CREATING EQUAL ACCESS
TO QUALITY **HEALTH CARE** FOR

TRANSGENDER PATIENTS

TRANSGENDER-AFFIRMING **HOSPITAL POLICIES**

Lambda Legal
making the case for equality

HUMAN RIGHTS CAMPAIGN FOUNDATION

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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, that recommendations for equitable and inclusive care are being followed, and that 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[4] 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.[5]

1. "Transgender" is an umbrella term used to describe people whose gender identity, one's inner sense of being male, female, or something else, 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 shift over time from occupying the social role of one gender to that of another. This term also describes the medical procedures that sometimes accompany that shift. Transition may or may not include taking hormones, having surgeries, or changing identity documents to reflect one's gender identity. For more information, see Lambda Legal, *Transgender Rights Toolkit: Transition-Related Health Care* (last updated 2016), 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 note 43.
2. See Transgender Legal Defense & Education fund *Access to Healthcare*, 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 Prople: Building a Foundation for Better Understanding*, 25-88 (2011), http://www.nationalacademies.org/hmd/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. "Gender-nonconforming" is a term used to describe people who do not meet society's expectations of gender roles.
5. 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 lesbian, gay, bisexual and transgender (LGBT) health survey conducted in 2010 also detailed transgender patients' experiences of discrimination in health care.[6] 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 denied needed health care outright because of their transgender status.[7]

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[8];
- 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.[9]

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, nondiscrimination, room assignments and access to restrooms, hormone therapy and personal items that assist gender presentation–issues that, when mishandled, become barriers to health care for transgender patients. Below each model policy we have included a short explanation of the rationale behind the policy. Following the model policies, we have provided guidance on collecting gender identity data in admitting/registration records, complying with privacy laws and assisting transgender patients in navigating common insurance issues. For reference, a glossary of key terms is included at the end of this publication.

We urge hospital administrators and legal departments to adopt these policies to ensure that their hospitals are offering health care that is nondiscriminatory 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.

6. Lambda Legal, *When Health Care Isn't Caring: Survey On Discrimination Against LGBT People and People Living with HIV*, 5-6 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_transgender-and-gender-nonconforming-people.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.
7. 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 "Insurance Issues," infra at 18-23. 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/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf.
8. The Health Insurance Portability and Accountability Act of 1996, Publ. 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.
9. 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 the D.C. General Hospital's medical malpractice caused Tyra's death and the emergency medical personnel had violated the D.C. Human

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 NONDISCRIMINATION POLICY

We recommend that hospitals include the following language in their patient nondiscrimination policy:

POLICY:

[Hospital] does not discriminate against any person on the basis of gender identity or gender expression.[10]

Further, we recommend that hospitals communicate this nondiscrimination 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;
- Include it in periodic trainings for employees.

EXPLANATION

Nondiscrimination 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. Section 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,[11] and in May 2016, the U.S. Department of Health & Human Services (HHS), Office for Civil Rights (OCR), issued regulations explaining that this prohibition extends to claims of discrimination based on gender identity and sex stereotyping.[12]

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 note 5, 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).

10. "Gender identity" is an individual's inner sense of being male, female, or another gender. Gender identity is not necessarily the same as sex assigned or presumed at birth. Everyone has a gender identity. "Gender expression" refers to the way a person expresses gender through dress, grooming habits, mannerisms and other characteristics.
11. 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 . . . .").
12. Department of Health and Human Services, Office of the Secretary, 45 CFR Part 92, RIN 0945-AA02, *Nondiscrimination in Health Programs and Activities*, May 18, 2016, http://federalregister.gov/a/2016-11458.

Over the past two decades, courts and regulatory agencies have recognized repeatedly that federal laws prohibiting sex discrimination, including Title VII, Title IX and the Equal Protection Clause, prohibit discrimination against transgender people whether based on sex stereotypes, gender identity, or gender transition.[13] Given this history of case law and the new federal regulations implementing §1557, it is expected that federal courts will find that the Affordable Care Act prohibits discrimination against transgender and gender-nonconforming individuals. Indeed, in March 2015, a federal district court in Minnesota became the first in the United States to hold that §1557 protects transgender patients who allege discrimination based on gender identity. In that case, a transgender man sued a hospital for sex discrimination under §1557, alleging, among other things, that a hospital clerk had given him a wristband labeled with an "F" even though he told the clerk that he identified as male and that a hospital doctor asked him questions about his sexual activity in a hostile manner and examined his genitals in an aggressive and painful way despite his repeated requests to stop the exam.[14]

Nondiscrimination policies are also 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."[15] The Joint Commission's LGBT Field Guide advises hospitals to post, disseminate and publicize this nondiscrimination policy on the hospital's website, in written material and in packets of information distributed to patients and employees.[16]

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.[17] 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.[18]

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:***
> *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.*

13. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (Equal Protection Clause); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-06 (D.D.C. 2008) (Title VII); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (Title VII and Equal Protection Clause); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (Equal Credit Opportunity Act); *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997) (Title IX); *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015) (Title VII); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012) (same).
14. See *Rumble v. Fairview Health Services*, No. 14 Civ. 2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).
15. See The Joint Commision, *Requirement, Rationale, Reference Report* (Feb. 9, 2011), http://www.jointcommission.org/assets/1/18/r3%20report%20issue%201%2020111.pdf.
16. 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*, 7 (Nov. 8, 2011), http://www.jointcommission.org/lgbt/.
17. As of May 2014, eighteen 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 Transgender Law & Pol'y Inst., *U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression* (last updated Feb. 1, 2012), http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions; Nat'l Gay & Lesbian Task Force, *Nondiscrimination Laws Map* (last updated May 21, 2014), http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_color_new.pdf; Lambda Legal, *States and Regions Map*, http://www.lambdalegal.org/states-regions.
18. See New York City Commission on Human Rights, Legal Enforcement

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 Nondiscrimination 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.[19]

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.[20] 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.

Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); NYC Admin. Code §8-102(23), 3 (Dec. 21, 2015), http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis_English.pdf.

19. Note also that courts have held that transgender people have a particularly compelling privacy interest in preserving the confidentiality of their transgender status. See, e.g., *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."); *Love v. Johnson*, No. 15-11834, 2015 WL 7190471 (E.D. Mich. Nov. 16, 2015) (finding that disclosure of confidential information about a person's transgender status creates a risk of embarrassment and physical harm and that transgender people have a fundamental right of privacy that protects them from being required to disclose their transgender status); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388 (JAD) (PAL), 2016 WL 123320, at *3 (D. Nev. Jan. 11, 2016) (observing that medical evidence of a transgender person's transition is "extremely private information" and denying employer's motion to compel production of such medical records).

20. See, e.g., Mass. Gen. Laws ch. 111, §70E (2016) ("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 (2016) ("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) (2016) ("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) (2015) ("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) (2015) ("Those not directly

POLICY 3

ACCESS TO HORMONE THERAPY

PURPOSE:

To ensure that hormone therapy will be provided for transgender patients in a manner consistent with the prevailing standard of care.

POLICY:

Transgender patients that have been receiving hormone therapy prior to admission should have that therapy continued without interruption pending evaluation by a specialist absent urgent medical reasons to the contrary.

Health care providers unfamiliar with this aspect of care will consult with providers who have this expertise as well as with the patient's prescribing physician if possible.

EXPLANATION

The use of estrogens in individuals assigned male at birth and androgens in individuals assigned female at birth to induce and maintain the physical and psychological characteristics of the sex that matches the individual's gender identity can be a critical and effective treatment for gender dysphoria.[21] Not all transgender people require hormone therapy, but if a transgender patient is admitted to a hospital and is currently taking hormones, that treatment should not stop unless there is a medical indication to do so. Abruptly stopping hormone therapy may result in negative physical and psychological consequences.[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 transgender patients present for health care, they will be addressed and referred to on the basis of their self-identified gender, using their pronouns and name in use, 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.

involved in [the patient's] care must have the permission of the patient to be present."); OKLA. Admin. Code §752:15-13-3(b)(5) (2016) ("Those not directly involved in the patient's care must have the permission of the patient to be present.").

21. See University of California, San Francisco, Center of Excellence for Transgender Health, Hormone Administration, http://www.transhealth.ucsf.edu/trans?page=protocol-hormones. See also Brief of Amici Curiae Medical and Mental Health Professionals: American Medical Association, et al. in Support of Appellees at 1, *Fields v. Smith*, Nos. 10-2339, 10-2466, 653 F.3d 550 (7th Cir. 2011), http://www.lambdalegal.org/in-court/legal-docs/fields_wi_20101009_amicus-brief-mental-health-professionals (noting that, based on medical research, the American Medical Association has found that hormone therapy is a medically necessary and effective therapeutic treatment for many people diagnosed with gender dysphoria).
22. See Brief of Amici Curiae Medical and Mental Health Professionals, supra note 21, at 9-11 (describing the significant physical and mental distress that can result from depriving a transgender individual of prescribed hormone therapy); see also *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011) (finding that "[w]hen hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise," including "muscle wasting, high blood pressure, . . . neurological complications," and a resurfacing of the patient's gender "dysphoria and associated psychological symptoms . . . in more acute form").

PROCEDURE:

A transgender patient's pronouns 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 pronouns 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 pronouns the patient uses.*

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

Refusing to refer to a transgender person by the person's pronouns and name in use,[23] or asking inappropriate questions about genitalia or surgical status in an effort to determine the person's "true" gender, is a form of harassment.[24] Such behavior violates a transgender patient's rights to privacy and dignity.[25] 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

23. "Name in use" refers to the name by which a person wants to and should be addressed, even though it may differ from the name appearing on the person's legal identity documents or the name assigned to the person at birth.
24. See *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015) (finding that misgendering a transgender woman by repeatedly referring to her by her former male name and male pronouns constituted actionable harassment under Title VII of the Civil Rights Act of 1964).
25. In *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999), a federal court held that transgender individuals possess a constitutional right to maintain medical confidentiality, and found that a prison official who gratuitously disclosed medical information relating to an inmate's transgender status had violated the transgender inmate's constitutional right to privacy. See also *Love v. Johnson*, No. 15-11834, 2015 WL 7190471 (E.D. Mich. Nov. 16, 2015); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388 (JAD) (PAL), 2016 WL 123320, at *3 (D. Nev. Jan. 11, 2016).

