CREATING EQUAL ACCESS TO QUALITY HEALTH CARE FOR TRANSGENDER PATIENTS:

TRANSGENDER-AFFIRMING HOSPITAL POLICIES

NEW YORK CITY BAR

Lambda Legal
making the case for equality

HUMAN RIGHTS CAMPAIGN FOUNDATION

INTRODUCTION

Over the last decade, hospitals throughout the United States have recognized that some groups of people face significant barriers to health care because of historic bias and discrimination against them. Many efforts have been launched to identify these groups, learn more about the challenges they face in health care, and welcome them into the nation's hospitals. To reach out to these long overlooked groups, hospitals have examined their policies and practices to ensure that discrimination is clearly prohibited, recommendations for equitable and inclusive care are being followed, and staff are trained to provide knowledgeable, sensitive care.

Transgender[1] people have become widely recognized as one such group that faces significant barriers to equal, consistent, and high-quality health care. From instances of humiliation and degradation to outright refusals to provide care, many institutions – consciously or not – have made it very difficult for transgender people to receive respectful, knowledgeable treatment. The end result often has been disengagement from the health care system that results in poor health outcomes for transgender people: rather than enduring abuse and poor treatment, transgender people often simply do without health care. As a result of this disengagement, treatable medical conditions too often become emergency medical problems, a common situation in communities with suboptimal access to care.[2] Adopting transgender-inclusive health care practices can reduce the costs associated with complications that arise when transgender patients are denied or delay medical treatment due to discrimination.[3]

In a 2011 survey of over 6,000 transgender Americans, 19% of the respondents reported being refused health care due to their transgender or gender-nonconforming status. In addition, 28% had postponed necessary health care when sick or injured, and 33% had delayed or had not sought preventive care because of experiences of health care discrimination based on their transgender status.[4]

1 "Transgender" is an umbrella term used to describe people whose gender identity, one's inner sense of being male or female, differs from their assigned or presumed sex at birth. Transgender patients generally are admitted to hospitals for the same types of care as other patients, although transgender patients may also enter hospitals for transition-related health care services. To "transition" means to undergo a process by which a person changes their physical sex characteristics and/or gender expression to match their inner sense of being male or female. This process may include a name change, a change in preferred pronouns, and a change in social gender expression through things such as hair, clothing, and restroom use. It may or may not include hormones and surgery. For more information, *see Transgender Rights Toolkit: Transition-Related Health Care*, Lambda Legal, (Aug. 29, 2013) http://www.lambdalegal.org/publications/trt_transition-related-health-care. It should be noted that the gender marker on transgender patients' legal identification documents may or may not match their gender identity because some states do not allow individuals to change their gender marker on birth certificates or driver's licenses and other states make the process very burdensome and expensive. *See infra* at note 21.

2 *See Access to Healthcare,* Transgender Legal Defense & Education Fund, http://transgenderlegal.org/work_show.php?id=2. The barriers transgender people face when seeking access to quality health care are both personal and structural. Personal barriers stem from the beliefs, attitudes, and behaviors of providers and patients within the health care system, while structural barriers operate regardless of individual attitudes. These institutional barriers include limitative insurance practices, insufficient provider knowledge, and inadequate provider training on the needs of transgender patients. For a more detailed discussion of the health care disparities faced by transgender patients in the United States, *see* The Inst. of Med., The Health of Lesbian, Gay, Bisexual and Transgender People: Building a Foundation for Better Understanding, 25-88 (2011), http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx.

3 *See* State of California, Department of Insurance, *Economic Impact Assessment Gender Non-discrimination in Health Insurance,* REG-2011-00023 (Apr. 13, 2012), http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

4 Jaime M. Grant, Ph.D., et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, 76 (2011), http://transequality.org/PDFs/NTDS_Report.pdf.

A large national LGBT health survey conducted in 2010 also detailed transgender patients' experiences of discrimination in health care.[5] Seventy percent of transgender respondents reported having one or more of the following experiences:

- Health care providers refusing to touch them or using excessive precautions;
- Health care providers using harsh or abusive language;
- Health care providers being physically rough or abusive;
- Health care providers blaming them for their health status.

In addition, nearly 27% of transgender survey respondents reported being outright denied health care because of their transgender status.[6]

Even when transgender people do receive medical treatment, their interactions with hospital staff – including physicians, nurses, allied health professionals, admitting and registration personnel, and security officers – often result in negative experiences. Examples of inappropriate staff behavior cited by transgender patients include:

- Laughter, pointing, joking, taunting, mockery, slurs, and a wide variety of negative comments;
- Violations of confidentiality, regardless of HIPAA[7];
- Use of improper name and/or pronoun for patient;
- Exceptionally long waits for care;
- Inappropriate questions and/or exams, including needless viewing of genitals;
- Prohibitions of bathroom use, or challenges to it;
- Inappropriate room assignments;
- Failure to follow standards of care.[8]

It is negative experiences like these that lead transgender people to avoid seeking health care. Yet hospitals can readily prevent these problems, and create a welcoming environment for transgender patients, by implementing key policies, practices, and staff training.

In the pages that follow, we provide a set of model hospital policies aimed at eliminating bias and insensitivity, and ensuring appropriate, welcoming interactions with transgender patients. These policies address the issues of confidentiality, non-discrimination, room assignments, bathroom access, and admitting/registration procedures – issues that, when mishandled, become

5 Lambda Legal, When Health Care Isn't Caring: Survey on Discrimination Against LGBT People and People Living with HIV, 5-6 (2010), http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf. This study also found that transgender and gender-nonconforming respondents reported the highest rates of discrimination and barriers to care, having experienced such discrimination up to two to three times more frequently than lesbian, gay, or bisexual respondents.

6 *Id.* at 5. Although the great majority of care sought by transgender hospital patients is of the same type as sought by other patients, it should be noted that insurance coverage for transition-related medical procedures is gradually expanding. *See* "Policy Guidance: Insurance Guidelines," *infra* at 15. In addition, widely accepted Standards of Care have been developed for transitions. *See* The World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th ed.), http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.

7 "The Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191 (1996) (amending 42 U.S.C. § 1301 *et seq.*)." HIPAA is the federal law that establishes, among other things, privacy and security requirements with respect to the use and disclosure of an individual's medical information.

8 For example, in 1995, emergency medical services workers were called to the scene of a car accident in which Tyra Hunter, a transgender woman, was seriously injured. As Tyra lay unconscious, the emergency medical services workers discovered that she had male genitalia and stopped providing emergency treatment to her while they began laughing and making derogatory comments about her. Tyra died as a result of their negligence. Tyra's mother then brought a wrongful death lawsuit against the D.C. General Hospital and D.C. Fire Department. After a five-week trial, the jury awarded Mrs. Hunter approximately $2.9 million in damages, finding that D.C. General Hospital's medical malpractice caused Tyra's death and the emergency medical personnel had violated the D.C. Human Rights Law. *See* Sue Anne Pressley, *Realizing, Fulfilling 'Who They Are': D.C. Slayings Help Galvanize Transgender Community's Push for Acceptance,* Washington Post (Nov. 29, 2003); Press Release, Gay & Lesbian Activists Alliance of Washington D.C., District Settles Hunter Lawsuit for $1.75 Million (Aug. 10, 2000), http://www.glaa.org/archive/2000/tyrasettlement0810.shtml. *See also* Grant, *supra* n.4, at 74 (finding that 28% of survey participants reported being subjected to verbal harassment in medical settings and 2% were victims of violence in doctors' offices).

barriers to health care for transgender patients. Below each model policy we have included a short explanation of the rationale behind the policy.

