A. Pearson, Sarah J. Seashols, Kelly L. Brown & Tracey Dawson Cruz, *Do US Black Women Experience Stress-Related Accelerated Biological Aging?*, 21 HUM NAT. 19 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2861506/>; Mark L. Hatzenbuehler, Jo C. Phelan & Bruce G. Link, *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM J PUBLIC HEALTH. 813 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3682466/>.
- <sup>xii</sup> Jaclyn M. White Hughto & Sari L. Reisner. *Association between barriers to accessing gender-affirming care and poor health among transgender adults in Massachusetts*. Unpublished Analysis from Project VOICE. (2018); Jaclyn M. White Hughto, Kirsty A. Clark, Frederick L. Altice, Sari L. Reisner, Trace S. Kershaw & John E. Pachankis. *Creating, Reinforcing, and Resisting the Binary: A Qualitative Study of Transgender Women's Healthcare Experiences in Segregated Jails and Prisons*, 14 INT J PRISON HEALTH. 69 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5992494/>.
- <sup>xiii</sup> 2015 U.S. Transgender Survey, *supra* note 7.
- <sup>xiv</sup> *Id.*
- <sup>xv</sup> *Id.*
- <sup>xvi</sup> Elizabeth A. Pascoe & Laura S. Richman, *Perceived discrimination and health: A meta-analytic review*, 135 PSYCHOLOGICAL BULLETIN. 531 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2747726/>.
- <sup>xvii</sup> Cornell, *supra* note 7.
- <sup>xviii</sup> Lambda Legal, *supra* note 1.
- <sup>xix</sup> 38 C.F.R. § 17.38(b).
- <sup>xx</sup> *Id.*