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.[26]

Note also that information about a patient's transgender status or transition-related services that can identify a patient or can be used with other available information to identify a patient constitutes protected health information under HIPAA. As a result, inappropriate disclosure of this information may be a violation of the Privacy Rule[27] and, other than in the context of providing treatment services (and limited other situations), is subject to the "minimum necessary" standard described in "Compliance with Privacy Laws" (infra at 16).

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, female, or something else, 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.*

26. In *Love v. Johnson*, No. 15-11834, 2015 WL 7180471 (E.D. Mich. Nov. 16, 2015), the court recognized that requiring transgender people to "disclose their transgender status . . . directly implicates their fundamental right of privacy." The court found that, particularly because transgender people face a risk of physical harm and hostility when their transgender status is disclosed, the Constitution protects their right to maintain the confidentiality of their transgender status.

27. 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 media. 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.

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 nondiscrimination 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

Gender-affirming room assignments are a crucial step toward breaking down barriers that have hindered transgender people's access to health care. 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. Transgender patients might delay or avoid seeking medical services entirely where they are not provided a safe and appropriate room assignment.

Section 92.206 of the federal regulations implementing §1557 of the Affordable Care Act requires covered entities to provide individuals equal access to their health programs or activities without discrimination on the basis of sex.[28] As explained by OCR when proposing these regulations, §92.206 applies to all health programs and activities and is intended to ensure that covered entities treat individuals consistent with their gender identity.[29] Furthermore, this provision is intended to prohibit, among other forms of adverse treatment, the denial of access to facilities administered by the covered entity.[30]

Courts have found that §1557 protects transgender patients who allege discrimination based on gender identity,[31] and OCR has already begun to investigate such allegations in the context of room assignments for transgender patients. When a transgender patient filed a complaint against The Brooklyn Hospital Center alleging discrimination on the basis of sex in the assignment of patient rooms, OCR began an investigation under §1557. The case was ultimately resolved in July 2015 through a settlement agreement in which The Brooklyn Hospital Center agreed to 1) revise its admissions policy to ensure that transgender and gender-nonconforming patients would be provided equal access to and equal opportunity to participate in all programs, benefits and services offered by the hospital and 2) revise its room placement policy to ensure the nondiscriminatory assignment of rooms for transgender patients.[32]

The model policy proposed above 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. Hospitals that are committed to optimal patient care will recognize the privacy and dignity of a person's self-identified gender and provide for the handling of complaints by staff trained in diverse cultural competencies.

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

28. See supra note 12.
29. HHS, *Nondiscrimination in Health Programs and Activities; Proposed Rule,* Federal Register Vol. 80, No. 173 (Sept. 8, 2015) at 54188, https://www.gpo.gov/fdsys/pkg/FR-2015-09-08/pdf/2015-22043.pdf.
30. Id.
31. See, e.g., *Rumble v. Fairview Health Services*, No. 14 Civ. 2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).
32. HHS OCR Bulletin, *The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients* (July 14, 2015), http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf. A copy of the Voluntary Resolution Agreement between HHS OCR and The Brooklyn Hospital Center is available at http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf.

sense of being male, female, or something else, 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. 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.[33]

Section 92.206 of the federal regulations implementing §1557 of the Affordable Care Act requires covered entities to provide individuals equal access to their health programs or activities without discrimination on the basis of sex.[34] As explained by OCR when proposing these regulations, §92.206 applies to all health programs and activities and is intended to ensure that covered entities treat individuals consistent with their gender identity.[35] Furthermore, this provision is intended to prohibit, among other forms of adverse treatment, the denial of access to facilities administered by the covered entity.[36]

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.[37] In some localities, discrimination related to restroom usage is expressly prohibited by law.[38]

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 nondiscriminatory bathroom access policy which allows not only patients but also hospital employees and visitors to access restrooms in accordance with their gender identity.

POLICY 7

ACCESS TO PERSONAL ITEMS THAT ASSIST GENDER PRESENTATION

PURPOSE:

To ensure that transgender and gender-nonconforming patients have access to personal items that facilitate gender expression to the same extent that other patients have access to these items, regardless of gender.

POLICY:

Transgender and gender-nonconforming patients may have access to personal items that facilitate gender expression (e.g. clothing, makeup) to the same extent that other patients have access to these items, regardless of gender. In addition, transgender and gender-nonconforming patients may also have access to other personal items that assist in their gender presentation, such as those used in binding, padding and tucking.

33. 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), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf (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).
34. See supra note 12.
35. HSS, *Nondiscrimination in Health Programs and Activities; Proposed Rule*, Federal Register Vol. 80, No. 173 (Sept. 8, 2015) at 54188, https://www.federalregister.gov/articles/2015/09/08/2015-22043/nondiscrimination-in-health-programs-and-activities.
36. Id.
37. For more information, see Lambda Legal, *Transgender Rights Toolkit: Equal Access to Public Restrooms* (Feb. 1, 2011), http://lambdalegal.org/publications/trt_equal-access-to-public-restrooms.
38. For more information, see Transgender Law & Pol'y Inst., supra note 17.