We urge hospital administrators and legal departments to adopt these policies to ensure that their hospitals are offering health care that is non-discriminatory and transgender-affirming. The policies are styled in a general format that can be tailored to the needs of individual hospitals. We encourage hospital administrators and legal departments to contact us should they require additional guidance in adapting policy language to fit their facility's unique circumstances.

These model policies are not intended to provide legal advice, and state and local laws may require that hospitals take additional steps to protect the rights of transgender and gender-nonconforming patients. For this reason, hospital administrators are strongly encouraged to review these policies in consultation with their legal counsel.

MODEL TRANSGENDER-AFFIRMING HOSPITAL POLICIES

POLICY 1: GENDER IDENTITY & GENDER EXPRESSION NON-DISCRIMINATION POLICY

We recommend that hospitals include the following language in their patient non-discrimination policy:

POLICY:

[Hospital] does not discriminate against any person on the basis of gender identity or gender expression.[9]

Further, we recommend that hospitals communicate this non-discrimination policy to their employees and patients in the following ways:

- Post it on the hospital website and in patient waiting areas and employee work areas;
- Include it in materials routinely given to patients at admitting/registration or at other times;
- Include it in materials routinely available for take-away in patient waiting areas;
- Include it in materials routinely given to employees at orientation.

EXPLANATION

Non-discrimination policies that prohibit discrimination based on gender identity and gender expression are a first and necessary step toward ensuring that transgender patients have equal access to respectful, knowledgeable treatment and care. Such non-discrimination policies are now required of accredited hospitals under Joint Commission standard RI.01.01.01, EP 29. This Joint Commission standard provides that an accredited hospital "respects, protects, and promotes patient rights" and "prohibits discrimination based on . . . gender identity or expression."[10] The Joint Commission's *LGBT Field Guide* advises hospitals to post, disseminate, and publicize this non-discrimination policy on the

9 Gender identity is one's internal, personal sense of being a man or a woman. Gender expression is the external manifestation of one's gender identity, usually expressed through "masculine," "feminine," or gender-variant behavior, clothing, haircut, voice, or body characteristics.

10 *See* The Joint Commission, Requirement, Rationale, Reference Report (Feb. 9, 2011), http://www.jointcommission.org/assets/1/18/r3%20report%20issue%201%2020111.pdf.

hospital's website, in written material, and in packets of information distributed to patients and employees.[11]

It should also be noted that a growing number of state and local governments now require places of "public accommodation" to implement policies forbidding discrimination based on gender identity.[12] For example, insofar as hospitals are considered public accommodations under the Administrative Code of the City of New York Section 8-107(4), it is an unlawful, discriminatory practice for a New York City hospital to directly or indirectly refuse, withhold from, or deny a person any of the accommodations, advantages, facilities, services, or privileges of the hospital based upon the person's actual or perceived gender, including the individual's actual or perceived sex, gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the legal sex assigned to the person at birth.[13]

In addition, § 1557 of the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act") prohibits sex discrimination in any hospital or health program that receives federal funds,[14] and the U.S. Department of Health & Human Services, Office of Civil Rights, has explicitly stated that this prohibition extends to claims of discrimination based on gender identity.[15] The Affordable Care Act references the protections of other federal civil rights laws that ban sex discrimination, and, in recent years, courts and administrative tribunals have increasingly held that these laws should also be read to prohibit discrimination against transgender people and people who fail to conform to sex stereotypes.[16] Because the Affordable Care Act's prohibition of sex discrimination is to be interpreted in the context of these other federal civil rights laws, it is likely that the Act will be read by federal courts to prohibit discrimination against transgender and gender-nonconforming individuals.

POLICY 2: PATIENTS' BILL OF RIGHTS

We recommend that hospitals include the following or similar language in their Patients' Bill of Rights:

The following rights apply to all patients:

11 *See* The Joint Commission, Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide (Nov. 8, 2011), http://www.jointcommission.org/lgbt/.

12 As of June 2013, seventeen states and the District of Columbia have banned discrimination based on gender identity or expression. In addition, at least 143 cities and counties have also adopted laws prohibiting discrimination based on gender identity or expression. For more information on state and local laws prohibiting discrimination based on gender identity or gender expression, *see U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression*, Transgender Law & Pol'y Inst. (last updated Feb. 1, 2012), http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions; Nat'l Gay & Lesbian Task Force, Nondiscrimination Laws Map (last updated Jan. 20, 2012), http://thetaskforce.org/reports_and_research/nondiscrimination_laws; *States and Regions Map*, Lambda Legal, http://www.lambdalegal.org/states-regions.

13 *See* New York City Commission on Human Rights, Guidelines Regarding Gender Identity Discrimination: A Form of Gender Discrimination Prohibited by The New York City Human Rights Law, 4 (2006), http://www.nyc.gov/html/cchr/pdf/GenderDis_English.pdf.

14 Affordable Care Act, 42 U.S.C. § 18116(a) (2010) ("[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) . . . 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 . . . .").

15 *See* Letter from Department of Health & Human Services to National Center for Lesbian Rights (July 12, 2012), http://hrc.org/files/assets/resources/HHSResponse8612.pdf.

16 For example, in the recent case of *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *7 (E.E.O.C. Apr. 20, 2012), the Equal Employment Opportunity Commission ("EEOC") found that transgender people are protected by Title VII's prohibition of sex discrimination, as have a growing number of federal courts. The EEOC explained that discrimination against someone because the person is "identifying as a transgender person," "has expressed his or her gender in a non-stereotypical fashion," or "has transitioned or is in the process of transitioning from one gender to another" is a form of sex-based discrimination. Such discrimination violates the law that an employer may not take gender into account when making employment decisions. *Id.*

The patient has the right to competent, considerate, and respectful care in a safe setting that fosters the patient's comfort and dignity and is free from all forms of abuse and harassment, including abuse or harassment based on gender identity or gender expression.

The patient has the right to privacy and confidentiality during medical treatment or other rendering of care within the [Hospital].

Medical students, residents, and other persons not directly involved in the care or treatment of a transgender or gender-nonconforming patient should not be present during the patient's case discussion, consultation, examination, or treatment except for legitimate training purposes. Before observing or participating in a transgender or gender-nonconforming patient's case discussion, consultation, examination, or treatment for training purposes, trainees should be counseled on the [Hospital's] Gender Identity and Gender Expression Non-Discrimination Policy and the Protocols for Interaction with Transgender Patients. In all cases, discussion, consultation, examination, and treatment must be conducted discreetly.

Transgender and gender-nonconforming patients have the right to refuse to be examined, observed, or treated by medical students, residents, or any other facility staff when the primary purpose is educational or informational rather than therapeutic, without jeopardizing the patient's access to medical care, including psychiatric and psychological care.

EXPLANATION

Just as hospitals are obligated to respect patients regardless of race, ethnicity, age, religion, creed, sex, disability, and sexual orientation, so too must they respect a patient's gender identity and gender expression. Likewise, all patients, including transgender and gender-nonconforming patients, deserve to have privacy when discussing or consulting with their health care providers on matters related to their health and when being examined or receiving treatment. Privacy can be especially important to transgender patients who may not want their transgender status disclosed for personal or safety reasons.[17]

Some state laws expressly recognize a patient's right to refuse to allow medical students or other health care staff members to be present or otherwise involved in the patient's case discussion, consultation, examination, or treatment.[18] However, even in states that do not have such laws, it is important that transgender and gender-nonconforming patients be able to refuse to be examined or observed by health care personnel who are not directly involved in the patient's care. Of course, it is important for trainees to have interaction with all patient groups, including transgender people, so the goal is not to have these patients exercise their right to restrict observation by trainees; rather, the goal is to make the environment comfortable so that the patient does not feel the need to exercise that right.

