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UNDER ATTACK: TRANSGENDER HEALTH IN 2020

PAULA M. NEIRA* & AN NA LEE**

INTRODUCTION

Anxiety. Fear. Frustration. These words described 2020 for most people. However, for transgender and gender-diverse people (“TGD”),¹ who have endured health disparities and inequity prior to the onset of the COVID-19 global pandemic, these feelings were amplified.² The 21st century’s second decade promised hopeful progress in advancing TGD people’s rights and improvements in their healthcare. Rather than the historically negative tropes portraying TGD

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1. For the purposes of this commentary the acronym “TGD” will be used to encompass transgender and gender diverse terms. This use comports with usage of the same acronym in AM. PSYCHOL. ASS’N OF GRADUATE STUDENTS COMM. ON SEXUAL ORIENTATION AND GENDER DIVERSITY, AM. PSYCHOL. ASS’N, A GUIDE FOR SUPPORTING TRANS AND GENDER DIVERSE STUDENTS (2019).

2. See Press Release, Nat’l LGBT Cancer Network & GLMA: Health Professionals Advancing LGBTW Equality, Open Letter About Coronavirus and the LGBTQ+ Communities: over 100 Organizations Ask Media & Health Officials to Weight Added Risk (Mar. 11, 2020), <https://cancer-network.org/wp-content/uploads/2020/03/Press-Release-Open-Letter-LGBTQ-Covid19-1-2.pdf> (explaining how the LGBTQ+ population is disproportionality affected by COVID-19 due to higher rates of HIV and tobacco use in the population as well as providing recommendations on how communities can assist members of the LGBTQ+ population); see also Press Release, Nat’l LGBT Cancer Network & Whitman-Walker Institute, Second Open Letter Urging Decisive Action to Prevent COVID-19 Discrimination: 170 Organizations Highlight Need for Nondiscrimination, Sexual Orientation & Gender Identity Data Collection, and More Help for Economically Devastated Communities (Apr. 21, 2020), <https://cancer-network.org/wp-content/uploads/2020/04/Second-Open-Letter-LGBTQ-COVID-19-Final-1.pdf> (laying out best practices to ensure that the LGBTQ+ population is not discriminated against in the healthcare system and how increased documentations of COVID-19 cases in the LGBTQ+ community can lead to better protection of its members).

people as deviants³ or as a joke's punchline,⁴ TGD people were portrayed positively with their issues discussed seriously in mainstream media. With passage of The Patient Protection and Affordable Care Act ("ACA")⁵ in 2010, an increased number of individuals obtained access to health insurance coverage.⁶ Transgender military personnel gained the ability to serve authentically and access medically necessary care when the ban on their service ended in 2016.⁷ With the election of Donald Trump, those gains were threatened by concerted actions driven by partisan politics that ignored medical science and best practices.⁸

This commentary provides a foundational understanding of TGD people and the health inequities they face, an explanation of the motivation driving Trump administration policies impacting the TGD population, and exemplars of federal and state actions negatively impacting TGD health.⁹ In conclusion, the authors recommend three action items for legal professionals, which are designed to enhance our collective ability to reduce health inequities impacting TGD people and enhance the holistic health and wellbeing of this marginalized community.¹⁰

I. AN OVERVIEW OF TRANSGENDER & GENDER-DIVERSE PEOPLES

While many Americans know people who are gay, lesbian, or bisexual, fewer know someone who is a part of the TGD community or the issues impacting their health.¹¹ Due to this level of ignorance about the community, an

3. See *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN (2020), <https://www.hrc.org/resources/understanding-the-transgender-community> ("The LGBT community still faces considerable stigma based on over a century of being characterized as mentally ill, socially deviant, and sexually predatory.").

4. See, e.g., *Married with Children: Calendar Girl* (Fox television broadcast Feb. 4, 1996) (showing that a cover girl of a girls calendar turns out to be a transgender woman); *Family Guy: Quagmire's Dad* (Fox television broadcast May 9, 2010) (showing that Quagmire's dad undergoes gender affirming treatment, and Brian, who was out of town for a semester, ends up sleeping with her).

5. The Patient Protection and Affordable Care Act of 2012, Pub. L. No. 111-48, § 1201, 124 Stat. 119, 154-62 (to be codified at 42 U.S.C. § 18001).

6. Tony Arevalo, *27+ Affordable Care Act Statistics and Facts (2020)*, POL'Y ADVICE (Apr. 21, 2020), <https://policyadvice.net/health-insurance/insights/affordable-care-act-statistics/>.