Harassment of transgender and gender-nonconforming patients for using these items to assist in their gender presentation 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, female, or something else, 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 are able to present themselves in a manner consistent with their gender identity. The medical community recognizes that this is essential to the health and well-being of transgender people.[39]

This policy is not intended to circumvent existing hospital policies that limit patients' access to certain personal items where such items could hinder treatment or jeopardize patient safety, nor does this policy contemplate that hospitals will purchase or supply personal items to transgender or gender-nonconforming patients that are not otherwise purchased and supplied to other patients.

POLICY GUIDANCE

Admitting/Registration Records–Collection of Gender Identity Data

An important first step toward respecting transgender patients' dignity and creating a transgender-inclusive environment is to affirm their gender identity by addressing transgender patients by their pronouns and name in use. Failure to identify a transgender patient by the patient's pronouns and name in use in a medical setting has been shown to negatively affect satisfaction and quality of care for transgender patients.[40] 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.[41]

In addition to collecting patients' pronouns and names in use to ensure that patients are addressed in a respectful manner, a number of healthcare authorities including the Institute of Medicine and The Joint Commission have recommended that gender identity data be routinely collected in healthcare settings.[42] From a clinical standpoint, collecting this data is essential to providing high-quality care to transgender patients.

39. 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/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf (discussing "social transition," i.e. changes in gender expression and role, which may involve living part time or full time in another gender role consistent with one's gender identity, as a treatment option for gender dysphoria). See also Brief of Amici Curiae Maine Chapter of Am. Acad. of Pediatrics et al. in Support of Appellants, *Doe v. Clenchy*, No. PEN-12-582 (Me.), 2013 WL 8349676, at *8-13 (May 1, 2013) ("Because gender identity is fundamental to a person's identity, being unable to live consistently with one's gender identity generally causes intense emotional suffering and distress . . . .").
40. Madeline B. Deutsch, et al., *Electronic Medical Records and the Transgender Patient: Recommendations from the World Professional Association for Transgender Health EMR Working Group*, J. Am. Inform. Assoc., 0:1-4 (Apr. 30, 2013); see also Madeline B. Deutsch & David Buchholz, *Electronic Health Records and Transgender Patients—Practical Recommendations for the Collection of Gender Identity Data*, J. Gen. Intern. Med. 30(6):843-847 (Jan. 6, 2015).
41. Madeline B. Deutsch, et al., *Electronic Medical Records and the Transgender Patient: Recommendations from the World Professional Association for Transgender Health EMR Working Group*, J. Am. Inform. Assoc., 0:1-4 (Apr. 30, 2013).
42. The Inst. of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*, 9, 302-303 (2011), http://www.nationalacademies.org/hmd/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx ("Data on . . . gender identity should be collected in electronic health records . . . with adequate privacy and security protection . . . [to] assist in identifying and addressing LGBT health disparities.") See also 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*, 25-30 (Nov. 8, 2011), http://www.jointcommission.org/lgbt/.

Data collection will also help us better understand and address the health disparities that transgender people face.

Hospital admitting/registration procedures should enable transgender patients to designate their gender identity and name in use 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.[43] Furthermore, not all transgender people update their name and gender marker on insurance records out of concern that the insurance company will consider insurance coverage for certain procedures to be "gender-specific."[44] HHS has addressed these barriers in adopting §92.207 of the federal regulations implementing §1557 of the Affordable Care Act. Section 92.207 states that a "covered entity shall not, in providing or administering health-related insurance or other health-related coverage . . . deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available."[45] In sum, hospitals should respect a transgender patient by using the patient's pronouns and name in use, regardless of whether the patient's identity documents or insurance cards are updated.

We recommend that hospitals and health systems adopt the following procedures when recording gender and name designations in the admitting/registration process[46]:

A. *Recording Gender in Admitting/Registration Records.* Current best practices call for collecting both the patient's current gender identity as well as the patient's sex assigned at birth. This "two-step" process is recommended because not every transgender person will identify as "transgender." However, a patient whose current gender identity does not match the patient's sex assigned at birth should be flagged as transgender in the admitting/registration record because this information can be important knowledge informing a provider to offer preventive screenings appropriate to that patient's anatomy.

Intake forms (paper or electronic) should utilize the two-step method for collecting gender information by asking the following questions:

1. What is your current gender identity?
   - ☐ Male
   - ☐ Female

43. 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 Lambda Legal, *Changing Birth Certificate Sex Designations: State-By-State Guidelines* (last updated Feb. 3, 2015), http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations. See also Lambda Legal, *FAQ About Identity Documents* (last visited Apr. 2, 2016), http://www.lambdalegal.org/know-your-rights/transgender/identity-document-faq.
44. See Lambda Legal, *Overcoming Health Care Discrimination*, 3 (last updated 2016), http://www.lambdalegal.org/sites/default/files/2016_overcoming-health-care-discrimination-fs-v6-single-withbleed.pdf. Note however that HHS, the Department of Labor (DOL), and the Treasury Department have recently clarified that insurance companies cannot limit sex-specific preventive services based on an individual's sex assigned at birth, gender identity, or recorded gender. HHS, DOL, and Treasury Department, *FAQS About Affordable Care Act Implementation* (Part XXVI), 6 (May 11, 2015), http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/aca_implementation_faqs26.pdf ("When an attending provider determines that a recommended preventive service is medically appropriate for the individual—such as, for example, providing a mammogram or pap smear for a transgender man who has residual breast tissue or an intact cervix—and the individual otherwise satisfies the criteria in the relevant recommendation or guideline . . . the plan or issuer must provide coverage for the recommended preventive service, without cost sharing, regardless of the sex assigned at birth, gender identity, or gender of the individual otherwise recorded by the plan or issuer.").
45. See supra note 12.
46. See The Fenway Institute, *Do Ask, Do Tell: A Toolkit for Collecting Data on Sexual Orientation and Gender Identity in Clinical Settings* (last visited Apr. 18, 2016), http://doaskdotell.org.