That said, it is inappropriate for health care providers to invite hospital staff not involved in the patient's care to observe the patient's body for any reason other than legitimate training purposes. Under no circumstances should persons not directly involved in the patient's care be permitted to observe or participate in examination of the patient when the patient has refused.

17 Note also that courts have held that transgender people have a particularly compelling privacy interest in preserving the confidentiality of their transgender status. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("The excrutiatingly [sic] private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.")

18 *See, e.g.*, Mass. Gen. Laws ch. 111, § 70E (2012) ("Every patient . . . shall be provided . . . the right . . . to refuse to be examined, observed, or treated by students or any other facility staff . . . [and] to refuse any . . . examination when the primary purpose is educational . . . rather than therapeutic"); N.Y. Comp. Codes R. & Regs. tit. 10, § 405.7 (2012) ("The hospital shall afford to each patient the right to . . . [know] the identity of any hospital personnel including students that the hospital has authorized to participate in the patient's treatment and the right to refuse treatment, examination and/or observation by any personnel"); 22 Cal. Code Regs. tit. 22, § 70707(a)(7) (2012) ("The patient has the right to be advised as to the reason for the presence of any individual [during case discussion, consultation, examination and treatment]."); 77 Ill. Admin. Code tit. 77, § 270.2000(o) (2012) ("Those persons not directly involved in the patient's care must have the patient's permission to be present."); La. Admin. Code tit. 48, § 701(A)(4) (2012) ("Those not directly involved in [the patient's] care must have the permission of the patient to be present."); Okla. Admin. Code § 752:15-13-3(a)(5) (2012) ("Those not directly involved in the patient's care must have the permission of the patient to be present.").

POLICY 3: ADMITTING/REGISTRATION RECORDS

Technology and best practices regarding patient admitting/registration records are rapidly evolving, but our current recommendations are that hospitals adopt the following procedures when recording gender and name designations in the admitting/registration process:

POLICY:

Recording Gender in Electronic Admitting/ Registration Records:

In the existing "Gender" field in admitting/registration records, the [Hospital] staff person will record the patient's gender as the gender designation (Male or Female) that appears on the patient's medical insurance record, legal identification, or other source customarily used in admitting/registration.

In addition, the admitting/registration record will include an optional "Other," "Notes," "Special Needs," or similar drop-down menu that will include the following two options:

☐ *Transgender Male/Trans man/Female-to-Male (FTM)*

☐ *Transgender Female/Trans woman/Male-to-Female (MTF)*

If the patient affirmatively states that he or she is transgender, the [Hospital] staff person will inform the patient that the hospital, The Joint Commission, and (if applicable) state law prohibit discrimination based on gender identity and gender expression, and ask the patient if he or she would like their transgender status to be indicated in the patient's admitting / registration record. If the patient indicates that the information should be included, the [Hospital] staff person will select either "Transgender Male/Trans man/Female-to-Male (FTM)" or "Transgender Female/Trans woman/Male-to-Female (MTF)" from the drop-down menu to indicate the patient's transgender status. The first option should be selected when the patient has transitioned from female to male; the second option should be selected when the patient has transitioned from male to female. If the [Hospital] staff person is unsure of which option to select, he or she should politely and discreetly ask the patient to verify whether the patient is a transgender male or transgender female.

The [Hospital] staff person should <u>not</u> attempt to guess whether a patient is transgender or ask the patient whether he or she is transgender. The patient's transgender status should only be recorded on the drop-down menu if the patient volunteers the information and agrees that it should be recorded.

Recording Gender on Paper Admitting/ Registration Forms:

Paper forms completed by the patient upon admitting/ registration should include the following questions concerning the patient's gender:

1. *What is the gender designation on your medical insurance records?*

☐ *Male*

☐ *Female*

2. *(Optional) Are you transgender?*

☐ *Yes, I am a Transgender Male/Trans man/FTM*

☐ *Yes, I am a Transgender Female/Trans woman/MTF*

☐ *No*

Recording Name/Pronouns in Electronic Admitting/Registration Records:

In addition to the "Legal Name" field, admitting/registration forms will include an optional field for a patient's "Preferred Name." All patients should be asked if they have a "preferred name" or "nickname" that they would like to include in their admitting/registration record.

If a patient volunteers that he or she is transgender, the [Hospital] staff person will inform the patient that the hospital, The Joint Commission, and (if applicable) state law prohibit discrimination based on gender identity and gender expression, and ask whether the patient would like to have his or her preferred name and pronouns recorded in the admitting/registration record. If the patient indicates that this information should be recorded, the [Hospital] staff person should ask if the patient prefers male or female pronouns. The [Hospital] staff person will record that information by including "M" or "F" in parentheticals in the optional field that captures the patient's Preferred Name.

The system should be configured to notify providers and staff if the patient's preferred name and/or pronouns differ from the patient's current legally documented name. The system should include a readily visible notification or alert flag that appears on the viewer's screen and indicates the patient's preferred name and pronouns.

Recording Name/Pronouns on Paper Admitting/Registration Forms:

Paper forms completed by the patient upon admitting/registration should include the following questions concerning the patient's name and pronouns:

1. *What is your legal name?*

2. *(Optional) What is your preferred name or nickname?*

3. *(Optional) What are your preferred pronouns (for example, he/him, she/her)?*

EXPLANATION

An important first step toward respecting transgender patients' dignity and creating a transgender-inclusive environment is to address transgender patients by their preferred name and pronouns, and to affirm their gender identity. Failure to identify a transgender patient by the patient's preferred name and pronoun in a medical setting has been shown to negatively affect satisfaction and quality of care for transgender patients.[19] For example, if a hospital staff person calls a transgender woman patient by a male name in a crowded waiting room, this could not only be a violation of privacy policies, but could also be embarrassing to the transgender woman, revealing her transgender status to the crowd and potentially exposing her to verbal or physical abuse from other patients in the waiting room.[20]

Hospital admitting/registration procedures should enable transgender patients to designate their gender identity and preferred name even when this gender identity and name differ from those that appear on the patients' medical insurance or legal identity documents. It is not always possible for transgender people to change their name and gender designation on legal identity documents, such as birth certificates or driver's licenses, because some states prohibit such changes and others make the process very burdensome and expensive.[21] While it is possible for transgender patients to change the gender marker on their medical insurance records, some transgender patients do not change this marker, even though it does not match their current gender identity, because their insurance company could refuse to cover certain "gender-specific" procedures (such as hysterectomies) that are typically covered only for people of one sex. The barriers to obtaining legal name/gender changes and insurance coverage for gender-specific procedures should not prevent transgender patients from using their preferred name and gender identity in a hospital context.

19 Deutsch, Madeline B., et al., *Electronic Medical Records and the Transgender Patient: Recommendations from the World Professional Association for Transgender Health EMR Working Group*, J. Am. Med. Inform. Assoc., 0:1-4 (Apr. 30, 2013).