7. See Memorandum from Ash Carter, Secretary of Defense (Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members" (June 30, 2016) (announcing the open service transgender military personnel) [hereinafter 2016 Secretary of Defense Memorandum].

8. See *The Discrimination Administration: Trump's Record of Action Against Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. <https://transequality.org/the-discrimination-administration> (last visited Aug. 4, 2020) [hereinafter NCTE].

9. See *infra* Sections I-II.

10. See *infra* Section III.

11. See *Where the Public Stands on Religious Liberty vs. Non-Discrimination*, PEW RESEARCH CTR. (Sept. 28, 2016), <https://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious->

overview is helpful as a foundation before discussing harmful policies, including the likely drivers, that negatively impact TGD healthcare. This section will describe the TGD population, including relevant definitions, outline the health disparities and health challenges that the community faces, and discuss the importance of the ACA to transgender health.

A. Demographics

In the United States, there are approximately 1.4 million TGD people,¹² including 150,000 youth between the ages of thirteen and seventeen.¹³ These estimates are derived from statistical analysis and are, therefore, undercounts.¹⁴ Governmental disinterest in obtaining accurate data, as well as well-founded fear of discrimination in all sectors, including healthcare, within the TGD community results in decreased self-reporting.¹⁵ The under inclusion or non-inclusion of the population in surveys hinders systemic health inequity analysis.¹⁶

B. Terminology

The ever-evolving terminology describing TGD people is of relatively recent origin.¹⁷ However, TGD people have always existed. The culture, society, and the time period in which they lived influenced their acceptance. Various cultures and societies have recognized more than the exclusive male or female binary gender concept characteristic of Western European culture.¹⁸

liberty-vs-nondiscrimination/ (explaining that a vast majority of Americans know someone who is gay, while fewer know someone who is transgender).

12. Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States*, UCLA SCH. OF L. WILLIAMS INST. 2 (Jan. 2017), <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/>.

13. *Id.*

14. *Id.* at 6.

15. See S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

16. See E.L. Meerwijk & J. M. Seveliu, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH e1, e1-e8 (2017) (finding that “under- or nonrepresentation of transgender individuals in population surveys is a barrier to understanding social determinants and health disparities” and therefore, the authors recommend “using standardized questions to identify respondents with transgender and nonbinary gender identities, which will allow a more accurate population size estimate.”).

17. See *16 Remarkable Historical Figures Who Were Transgender*, HIST. COLLECTION, <https://historycollection.com/16-remarkable-historical-figures-who-were-transgender/> (last visited Aug 6, 2020). Dr. John Oliven, a psychiatrist at Columbia University, coined the term “Transgender” in 1965 to encompass a broader population than those included in the term “transsexual” and reflective of the variability and fluidity of how individuals may identify in terms of gender. *Id.*

18. *A Map of Gender-Diverse Cultures*, PBS: INDEPEND. LENS (Aug. 11, 2015), https://www.pbs.org/independentlens/content/two-spirits_map-html/.

Many North American indigenous cultures recognized gender-diverse peoples, including the Zuni (Lhamana), Navajo (Nádleehí), Blackfoot Confederacy (Ninauposkitzipxpe), and Lakota (Winkte).¹⁹ Hawaiian culture recognized the mahu and Australian aboriginal people accepted transgender people (“sistergirls” or “brotherboys”).²⁰ Other examples include the travesti in South America, the hijra in India, and the bakla in the Philippines.²¹ Often, Western European colonization replaced acceptance with increased stigmatization and discrimination.²²

Knowledge of basic terminology is essential to understanding the TGD community and its healthcare needs. Common terms include:

Transgender: “An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms - including *transgender*.”²³ The word “transgender” is an adjective, not a noun.²⁴

Cisgender: “A term used by some to describe people who are not transgender. . . A more widely understood way to describe people who are not transgender is simply to say *non-transgender people*.”²⁵

Non-binary / genderqueer: “Terms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may

19. *Id.* (The Zuni, located in New Mexico, have a two-spirit tradition known as the lhamana, “in which a person lives as both genders simultaneously.” “The Navajo term nadleehi refers to that culture’s traditional third gender, in which a biologically male-born person embodies both the masculine and feminine spirit” and the “dilbaa refers to a female-born person with a more masculine spirit.” The Blackfoot Confederacy, located in Alberta, Canada, honored a third-gender, ninauposkitzipxpe, which, roughly translated, “it means ‘manly-hearted woman’ and defined a biological female who did not necessarily dress in a masculine mode, but was unrestricted by the social constraints placed on other women in the Blackfoot society.” The Lakota, located in South Dakota, had a word, winkte, for a two-spirit people where they “are born male but assume many traditional women’s roles, such as cooking and caring for children, as well as assuming key roles in rituals and serving as the keeper of the tribe’s oral traditions.”).