- ☐ Female-to-male (FTM)/Transgender Male/ Trans Man
- ☐ Male-to-Female (MTF)/Transgender Female/ Trans Woman
- ☐ Genderqueer, neither exclusively male nor female
- ☐ Additional Gender Category/(or Other), please specify: _____
- ☐ Decline to answer

2. What sex were you assigned at birth on your original birth certificate? (Check one)
   - ☐ Male
   - ☐ Female
   - ☐ Decline to answer

B. *Recording Gender Marker Affiliated with Patient's Insurance Record in Admitting/Registration Records.* Hospitals should also include a field that captures the patient's gender for insurance billing purposes.[47] To obtain this information, the admitting/registration personnel should ask the patient what gender marker is indicated on the patient's insurance records. However, it is the patient's current gender identity (in answer to Question 1 in the section above) that should be used to populate the "gender" field on patient identification materials and in making room assignments.

C. *Recording Name and Pronouns in Admitting/Registration Records.* In addition to the "Legal Name" field, admitting/registration forms should include an optional field for a patient's "Name in Use." The hospital can use an existing "nickname," "alias" or similar field to record the patient's name in use and an optional field to record patient's pronouns.[48] We recommend that hospital staff ask all patients for their name in use, as many non-transgender patients are also likely to use a nickname. Patients should also be asked about their pronouns and those pronouns should be entered into the designated field.

The system should be configured to notify providers and staff if the patient's name in use and/or pronouns differ from the patient's 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 pronouns and name in use.

Because the risk of medical or billing errors may increase where a patient is being identified in admitting/registration records by two different names (both the legal name and name in use), hospitals must take precautions to avoid misidentifying patients. These precautions include using a date of birth and patient identification number and/or barcode to identify unique patients rather than relying solely on the patient's name.

D. *Training.* Staff should be provided with training on how to collect gender identity data in a sensitive manner as well as how it should be recorded in the hospital's electronic health records. Staff should also be trained on how to collect and use this data while also protecting the patient's confidentiality and privacy.[49]

Technology and best practices regarding patient admitting/registration records are rapidly evolving. While many leading health care institutions, including UC Davis Medical Center, the Mayo Clinic, Kaiser Permanente and Beth Israel Deaconess have moved toward collecting sexual orientation and gender identity (SO/GI) data in their electronic health record (EHR) systems, this collection is neither standardized nor nationally mandated.[50] Recently, HHS took a landmark

47. For more information, see "Insurance Issues," infra at 18-23.
48. For more information on how to implement the recording of a patient's gender identity, name in use, and pronouns on electronic health records, see Madeline B. Deutsch & David Buchholz, *Electronic Health Records and Transgender Patients—Practical Recommendations for the Collection of Gender Identity Data*, J. Gen. Intern. Med. 30(6):843-847 (Jan. 6, 2015).
49. See The Fenway Institute, *Do Ask, Do Tell: A Toolkit for Collecting Data on Sexual Orientation and Gender Identity in Clinical Settings* (last visited Apr. 18, 2016), http://doaskdotell.org/ehr/toolkit/stafftraining/.
50. See Cameron Donald & Jesse M. Ehrenfeld, *The Opportunity for Medical Systems to Reduce Health Disparities Among Lesbian, Gay, Bisexual, Transgender and Intersex Patients*, J. Med. Syst. 19:178 (2015). Note, however, that the U.S. Department of Health and Human Services Health Resources and Services Administration (HRSA) announced in March 2016 that certain Health Center Program grantees will be required to report sexual orientation and gender identity data to the HRSA's Uniform Data System. See HRSA, PAL 2016-02, *Program Assistance Letter: Approved Uniform Data System Changes for Calendar Year 2016* (Mar. 22, 2016), http://bphc.hrsa.gov/datareporting/pdf/pal201602.pdf.

step in addressing disparities affecting LGBT people in health care by including SO/GI data in its EHR requirements certified under the Meaningful Use program. The new final rules, from the Centers for Medicare and Medicaid Services (CMS) and the Office of the National Coordinator of Health Information Technology (ONC), require all EHR systems certified under Stage 3 of Meaningful Use to allow users to record, change and access structured data on sexual orientation and gender identity. This requirement is part of the 2015 Edition "demographics" certification criterion and adds SO/GI data to the 2015 Edition Base EHR definition, which is a part of the definition of Certified EHR Technology.[51] The new requirements are currently slated to take effect in 2018. While the ONC rule applies to vendors who are building certified EHR systems and health institutions and practices that are using these systems as part of their participation in the Meaningful Use program, the ONC rule does not actually require providers to collect SO/GI information.[52]

In addition to the procedures for collecting gender identity data outlined above, we strongly encourage hospitals and health systems to incorporate SO/GI data into their EHR systems.