20 *Id.*

21 The process for changing one's legal name and sex varies by state. For example, some states will permit changes of name and sex on legal identity documents only by court order. Others require proof that the individual seeking the change has undergone sex reassignment surgery. Requiring sex reassignment surgery in order to amend one's birth certificate can make it impossible for a transgender person to change the sex designation on their birth certificate if they cannot afford or do not want to undergo sex reassignment surgery. For more information, *see Sources of Authority to Amend Sex Designation on Birth Certificates*, Lambda Legal (Jan. 3, 2012), http://lambdalegal.org/publications/sources-of-authority-to-amend.

Hospitals should ensure that the patient's gender as captured in the "Gender" field in admitting/registration records matches the gender marker that appears on the patient's medical insurance so the patient will not be denied coverage for medical treatment based on a "gender mismatch." However, the admitting/registration record should be designed to also capture a transgender patient's current gender identity regardless of what is on the patient's legal identity documents or insurance records. This information can be most easily recorded by including in the admitting/registration record an optional drop-down menu from which the hospital staff person can select "Transgender Male/Trans man/Female-to-Male (FTM)" or "Transgender Female/Trans woman/Male-to-Female (MTF)." Admitting/registration records that already contain separate optional fields or drop-down menus for recording demographic data, such as the patient's ethnicity or primary language, can readily be modified to include the options "Transgender Male/Trans man/FTM" and "Transgender Female/Trans woman/MTF."

We advise that hospital staff not ask the patient whether he or she identifies as transgender when completing the admitting/registration record because transgender patients may be uncomfortable answering that question for a variety of reasons. For example, transgender patients may be reluctant to disclose transgender status when unsure whether the information will be treated confidentially or who will have access to the information in the future, because disclosure of transgender status, even to the patient's medical insurance company, could result in discrimination. The better practice is to allow the patient to affirmatively volunteer that he or she is transgender. When a patient states that he or she is transgender, the hospital staff should inform the patient that the hospital, The Joint Commission, and (if applicable) state law prohibit discrimination based on gender identity and gender expression before asking the patient whether he or she would like the hospital to record the patient's transgender status on the admitting/registration form.

Similarly, we recommend that the hospital create an optional field (or use an existing "nickname," "notes," or similar field) to record the patient's preferred name and pronouns. We advise that hospital staff ask all patients whether they have a preferred name, as many non-transgender patients are also likely to use a nickname, but we advise that staff not ask for a patient's preferred pronouns unless the patient affirmatively volunteers that he or she is transgender. If a patient volunteers that he or she is transgender, the staff should ask if the patient has preferred pronouns and would like those pronouns to be indicated in the admitting/registration record.[22]

POLICY 4: PROTOCOLS FOR INTERACTION WITH TRANSGENDER PATIENTS

PURPOSE:

To ensure that hospital staff members interact with transgender patients with professionalism, courtesy, and respect.

POLICY:

When a transgender patient presents for health care, they will be addressed and referred to on the basis of their self-identified gender, using their preferred pronoun and name, regardless of the patient's appearance, surgical history, legal name, or sex assigned at birth. If the patient's family members suggest that the patient is of a gender different from that with which the patient self-identifies, the patient's view should be honored.

Hospital staff members will not use language or tone that a reasonable person would consider to demean, question, or invalidate a patient's actual or perceived gender identity or expression.

Hospital staff members will not ask questions or make statements about a transgender person's genitalia, breasts, other physical characteristics, or surgical status except for professional reasons that can be clearly articulated. Information about a patient's transgender status or any transition-related services that the patient is seeking and/or has obtained is sensitive medical information, and hospital staff members will treat it as such.

22 For more information on how to implement the recording of a patient's gender identity, preferred name, and pronouns on electronic health records, *see* Deutsch, *supra* note 19.

PROCEDURE:

A transgender patient's preferred pronoun should be determined as follows:

1. *If the patient's gender presentation clearly indicates to a reasonable person the gender with which the patient wishes to be identified, the hospital staff member should refer to the patient using pronouns appropriate to that gender.*

2. *If the hospital staff member determines the patient's preferred pronoun on the basis of the patient's gender presentation, but is then corrected by the patient, the staff member should then use the pronouns associated with the gender identity verbally expressed by the patient.*

3. *If the patient's gender presentation does not clearly indicate the patient's gender identity, the hospital staff member should discreetly and politely ask the patient for the patient's preferred pronoun and name.*

A patient should not be asked about transgender status, sex assigned at birth, or transition-related procedures unless such information is directly relevant to the patient's care. If it is necessary to the patient's care for a health care provider to inquire about such information, the provider should explain to the patient: 1) why the requested information is relevant to the patient's care, 2) that the information will be kept confidential but some disclosures of the information may be permitted or required, and 3) that the patient should consult the hospital's HIPAA policy for details concerning permitted disclosures of patient information.

EXPLANATION

Referring to transgender people by the wrong pronoun or name, or asking inappropriate questions about genitalia or surgical status in an effort to determine their "true" gender, is a form of harassment. Such behavior violates a transgender patient's rights to privacy and dignity. Verbal harassment can rise to the level of sexual harassment when a staff member asks inappropriate questions about the patient's genital status (*e.g.*, "What's between your legs?" "Have you had the surgery?") or makes inappropriate assertions about the patient's genitalia (*e.g.*, "as long as you have a penis, I am going to call you by a male name"). Fortunately, only minimal effort is required to refrain from using this kind of harassing and disrespectful language.

Transgender patients may be reluctant to share information regarding transgender status or transition-related services because they fear discrimination or inappropriate treatment, even when this information may be integral to the patient's care. To facilitate rapport between health care providers and transgender patients, when a provider asks a patient about transgender status or transition-related services, the provider should explain proactively to the patient why the information sought is relevant to the patient's care and that such information will be treated confidentially in accordance with and to the extent required by law. Before the patient discloses information in response to the provider's inquiry, the patient should be fully informed of any mandatory or permissive disclosures of the information in accordance with the hospital's standard notice of privacy practices. The inappropriate disclosure of transgender status or transition-related medical history may result in discrimination against the transgender patient, so the transgender patient is entitled to make an informed decision about what information to share with the provider.

Note also that information about a patient's transgender status or transition-related services may constitute protected health information under HIPAA. As a result, inappropriate disclosure of this information may be a violation of the Privacy Rule and, other than in the context of providing treatment services (and limited other situations), is subject to the "minimum necessary" standard described in the "Policy Guidance: Compliance with Privacy Laws" section below.

POLICY 5: ROOM ASSIGNMENTS

We recommend that hospitals adopt the following policy regarding room assignments for transgender patients:

PURPOSE:

To establish guidelines for the safe, ethical, and appropriate assignment of rooms for transgender patients.

For the purposes of this policy, "transgender" is defined to include any person whose gender identity, that is, their inner sense of being male or female, differs from their assigned or presumed sex at birth.

POLICY:

Where room assignments are gender-based, transgender patients will be assigned to rooms based on their self-identified gender, regardless of whether this self-identified gender accords with their physical appearance, surgical history, genitalia, legal sex, sex assigned at birth, or name and sex as it appears in hospital records.

That a transgender patient's physical appearance or genitalia differ from other patients who share the same self-identified gender is not a bar to assigning the patient to a room in accordance with his or her gender identity. Sufficient privacy can be ensured by, for example, the use of curtains or accommodation in a single side-room adjacent to a gender-appropriate ward.