20. *Id.*

21. *Id.*

22. *Id.*

23. *GLAAD Media Reference Guide – Transgender*, <https://www.glaad.org/reference/transgender> (last visited Aug. 7, 2020) [hereinafter GLAAD].

24. *Id.* (emphasis in original).

25. *Id.*

define it as wholly different from these terms. The term is not a synonym for *transgender*. . . .”²⁶

Gender Non-conforming: “A term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. . . . Simply being transgender does not make someone gender non-conforming.”²⁷

Gender diverse: “An umbrella term to describe and ever-evolving array of labels people may apply when their gender identity, expression or even perception does not conform to the norms and stereotypes others expect.”²⁸

Gender identity: “A person’s internal, deeply held sense of their gender.”²⁹

Sex assigned at birth: “The classification of a baby as male, female or intersex based on visible genitalia at birth.”³⁰

Transition: The process of going from living aligned with one’s sex assigned at birth to living aligned with one’s gender identity. This process may include legal (e.g. changing legal name and gender marker), social (e.g. telling others about one’s gender identity, changing one’s gender expression), or medical (e.g. mental health counselling, hormone therapy, gender-affirming surgery) dimensions. Every person’s transition is unique.³¹

Gender Dysphoria: The conflict between one’s gender identity and one’s assigned or physical gender as well as the conflict with the societal interactions based on that assigned or physical gender.³²

26. *Id.* (emphasis in original)

27. *Id.*

28. Jason Rafferty, *Gender-Diverse & Transgender Children*, AM. ACAD. OF PEDIATRICS (Sept. 17, 2018), <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Diverse-Transgender-Children.aspx>.

29. See *GLAAD*, *supra* note 23.

30. *Sex Assigned at Birth*, NLGJA: THE ASS’N OF LGBTQ JOURNALISTS STYLEBOOK, <https://www.nlgja.org/stylebook/sex-assigned-at-birth/> (last visited Aug. 5, 2020).

31. See *GLAAD*, *supra* note 23.

32. See generally *id.*; see also *What is Gender Dysphoria*, AM. PSYCHIATRIC ASS’N (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>. While Gender Dysphoria is a chapter in the Diagnostic and Statistics Manual (DSM), its continued inclusion in the

Gender Incongruence: Pronounced and continual incongruence between the gendered lived experience of a person and their assigned sex at birth.³³

C. Transgender Health

In America, “health” is often defined by the absence of illness or injury and measured by morbidity and mortality statistics.³⁴ Since 1948, the World Health Organization has defined health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³⁵ This view of health encompasses the social determinants which affect people’s ability to live healthy lives. The U.S. Department of Health and Human Services (“HHS”) Office of Disease Prevention and Health Promotion (“ODPHP”) described the social determinants of health as “conditions in the environments in which people are born, live, learn, work, play, worship, and age that affect . . . health, functioning, and quality-of-life outcomes and risks.”³⁶ Examples of social determinants that have great influence on the transgender community’s health include the following: safe housing; access to educational, economic, and employment opportunities; access to healthcare services; public safety; social support; social attitudes such as discrimination or racism; exposure to crime, violence and social disorder; poverty; and culture.³⁷ The federal government recognizes that policies advancing social and economic conditions enhances the improvement and sustainability of individual and population health.³⁸

The World Professional Association of Transgender Health (“WPATH”) recognizes that:

mental health diagnostics is troublesome as being transgender is not a mental disease or disorder. *Id.* The continued presence of the diagnosis within mental health is often seen as a concession to the needs for insurance coverage in the American healthcare system. See GLAAD, *supra* note 23. With the ICD-11, the terminology will change to “Gender Incongruence” and it will move to the chapter on sexual health. See Brigitte Khoury et al., *The ICD-11 Classification of Gender Incongruence of Adolescence and Adulthood*, 23 CULT. HEALTH SEX. 1, 3 (2020) (citing the WHO Int’l Classification of Diseases 11 Revision (2018)).

33. Brigitte Khoury et al., *The ICD-11 Classification of Gender Incongruence of Adolescence and Adulthood*, 23 CULT. HEALTH SEX. 1, 3 (2020) (citing the WHO Int’l Classification of Diseases 11 Revision (2018)).

34. See *Health-Related Quality of Life (HRQOL)*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hrqol/concept.htm> (last reviewed Oct. 31, 2018).