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.[53] In addition to the protections of HIPAA, a number of courts have recognized the importance of the right to medical privacy for transgender people.[54] 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.[55] 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 information would be considered protected health information, for example, when it can identify the patient or can be coupled with other available information, such as a name, photograph, or other medical history, 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

51. CMS, Medicare and Medicaid Programs; *Electronic Health Record Incentive Program-State 3 and Modifications to Meaningful Use in 2015 Through 2017*, Federal Register Vol. 80, No. 200 (Oct. 16, 2015) at 62761, https://www.gpo.gov/fdsys/pkg/FR-2015-10-16/pdf/2015-25595.pdf.
52. Id.
53. See supra note 27.
54. See, e.g., *Powell v. Schriver*, 175 F.3d 107 (2d Cir.1999) (holding that "individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality"). See also *Love v. Johnson*, No. 15-11834, 2015 WL 7190471 (E.D. Mich. Nov. 16, 2015) (transgender people have a fundamental right of privacy that protects them from being required to disclosure their transgender status); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388 (JAD) (PAL), 2016 WL 123320, at *3 (D. Nev. Jan. 11, 2016).
55. 45 C.F.R. §164.530(i).

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.[56]

C. *Privacy Training Programs.* The Privacy Rule requires that hospitals and other covered entities provide training to physicians, employees and contractors to ensure compliance.[57] 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.[58] 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.

E. *Breach.* Regulations implementing the Health Information Technology for Economic and Clinical Health (HI-TECH) Act[59] require hospitals and other covered entities to provide notification to an individual following a breach of that individual's unsecured protected health information.[60] Generally, a 'breach' occurs when there is an impermissible use or disclosure of protected health information that compromises the security or privacy of the protected health information. An impermissible use or disclosure of protected health information is presumed to be a breach unless the hospital or other covered entity demonstrates that there is a low probability that the protected health information has been compromised.[61] 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.

56. 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.
57. 45 C.F.R. §164.530(b).
58. 45 C.F.R. §164.530(c).
59. The HI-TECH Act was enacted as part of the American Recovery and Reinvestment Act of 2009 to strengthen the privacy and security protections for health information established under HIPAA.
60. 45 C.F.R. §164.404.
61. 45 C.F.R. §164.402.

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.[62] 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 its compliance with such policies and procedures.[63] A covered entity must document all complaints received and their disposition, if any.[64] 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.

Insurance Issues

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.

Exclusions and Denials of Insurance Coverage for Medically Necessary Care for Transgender Patients

Leading authorities in the medical and policy communities,[65] including the American Medical Association and American Psychiatric Association, have recognized the medical necessity of sex reassignment surgery (SRS)[66] and hormone therapy for patients with "gender dysphoria" (formerly classified as "gender identity disorder").[67] As a result, an increasing

62. 45 C.F.R. §164.530(e).
63. 45 C.F.R. §164.530(d)(1).
64. 45 C.F.R. §164.530(d)(2).
65. For a full compilation of professional organizations' statements in support of access to care for transgender patients, see Lambda Legal, *Professional Organization Statements Supporting Transgender People in Health Care* (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), https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-transgender-gender-variant-access-care.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."); Am. Psychiatric Ass'n, Council of Representatives, Transgender, Gender Identity, & Gender Expression Non-Discrimination (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 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.tgender.net/taw/ama_resolutions.pdf ("Resolved, That the AMA support public and private health insurance coverage for treatment of gender identity disorder . . . ."). 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.
66. Note that this may also be termed "Gender Reassignment Surgery" and abbreviated GRS. Gender-affirming surgeries include a variety of surgical procedures that may be a part of a person's gender transition.
67. 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 American Psychiatric Association, Gender Dysphoria (2013), http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf.

number of insurance companies are now providing coverage to transgender patients for transition-related treatment.[68]

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.[69] 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.[70]

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.[71] Denials of coverage, along with other barriers 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.[72] But studies also show that with proper medical intervention and treatments, depression and suicidal ideation among transgender patients decrease significantly.[73] In fact, a recent study found that not only is insurance coverage for the transgender population medically necessary and morally imperative, it is affordable and cost-effective.[74]

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.[75]

68. 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 Transexual Clients: Selected Legal Issues* (Oct. 2003), http://www.transgenderlaw.org/resources/translaw.htm#_ftnref49.
69. 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.").
70. See The World Professional Association for Transgender Health, *Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People* 5 (7th ed.), http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.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.
71. See State of California, Department of Insurance, supra note 3.
72. See Laura Rena Murray, *The High Price of Looking Like a Woman, NY 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).
73. 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).
74. See William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, *J. Gen. Intern. Med.* 31(4): 394-401 (2015).
75. Transgender Law Center, *Recommendations for Transgender Health Care*, http://www.transgenderlaw.org/resources/tlchealth.htm#_ftnref2.

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.

Federal Anti-Discrimination Requirements Concerning Insurance Coverage for Transgender Patients

On the federal level, Section 1557 of the Affordable Care Act prohibits discrimination by insurance carriers against transgender individuals including the denial of coverage for a treatment simply because it is related to the patient's gender identity.[76] In practice, while the implementing regulations do not require insurers to cover any specific treatment, including transition-related services, insurers will be in direct violation of the rule if they continue to implement blanket denial policies for transition related care, or if they refuse to cover a particular health service for a transgender person if that service is provided to treat other conditions.