PROCEDURE:

Where patients are assigned to rooms based on gender, the [Hospital Admitting Office] shall assign a transgender patient to a room in accordance with the patient's self-identified gender, unless the patient requests otherwise. Transgender patients shall be assigned to in-patient rooms in the following order of priority:

1. *If a transgender patient requests to be assigned to a room with a roommate of the patient's same gender identity, and such a room is available, the request should be honored.*

2. *If a transgender patient requests a private room and there is one available, it should be made available to the patient.*

3. *If a transgender patient does not indicate a rooming preference, and a private room is available, the private room should be offered to the transgender patient. The offer should be explained to the patient as optional and for the purpose of ensuring the patient's privacy, safety, and comfort.*

4. *If a private room is not available and the transgender patient does not wish to share a room with a roommate, the transgender patient should be assigned to an empty double room with the second bed blocked.*

5. *If there is no private room or empty double room available, the patient should be assigned to a room with a patient of the gender with which the transgender patient identifies.*

6. *If there is no private or empty double room available and a transgender patient does not wish to share a room, other patients may be moved to make a private room available if doing so would not compromise the health or safety of the patient(s) being moved.*

7. *If there is no private or empty double room available, the transgender patient refuses to share a room, and no other patient can safely be moved to make a private room available, the transgender patient should be allowed to remain in the Emergency Department or Admitting Office without harassment until a private room becomes available.*

The [Hospital Admitting Office] shall determine a patient's self-identified gender prior to assigning the patient a room by reviewing the patient's admitting/registration record. If the patient's family members suggest that the patient is of a gender different from that with which the patient self-identifies, the patient's view should be honored. If upon admission it is impossible for the patient to inform the staff of his or her self-identified gender because he or she is unconscious or incapacitated, then, in the first instance, inferences should be drawn from the patient's presentation and mode of dress. No investigation of the genitals of the person should be undertaken unless specifically necessary to carry out treatment.

No patient will be denied admission if a gender-appropriate bed is not available. Furthermore, complaints from another patient related to a roommate's gender identity or expression do not constitute grounds for an exception to this room assignment policy, as would be the case for other patients protected by non-discrimination policy, standards, and/or law. Should hospital staff receive such complaints, they should remedy the situation by using curtains or other room dividers to increase the privacy of both patients. A patient making ongoing complaints should be moved to another room as long as relocating the patient would be medically appropriate and safe.

Should a transgender patient complain that the patient's roommate is subjecting him or her to harassment based on the patient's gender identity or expression, [a member of the hospital staff trained in handling patient complaints and in issues of transgender cultural competency] should remedy the situation by relocating the patient's roommate to prevent continued harassment, as long as relocating the roommate would be medically appropriate and safe. If the roommate cannot be relocated, the transgender patient should be moved. The transgender patient's health is not to be compromised by an unsafe room assignment.

Where there are questions or concerns related to room assignments, [a member of the hospital staff trained in handling patient complaints and in issues of transgender cultural competency] is to be consulted and an ethics consultation may be requested.

EXPLANATION

The failure to grant room assignments to transgender patients in accordance with their gender identity is a form of discrimination that jeopardizes transgender patients' dignity and privacy and, in turn, discourages them from seeking medical services. Gender-affirming room assignments are a crucial step toward breaking down barriers that have hindered transgender people's access to health care.

The policy provides for the handling of complaints by a member of the hospital staff who is experienced in patient relations and, ideally, has received transgender cultural competency training. This would be no different from a situation involving a patient room reassignment due to roommate complaints for any other reason, except that it recognizes the privacy and dignity of a person's self-identified gender and provides for the handling of complaints by staff trained in diverse cultural competencies and committed to optimal patient care.

POLICY 6: ACCESS TO RESTROOMS

PURPOSE:

To ensure that transgender patients have safe and equal access to restrooms in accordance with their gender identity.

POLICY:

All patients of the hospital may use the restroom that matches their gender identity, regardless of whether they are making a gender transition or appear to be gender-nonconforming. Transgender and gender-nonconforming patients shall not be asked to show identity documents in order to gain access to the restroom that is consistent with their gender identity.

Harassment of transgender and gender-nonconforming patients for using hospital restrooms in accordance with their gender identity will not be tolerated. Transgender and gender-nonconforming patients who are harassed in this manner may contact [member of the hospital staff trained in handling harassment complaints and in issues of transgender cultural competency].

For the purpose of this policy, "transgender" is defined to include any person whose gender identity, that is, their inner sense of being male or female, differs from their assigned or presumed sex at birth.

For the purpose of this policy, "gender-nonconforming" is defined to include any person who does not meet society's expectations of gender roles.

EXPLANATION

This policy ensures that transgender and gender-nonconforming patients will be able to use restrooms throughout the hospital that correspond to their gender identity.[23] The medical community now recognizes that it is essential to the health and well-being of transgender people for them to be able to live in accordance with their internal gender identity in all aspects of life, and that restroom usage is a necessary part of that experience. In addition, courts of law have increasingly found that discrimination against transgender and gender-nonconforming people is sex discrimination, making it unacceptable to prevent transgender and gender-nonconforming people from using the bathroom that matches their gender identity.[24] In some localities, discrimination related to restroom usage is expressly prohibited by law.[25]

One way hospitals can create a safer and more welcoming environment for transgender and gender-nonconforming patients is to offer private unisex bathrooms. An easy way to create a private unisex bathroom is to change the sign to "unisex" on the door of a single-stall bathroom that was previously labeled "men" or "women."

While this policy is intended to cover patients only, we encourage hospitals to embrace a truly non-discriminatory bathroom access policy which allows not only patients but also hospital employees and visitors to access restrooms in accordance with their gender identity.

POLICY GUIDANCE: COMPLIANCE WITH PRIVACY LAWS

HIPAA and other privacy-related statutes and their implementing regulations currently provide a framework for hospitals and providers to handle confidential patient information.[26] However, hospitals, physicians, employees, and contractors may not be aware that a patient's transgender status or history of transition-related procedures may constitute protected health information under HIPAA's implementing regulation (the "Privacy Rule"). Therefore, we recommend that hospitals review privacy-related materials to ensure that the needs of transgender patients are adequately met. In particular, we recommend that hospitals address the needs of transgender patients in the following ways:

A. *Privacy Policies and Procedures.* A hospital or other covered entity must develop written privacy policies and procedures to ensure compliance with the Privacy Rule.[27] These policies and procedures should be reviewed to ensure that transgender patients' rights to privacy are specifically addressed. In particular, a discussion of when a patient's transgender status and transition-related services would be considered protected health information should be included in the Hospital's HIPAA Privacy Procedure Manual. This will ensure that all physicians, employees, and contractors know that a patient's transgender status and transition-related services may constitute protected health information under the Privacy Rule and also know the particular situations when such

23 Jody L. Herman, The Williams Institute, UCLA School of Law, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives* (2013) (discussing minority stress related to gender nonconformity and the negative affect on health outcomes for transgender and gender-nonconforming people who experience prejudice and stigma in accessing restrooms).

24 For more information, *see Transgender Rights Toolkit: Equal Access to Public Restrooms*, Lambda Legal (Feb. 1, 2011), http://lambdalegal.org/publications/trt_equal-access-to-public-restrooms.

25 For more information, *see* Transgender Law & Pol'y Inst., *supra* note 12.

26 Under the Privacy Rule, "protected health information" is all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or medium. This includes all information, including demographic data, that relates to (i) the individual's past, present, or future physical or mental health or condition; (ii) the provision of health care to the individual; or (iii) the past, present, or future payment for the provision of health care to the individual; and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. 45 C.F.R. § 160.103.

27 45 C.F.R. § 164.530(i).

information would be considered protected health information, for example, when it is coupled with identifying information, such as a name, photograph, or other medical history which could be used to identify the patient.

B. *"Minimum Necessary" Standard.*

We recommend that the hospital include the following language in its HIPAA Privacy Procedure Manual:

> *Every physician, [Hospital] employee, and contractor who uses, discloses, or requests patient information, including information regarding a patient's gender identity or expression, transgender status, or other demographic data, on behalf of [Hospital], shall make reasonable efforts to limit disclosure of and requests for protected health information to any person not directly involved in the treatment of a particular patient to the minimum necessary to accomplish the authorized purpose of the use, disclosure, or request, in accordance with applicable federal law and regulations, including minimizing incidental disclosures. Procedures appropriate for implementing this policy vary based on the intended purpose of the use, disclosure, or request, as provided elsewhere in this HIPAA Privacy Procedure Manual.*
>
> *[Hospital] will ensure that every physician, [Hospital] employee, and contractor will have access to protected health information only to the minimum extent necessary and relevant to perform his or her specific job functions, as described in this HIPAA Privacy Procedure Manual.*[28]

C. *Privacy Training Programs.* The Privacy Rule requires that hospitals and other covered entities provide training to physicians, employees, and contractors to ensure compliance.[29] These trainings and related materials should be reviewed and revised as necessary to include specific examples of the circumstances under which transgender status and transition-related services may be considered protected health information and the application of the Privacy Rule to such information.

D. *Safeguards.* The Privacy Rule requires that hospitals and other covered entities maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information in violation of the Privacy Rule.[30] Hospital policies should be revised, as necessary, to make clear that any discussion or documentation of transgender status and transition-related services, any medical history related to transition, and similar information may involve protected health information, and as such would be subject to the hospital's administrative, technical, and physical safeguards. For example, if a patient indicates in an admitting/registration record or in a subsequent conversation with admitting/registration personnel that he or she is transgender, reasonable and appropriate safeguards (such as keeping the records in a folder where they are not easily accessible, or taking care to hold conversations about the patient's status in private) should be in place to ensure that no protected health information is intentionally or unintentionally disclosed or overheard by physicians, employees, independent contractors, patients, or hospital visitors.

28 Hospitals are already required under HIPAA's implementing privacy regulation (the "Privacy Rule") to limit disclosures of protected health information, including under the "minimum necessary" standard. These protections apply to transgender individuals as they would for any other patient. Note that "protected health information" includes any health information, including demographic data, that relates to an individual's physical or mental health condition, or payment for the provision of health care, and that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual. 45 C.F.R. § 160.103.

29 45 C.F.R. § 164.530 (b).

30 45 C.F.R. § 164.530 (c).

E. *Breach.* Interim final regulations implementing the HI-TECH Act require hospitals and other covered entities to provide notification to an individual following a breach of that individual's unsecured protected health information.[31] Generally, a "breach" occurs when there is an impermissible use or disclosure of unsecured protected health information under the Privacy Rule that poses a significant risk of financial, reputational, or other harm to the affected individual.[32] Hospitals should review their policies to ensure that any "breach" related to a transgender patient's protected health information is handled in accordance with these regulations and that transgender patients are notified if their protected health information is inappropriately disclosed. Physicians, employees, and contractors should be trained accordingly.

F. *Internal Sanctions.* Under the Privacy Rule, a covered entity must have in place and apply appropriate sanctions against members of its workforce (*i.e.,* physicians, employees, and contractors) who violate the entity's policies and procedures and the Privacy Rule.[33] Hospitals should specify that inappropriate use, disclosure, or request of a transgender patient's protected health information is both a violation of the hospital's internal HIPAA policies and procedures, and a violation of the Privacy Rule, and that such violations will be subject to appropriate disciplinary action.

G. *Complaints.* The Privacy Rule requires that covered entities must provide a process for individuals to make complaints concerning the entity's policies and procedures required by the Privacy Rule, and concerning the entity's compliance with such policies and procedures.[34] A covered entity must document all complaints received, and their disposition, if any.[35] Hospitals should review their policies to ensure that a proper process is established for documenting and responding to complaints, and should ensure that transgender patients are made aware of their right to complain about improper uses or disclosures of their protected health information.

POLICY GUIDANCE: INSURANCE GUIDELINES

The negative experiences that these model policies aim to eliminate are often compounded by insurance-related practices that create additional barriers to care. To foster a better understanding of the insurance issues faced by transgender patients, this section briefly discusses insurance-related practices that affect access to quality health care.

Leading authorities in the medical and policy communities,[36] including the American Medical As-

31 45 C.F.R. § 164.404.

32 45 C.F.R. § 164.402.

33 45 C.F.R. § 164.530(e).

34 45 C.F.R. § 164.530(d)(1).

35 45 C.F.R. § 164.530(d)(2).

36 For a full compilation of professional organizations' statements in support of access to care for transgender patients, *see Professional Organization Statements Supporting Transgender People in Health Care*, Lambda Legal (July 2, 2013), http://www.lambdalegal.org/publications/fs_professional-org-statements-supporting-trans-health. *See also, e.g.*, Am. Med. Ass'n H.D., Resolution 122 (A-08): Removing Financial Barriers to Care for Transgender Patients (June 2008), http://www.tgender.net/taw/ama_resolutions.pdf ("Whereas, 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; and . . . Health experts in GID . . . have rejected the myth that such treatments are 'cosmetic' or 'experimental' and have recognized that these treatments can provide safe and effective treatment for a serious health condition . . . therefore be it . . . Resolved, That the AMA oppose categorical exclusions of coverage for treatment of gender identity disorder when prescribed by a physician . . . ."); Am. Psychiatric Ass'n, Position Statement on Access to Care for Transgender and Gender Variant Individuals (July 2012), http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf ("[T]he American Psychiatric Association . . . [r]ecognizes that appropriately evaluated transgender . . . individuals can benefit greatly from medical and surgical gender transition treatments . . . [and] supports both public and private health insurance coverage for gender transition treatment."); *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, Am. Psychological Ass'n, Council of Representatives (Aug. 2008), http://www.apa.org/about/policy/transgender.aspx ("APA recognizes the efficacy, benefit and medical necessity of gender transition treatments for appropriately evaluated individuals

sociation and American Psychiatric Association, have recognized the medical necessity of sex reassignment surgery ("SRS")[37] and hormone therapy for patients with "gender dysphoria" (formerly classified as "gender identity disorder").[38] As a result, an increasing number of insurance companies are now providing coverage to transgender patients for transition-related treatment.[39]

Nevertheless, a number of public and private insurance companies continue to exclude transition-related health care, such as SRS and hormone treatments, from their insurance coverage – even when a physician has confirmed that they are medically necessary for a patient.[40] This "transgender exclusion" may also deny coverage for visits to monitor hormone replacement therapy, receive ongoing transition assistance, and access psychological counseling. The exclusion is based on the misconception that these treatments are experimental or cosmetic, whereas, in fact, there is medical consensus that these treatments can be medically necessary.[41]