State Anti-Discrimination Requirements Concerning Insurance Coverage for Transgender Patients

Many State governments have taken steps to eliminate transgender-related discrimination in health insurance coverage. Ten states–California,[77] Colorado,[78] Connecticut,[79] Illinois,[80] Massachusetts,[81] New York,[82] Oregon,[83] Pennsylvania,[84]

76. See supra note 12.
77. 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.
78. See Colorado Department of Regulatory Agencies, Division of Insurance, Bulletin No. B-4.49, *Insurance Unfair Practices Act Prohibition on Discrimination Based Upon Sexual Orientation* (Mar. 18, 2013), http://www.one-colorado.org/wp-content/uploads/2013/03/B-4.49.pdf.
79. See Connecticut Insurance Department, Bulletin IC-37 (Dec. 19, 2013), http://www.ct.gov/cid/lib/cid/Bulletin_IC-37_Gender_Identity_Nondiscrimination_Requirements.pdf.
80. See Illinois Department of Insurance, Company Bulletin 2014-10, *Healthcare for Transgender Individuals* (July 28, 2014), http://insurance.illinois.gov/cb/2014/CB2014-10.pdf.
81. See Commonwealth of Massachusetts, Office of Consumer Affairs and Business Regulation, Division of Insurance, Bulletin 2014-03, *Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services* (June 20, 2014), http://www.mass.gov/ocabr/docs/doi/legal-hearings/bulletin-201403.pdf.
82. See New York State Department of Financial Services, Insurance Circular Letter No. 7 (2014), *Health Insurance Coverage for the Treatment of Gender Dysphoria* (Dec. 11, 2014), http://www.transgenderlegal.org/media/uploads/doc_597.pdf.
83. See Oregon Department of Consumer and Business Services, Insurance Division, Bulletin Ins 2012-1, *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.oregon.gov/DCBS/insurance/legal/bulletins/Documents/bulletin2012-01.pdf.
84. See Pennsylvania Insurance Department, Office of Insurance Product Regulation, 46 Pa.B. 2251, *Notice Regarding Nondiscrimination*; Notice 2016-05

Vermont,[85] Washington[86]–and the District of Columbia[87] have affirmatively stated that their laws prohibiting discrimination in health insurance apply with respect to transgender people and require insurance companies to provide equal access to transgender insureds.[88] Although the states' requirements vary, they all 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.[86]

Medicare covers medically necessary hormone therapy and sex reassignment, as well as routine preventive care, regardless of gender markers.[90] Additionally, many of the states that require that private insurers provide transgender health coverage, including Colorado,[91] New York[92] and Oregon,[93] also now require that their Medicaid programs cover transition related care and services. For example, New York enacted regulations effective March 11, 2015 outlining the specific requirements, under both New York State fee-for-service Medicaid and Medicaid Managed Care, for coverage of medically necessary hormone therapy and gender reassignment surgery for individuals with a diagnosis of gender dysphoria.[94]

Transgender-Inclusive Health Coverage by Private and Public Insurers

Both voluntarily and at the behest of state and federal regulators, both private and public health insurers are increasingly offering transgender-inclusive health insurance plans at a reasonable cost and employers are increasingly offering such plans to their employees. Because conditions such as gender

(Apr. 30, 2016), http://www.pabulletin.com/secure/data/vol46/46-18/762.html. See also Pennsylvania Pressroom, *Governor Wolf Applauds PA Insurance Commissioner for Issuing Non-Discrimination Guidance to Insurers, Prohibiting Discrimination on Basis of Sex, Sexual Orientation, and Gender Identity* (Apr. 27, 2016), http://www.media.pa.gov/Pages/Insurance-Details.aspx?news-id=172.

85. 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://translaw.wpengine.com/wp-content/uploads/2013/04/Bulletin_174.pdf.
86. See Washington Officer of Insurance Commissioner Letter (June 25, 2014), http://translaw.wpengine.com/wp-content/uploads/2014/06/FINAL-gender-identity-discrimination-letter-to-carriers.pdf.
87. See District of Columbia Department of Insurance, Securities and Banking, *Bulletin 13-IB-01-30/15, Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression* (Feb. 27, 2014), http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-Prohibition-DiscriminationBasedonGenderIdentityorExpressionv022714.pdf.
88. See Trans Health Care, *List of U.S. States That Have Banned Anti-Transgender Discrimination in Health Insurance* (last updated Feb. 9, 2015), http://www.transhealthcare.org/states-that-have-banned-anti-transgender-discrimination-in-health-insurance/.
89. Kellan Baker & 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).
90. For a fuller discussion of Medicare coverage for transgender people, see National Center for Transgender Equality, *Medicare Benefits and Transgender People* (May 2014), http://www.transequality.org/sites/default/files/docs/kyr/MedicareAndTransPeople.pdf.
91. Colorado Department of Health Care Policy & Financing, *Transgender Services Benefit Coverage Standard* (Nov. 2, 2015), https://www.colorado.gov/pacific/sites/default/files/Benefits%20Collaborative%20Transgender%20Services%20Benefit%20Coverage%20Standard%20November%209,%202015.pdf.
92. See 18 NYCRR 505.2(l).
93. See Basic Rights Oregon, *Oregon Health Plan Coverage of Gender Dysphoria*, http://www.basicrights.org/wp-content/uploads/2015/09/OHP_FAQ_For_Individuals_Nov_2015.pdf.
94. 18 NYCRR 505.2(l).