Denials of insurance coverage for medically necessary care can cause serious harm to transgender people. Studies show a clear correlation between lack of insurance coverage for transition-related health care and depression, even suicide, among transgender people.[42] Denials of coverage, along with other barri-

and calls upon public and private insurers to cover these medically necessary treatments"); Am. Med. Ass'n, Resolution 122: Removing Financial Barriers to Care for Transgender Patients (June 2008), http://www.ama-assn.org/resources/doc/hod/a08resolutions.pdf ("Resolved, That our American Medical Association support public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician."). Note also that numerous federal courts have recognized gender dysphoria as an objectively serious medical condition for Eighth Amendment purposes. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (state law that prevented medical personnel from providing hormone therapy to inmates with gender identity disorder was an unconstitutional violation of the Eighth Amendment). Moreover, following a U.S. Tax Court decision, the Internal Revenue Service has agreed with the court's determination that expenses incurred for hormone therapy and sex reassignment surgery, that are not compensated for by insurance or otherwise, are tax deductible expenses under Section 213 of the Internal Revenue Code. *See* Internal Revenue Service, *Action on Decision: O'Donnabhain v. Commissioner, 134 T.C. 34 (2010)* (Nov. 21, 2011), http://www.hrc.org/files/images/pages/Transgender_IRSagreeswithTaxCourt_2011.pdf.

37 Note that this may also be termed "Gender Reassignment Surgery" and abbreviated "GRS."

38 For a description of the "gender dysphoria" diagnosis as it appears in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), *see Gender Dysphoria*, American Psychiatric Association (2013), http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf.

39 Yet even where insurance companies purport to cover treatment for transition-related health care, it may still be difficult for transgender patients to obtain reimbursement. For example, in the Medicaid context, transgender patients may struggle to receive reimbursement for medical procedures related to sex reassignment surgery because the front line Medicaid staff who process Medicaid claims often automatically deny claims from transgender people based on the mistaken belief that the procedures are cosmetic, experimental, or categorically excluded; health care providers often fail to submit adequate documentation supporting the medical necessity of particular procedures, based on a lack of familiarity with the legal requirements for showing medical necessity; and health care providers who specialize in transgender issues often do not accept Medicaid patients. *See* National Center for Lesbian Rights, Representing Transsexual Clients: Selected Legal Issues (Oct. 2003), http://www.transgenderlaw.org/resources/translaw.htm#_ftnref49.

40 *See* Lambda Legal, *supra* note 1. *See also* Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 Colum. J. Gender & L. 88, 92 (2002) (noting that despite the medical community's internationally endorsed treatment and the documented side effects of leaving gender dysphoria untreated, many public and private insurers explicitly exclude coverage for SRS and "liberally apply the SRS exclusion clauses to deny transsexuals coverage for non-transition related, medically necessary conditions such as back pain, intestinal cysts, and even cancer, under the rationale that any medical care a transsexual needs is an excludable transsexual-related condition"); Pooja Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 Sexuality Research & Soc. Pol'y: J. of NSRC 7, 9 (2007) ("Twenty-four states explicitly exclude coverage for transition-related health care by [state Medicaid] regulation. . . . In those states that do not have an explicit exclusion, coverage for transition-related care may still be denied based on interpretation and application of a more general exclusion, such as for so-called experimental or cosmetic treatments.").

41 *See* The World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 5 (7th ed.), http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf (providing clinical guidance for health professionals to assist transgender patients with primary care, gynecologic and urologic care, reproductive options, voice and communication therapy, mental health services, and hormonal and surgical treatments); The Endocrine Society, Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline (2009), https://www.endocrine.org/~/media/endosociety/Files/Publications/Clinical%20Practice%20Guidelines/Endocrine-Treatment-of-Transsexual-Persons.pdf.

42 *See* State of California, Department of Insurance, *supra* note 3.

ers to medically necessary health care, can also lead transgender individuals to turn to self-medication or self-surgery to make their bodies match their gender identity.[43] But studies also show that with proper medical intervention and treatments, depression and suicidal ideation among transgender patients decrease significantly.[44]

In addition to denying coverage for claims related to gender transition, insurance companies may misconstrue exclusionary language so as to deny coverage for treatments not actually related to a patient's gender transition. For example, in one documented case, an insurance company refused to pay the costs of treating a transgender man's broken arm because the company wrongly assumed that any health problems he experienced were due to his transgender status.[45]

Transgender patients may also face insurance obstacles when seeking coverage for "gender-specific" treatments, *i.e.,* treatments typically thought of as related to one gender, such as hysterectomies. Insurance companies require that every patient identify as either "male" or "female," and then provide coverage for gender-specific treatments only to people who have indicated that they are of the gender typically associated with that treatment.

This creates difficulties for transgender patients whose bodies may not match male and female stereotypes. For example, a transgender man may be taking testosterone and have developed male secondary sex characteristics but still have a uterus. If he has indicated to his insurance company that he is male, the insurance company is likely to initially deny him coverage for gynecological treatments such as an ovarian cancer screening. Similarly, a transgender woman who has indicated to her insurance company that she is female is likely to be initially denied coverage for treatments such as a prostate exam, because coverage for prostate exams is only provided to those identified to the insurance company as male. While health care providers and billing staff are increasingly able to reverse claim denials like these, even reversed denials can cause significant inconvenience to transgender patients.

Fortunately, both private and public health insurers have begun providing transgender-inclusive health coverage. Many private insurers, including virtually all large health plans, now offer transgender-inclusive policies to employers at manageable cost, often guided by standards of care developed by the World Professional Association for Transgender Health.[46] Over 200 of the nation's largest employers now offer transgender-inclusive employee health coverage,[47] and CalPERS, the massive State of California health and retirement benefits administrator, now offers transgender-inclusive coverage to 1.3 million employees and their dependents.[48] In addition, a number of localities–including San Francisco; Seattle; Minneapolis; Portland, Oregon; and Multnomah County, Oregon[49]–

43 *See* Laura Rena Murray, *The High Price of Looking Like a Woman,* N.Y. Times, Aug. 19, 2011, at MB1 (discussing the medical complications and fatalities resulting from the practice of "pumping," whereby transgender women receive silicone injections from unlicensed persons on the black market).

44 State of California, Department of Insurance, *supra* note 3 (citing Kuiper, M., 1988 and Gorton, 2011) (finding that suicide rates among transgender males decreased from 19% to zero percent, and from 24% to 6% among transgender females).

45 *Recommendations for Transgender Health Care,* Transgender Law Center, http://www.transgenderlaw.org/resources/tlchealth.htm#_ftnref2.

46 *See Finding Insurance for Transgender-Related Healthcare,* Human Rights Campaign, http://www.hrc.org/resources/entry/finding-insurance-for-transgender-related-healthcare (a growing number of insurance carriers are offering plans without blanket exclusions of transgender-related health care, including Aetna, Amerihealth, Anthem BCBS, BCBS Massachusetts, BCBS Minnesota, BCBS Michigan (Blue Care Network HMO), Cigna, EmblemHealth, HealthNet, HealthPartners, Independence Blue Cross, and Medica).

47 *See Corporate Equality Index: List of Businesses with Transgender-Inclusive Health Coverage,* Human Rights Campaign, http://www.hrc.org/resources/entry/corporate-equality-index-list-of-businesses-with-transgender-inclusive-heal.

48 *See CalPERS Makes History: Board Approves Trans-Inclusive Health Coverage*, Human Rights Campaign (June 21, 2013), http://www.hrc.org/blog/entry/calpers-makes-history-board-approves-trans-inclusive-health-coverage.