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.[95]

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.[96] Over 200 of the nation's largest employers now offer transgender-inclusive employee health coverage,[97] and CalPERS, the massive State of California retirement benefits administrator, now offers transgender-inclusive coverage to 1.3 million employees and their dependents.[98] As of January 1, 2016, federal employees' health insurers must cover medically necessary procedures and treatments for transgender employees.[99] In addition, a number of states and localities–including California; Connecticut; Maryland; Massachusetts; New York; Oregon; Washington; the District of Columbia; San Francisco; Seattle; Minneapolis; Portland, Oregon; and Multnomah County, Oregon[100]–have removed transgender coverage exclusions from their employee health policies, as have a number of colleges and universities.[101] Hospitals are strongly urged to provide transgender-inclusive coverage in health plans offered to employees and their families.

The Role of Hospitals in Helping Transgender Patients Overcome Insurance-Related Barriers to Health Care

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 "Admitting/Registration Records–Collection of Gender Identity Data" (supra at 13) 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

95. For more information on estimating the cost to employers of providing transgender-inclusive health insurance coverage to employees, see Human Rights Campaign, *Transgender-Inclusive Benefits: Medical Treatment Cost and Utilization*, http://www.hrc.org/resources/entry/transgender-inclusive-benefits-medical-treatment-cost-and-utilization.
96. See Human Rights Campaign, *Finding Insurance for Transgender-Related Healthcare*, 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).
97. See Human Rights Campaign, *Corporate Equality Index: List of Businesses with Transgender-Inclusive Health Coverage*, http://www.hrc.org/resources/entry/corporate-equality-index-list-of-businesses-with-transgender-inclusive-heal.
98. See Human Rights Campaign, *CalPERS Makes History: Board Approves Trans-Inclusive Health Coverage* (June 21, 2013), http://www.hrc.org/blog/entry/calpers-makes-history-board-approves-trans-inclusive-health-coverage.
99. See U.S. Office of Personnel Management, *Healthcare and Insurance FEHB Program Carrier Letter, Letter No. 2015-12* (June 23, 2015), http://www.transequality.org/sites/default/files/images/blog/FEHB%20CL%202015-12%20Covered%20Benefits%20for%20Gender%20Transition%20Services.pdf.
100. See Lambda Legal, *Transgender Rights Toolkit: Overcoming Health Care Discrimination*, http://www.lambdalegal.org/publications/trt_overcoming-health-care-discrimination.
101. See Campus Pride, *Colleges and Universities that Cover Transition-Related Medical Expenses Under Student Health Insurance* (last visited Apr. 18, 2016), https://www.campuspride.org/tpc/student-health-insurance/ (listing "71 colleges and universities that cover hormones and gender reassignment/confirmation surgeries for students").

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.[102] 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 §1557 of the Affordable Care Act, The Joint Commission 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.

GLOSSARY

Gender-affirming surgery—a general term for a variety of surgical procedures that may be a part of a person's gender transition; sometimes referred to as "sex reassignment surgery" or "gender reassignment surgery."

Gender dysphoria—a clinical psychiatric diagnosis, first listed in the 5th edition of the *Diagnostic and Statistical Manual of Mental Disorders*, that describes an intense, continuous distress resulting from an individual's sense of the inappropriateness of their assigned sex at birth; previously known as "gender identity disorder."

Gender expression—the way a person expresses gender through dress, grooming habits, mannerisms and other characteristics.

Gender identity—an individual's inner sense of being male, female, or another gender. Gender identity is not necessarily the same as sex assigned or presumed at birth. Everyone has a gender identity.

Gender-nonconforming—a term used to describe people who do not meet society's expectations of gender roles.

102. 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); CMS, *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.

Genderqueer—a term used by people who identify their gender as being somewhere on the continuum between, or outside of, the binary gender system; genderqueer people may or may not also identify as transgender.

Name in use—the name by which a person wants to and should be addressed, even though it may differ from the name appearing on the person's legal identity documents or the name assigned to the person at birth.

Transgender—an umbrella term used to describe people whose gender identity, one's inner sense of being male, female, or something else, differs from their assigned or presumed sex at birth.

Trans man—an identity label sometimes adopted by female-to-male transgender people to signify that they are men while still affirming their gender history.

Transition—a shift over time from occupying the social role of one gender to that of another. This term also describes the medical procedures that sometimes accompany that shift. Transition may or may not include taking hormones, having surgeries, or changing identity documents to reflect one's gender identity.

Trans woman—an identity label sometimes adopted by male-to-female transgender people to signify that they are women while still affirming their gender history.

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RESOURCES

Lambda Legal
making the case for equality
www.lambdalegal.org/know-your-rights/transgender

HUMAN RIGHTS CAMPAIGN FOUNDATION
www.hrc.org/hei