49 *See Transgender Rights Toolkit: Overcoming Health Care Discrimination*, Lambda Legal, http://www.lambdalegal.org/publications/trt_overcoming-health-care-discrimination.

have removed transgender coverage exclusions from their employee health policies, as have a number of colleges and universities.[50] Furthermore, Medicare covers medically necessary hormone therapy, as well as routine preventive care, regardless of gender markers.[51] Hospitals are strongly urged to provide transgender-inclusive coverage in health plans offered to employees and their families.

State governments are also taking steps to eliminate transgender-related discrimination in health coverage. In California, insurance products overseen by the California Department of Insurance, which primarily regulates preferred provider plans, may not discriminate against transgender patients on the basis of their gender identity.[52] In addition, California's Department of Managed Health Care has ordered California's health plans to remove exclusions of coverage based on gender identity and expression.[53] Similarly, state insurance bulletins issued in Oregon, Vermont, Colorado, and the District of Columbia have asserted those governments' commitment to eliminating discrimination on the basis of gender identity by insurers.[54] Although there are some differences among the bulletins because they are based on state statutes, the bulletins generally require that insurance carriers:

1. Ensure that transgender individuals have access to medically necessary care to the same degree as other plan enrollees.

2. Remove exclusions that deny or limit coverage based on gender, gender identity, or diagnosis of gender identity disorder or gender dysphoria, including exclusions for services related to gender transition.

3. Provide transgender people with access to internal and external appeals processes to contest denials of coverage.[55]

Both voluntarily and at the behest of state governments, insurers are increasingly offering transgender-inclusive health insurance plans at a reasonable cost and, as discussed above, employers are increasingly offering such plans to their employees. Because conditions such as gender dysphoria are relatively rare, distributed costs are extremely low and the annualized cost of providing insurance coverage for transgender-related care is typically minimal, particularly for medium-sized and larger employers.[56]

50 *See Trans-Inclusive Benefits: Colleges & Universities*, Human Rights Campaign, http://www.hrc.org/resources/entry/transgender-inclusive-benefits-colleges-universities.

51 For a fuller discussion of Medicare coverage for transgender people, *see* National Center for Transgender Equality, Medicare Benefits and Transgender People (August 2011), http://transequality.org/Resources/MedicareBenefitsAndTransPeople_Aug2011_FINAL.pdf.

52 In April 2013, California's Department of Managed Health Care clarified that California's Insurance Non-Discrimination Act of 2006 ordered California's health plans to remove exclusions of coverage based on gender identity and expression. *See* California Health and Human Services Agency, Department of Managed Health Care, Letter No. 12-K, Gender Nondiscrimination Requirements (Apr. 9, 2013), http://transgenderlawcenter.org/wp-content/uploads/2013/04/DMHC-Director-Letter-re-Gender-NonDiscrimination-Requirements.pdf.

53 *CA Bans Insurance Discrimination Against Transgender Patients*, Transgender Law Center (Apr. 9, 2013), http://transgenderlawcenter.org/archives/3920.

54 *See* Vermont Department of Financial Regulation, Division of Insurance, Insurance Bulletin No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (Apr. 22, 2013), http://www.dfr.vermont.gov/sites/default/files/Bulletin_174.pdf. *See also* Oregon Insurance Division Bulletin INS 2012-01, Re: Application of Senate Bill 2 (2007 Legislative Session) to Gender Identity Issues in the Transaction and Regulation of Insurance in Oregon (Dec. 19, 2012), http://www.cbs.state.or.us/ins/bulletins/bulletin2012-01.html; Kellan Baker and Andrew Cray, Center for American Progress, *Why Gender-Identity Nondiscrimination in Insurance Makes Sense,* 3-4 (May 2, 2013), http://www.americanprogress.org/issues/lgbt/report/2013/05/02/62214/why-gender-identity-nondiscrimination-in-insurance-makes-sense/ (discussing state bulletins in CA, CO, OR, VT, and D.C. which clarify that state laws prohibit insurance discrimination against transgender people).

55 Baker & Cray, *supra* at note 54.

56 For more information on estimating the cost to employers of providing transgender-inclusive health insurance coverage to employees, *see Transgender-Inclusive Benefits: Medical Treatment Cost and Utilization*, Human Rights Campaign, http://www.hrc.org/resources/entry/transgender-inclusive-benefits-medical-treatment-cost-and-utilization.

As the insurance landscape evolves, hospitals have an important role in the effort to eliminate insurance-related difficulties faced by transgender patients. Because many obstacles arise from coding systems that provide specific procedures for patients of one sex but not another, hospitals can help facilitate access to health care by adopting the admitting/registration approach discussed in "Policy 3: Admitting/Registration Forms" (*supra* at 7) and ensuring that the name/gender provided to the insurer matches the name/gender on claims submitted on the patient's behalf or bills provided to the patient for reimbursement.

It is also recommended that hospital billing staff receive training in addressing claims rejected because of gender marker mismatches, so that transgender patients need not handle these mistakes by themselves. For example, hospitals should train their staff on the special billing codes created by the Center for Medicare and Medicaid Services ("CMS") to prevent transgender patients from being inappropriately denied coverage when the gender marker on their insurance record is not the gender typically associated with a certain medical treatment. For Part A claims, the special billing code is condition code 45 (Ambiguous Gender Category). When this code is used in conjunction with the standard billing codes for gender-specific procedures, the code alerts Medicare's computer system to ignore any perceived conflict between the patient's gender and the gender associated with the procedure, thereby allowing the claim to be processed. For Part B claims, CMS has instructed institutional providers to use the KX modifier (which is defined as "requirements specified in the medical policy have been met") to alert the system that the medical services are gender-specific and that the claim should be processed regardless of any conflict with the patient's gender marker.[57] A growing number of private insurance companies are now using this as a model to ensure that transgender people receive coverage for gender-specific treatments, regardless of whether they have a male or female gender marker on their insurance record.

CONCLUSION

Hospitals have embraced transgender equity and inclusion – indeed, LGBT equity and inclusion – in their policies and practices for a variety of compelling reasons. First, equitable and inclusive policies and practices ensure compliance with The Joint Commission, Section 1557 of the Affordable Care Act, and (in some areas) state and local law. As a result, they reduce the risk of complaints and litigation – and maximize patient satisfaction, safety, and quality of care. These policies and practices also provide much-needed guidance to hospital staff, who might otherwise run afoul of accreditation and legal requirements or provide suboptimal care.

In addition, transgender, lesbian, gay, and bisexual patients are highly loyal to hospitals that offer them respectful, knowledgeable care; a number of healthcare facilities have benefited from reaching out to these patients, many of whom, even if well-insured, have previously delayed and avoided care for fear of biased treatment. Finally, hospitals that ensure equity and inclusion for transgender patients signal a powerful overall commitment to diversity, and demonstrate that they are at the forefront of best health care policies and practices nationwide.

57 For more information, *see* MEDICARE CLAIMS PROCESSING MANUAL, ch. 32, §240 (2013), http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/clm104c32.pdf (Special Instructions for Services with a Gender/Procedure Conflict); Center for Medicare and Medicaid Services, *Instructions Regarding Processing Claims Rejecting for Gender/Procedure Conflict* (last updated Jan. 3, 2013), http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/MM6638.pdf; National Center for Transgender Equality, *Medicare Benefits and Transgender People* (Aug. 2011), http://transequality.org/Resources/MedicareBenefitsAndTransPeople_Aug2011_FINAL.pdf.

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