35. *Constitution of World Health Organization*, WHO at 1 (June 19, 1946), https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=7; see also *Frequently Asked Questions*, WHO, <https://www.who.int/about/who-we-are/frequently-asked-questions> (last visited Jun. 9, 2020).

36. *Social Determinants of Health*, U.S. DEP’T OF HEALTH AND HUM. SERV., <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> (last modified Jun. 10, 2020).

37. *Id.*

38. See *id.*

[H]ealth is dependent upon not only good clinical care but also social and political climates that provide and ensure social tolerance, equality, and the full rights of citizenship. Health is promoted through public policies and legal reforms that promote tolerance and equity for gender and sexual diversity and that eliminate prejudice, discrimination, and stigma.³⁹

Therefore, reducing TGD health inequities encompasses gender-affirming care specifically, access to medical care generally, and living a healthy life within society in its broadest sense. Gender affirmation is the process by which an individual's gender identity is acknowledged, supported, and respected in interpersonal or systemic interactions.⁴⁰ An expansive definition of health recognizes the detrimental effects that seemingly-unrelated-to-health policies, legislation, and judicial decisions have on TGD people's ability to be holistically healthy.

Gender-affirming care is the provision of culturally and clinically-competent care across all health disciplines to enhance TGD wellbeing. Specifically, gender-affirming care such as hormone therapy or surgery is considered medically necessary by the medical establishment including organizations such as the American Medical Association ("AMA"), the American Psychological Association ("APA"), and WPATH.⁴¹ The WPATH Standards of Care provide flexible, patient-centered, clinical guidance for healthcare professionals⁴² to assist TGD people to "maximize their overall health, psychological well-being, and self-fulfillment."⁴³ These standards of care, encompassing TGD healthcare's multi-discipline nature, address behavioral health, primary care, endocrinology, urology, obstetrics/gynecology, surgery, voice therapy, and reproductive care.⁴⁴ However, the routine provision of gender-affirming care within the American healthcare system remains aspirational.

39. ELI COLEMAN ET AL., WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 1–2 (7th ed. 2012) (ebook).

40. Jae Sevelius, *Gender Affirmation: A Framework for Conceptualizing Risk Behavior Among Transgender Women of Color*, 68 SEX ROLES 675, 676 (2013).

41. See *Transition-related Health Care*, LAMBDA LEGAL, https://www.lambdalegal.org/sites/default/files/2016_transition_related_care.pdf (last visited Aug. 5, 2020).

42. See COLEMAN ET AL., *supra* note 39, at 1.

43. *Id.*

44. *Id.*

Historically, TGD healthcare concerns have not been prioritized. Only in 2010 when HHS launched *Healthy People 2020* did “Lesbian, Gay, Bisexual and Transgender Health” become a topic of interest for the federal government.⁴⁵ This government initiative identified multiple health disparities facing the TGD population that were “linked to societal stigma, discrimination, and denial of their civil and human rights.”⁴⁶ These disparities included:

- Increased risk for mental health co-morbidities
- Increased risk for substance abuse
- Increased risk for suicide
- Increased risk to be the victim of violence
- Increased use of tobacco, alcohol or drugs
- Reduced access to health services⁴⁷

Further, the government identified social determinants of health related to “oppression and discrimination”⁴⁸ that were negatively impacting TGD health such as:

- Shortage of clinically and culturally competent healthcare providers
- Lack of laws protecting children and adolescents from anti-transgender bullying
- Lack of social programs for transgender people across the lifespan
- Legal discrimination in access to healthcare, housing, employment, public accommodations, and familial-relational benefits⁴⁹

Between 2010, when *Healthy People 2020* was released and the ACA enacted, and January 2017, when the Trump administration officially began, the story of TGD healthcare was characterized by both progress and stagnation.⁵⁰ Progress included more TGD people receiving insurance coverage for general healthcare,⁵¹ an increasing number of insurers providing coverage for gender-

45. See *Healthy People 2020*, NAT’L CTR. FOR HEALTH STAT. (Apr. 1, 2019), https://www.cdc.gov/nchs/healthy_people/hp2020.htm.

46. *Lesbian, Gay, Bisexual, and Transgender Health*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION (Aug. 6, 2020), <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> [hereinafter ODPHP].

47. *Id.*

48. *Id.*

49. See *id.*

50. See MOVEMENT ADVANCEMENT PROJECT, MAPPING LGBTQ EQUALITY: 2010 TO 2020 15, (2020) [hereinafter MAP] (“In sum [...] there has been remarkable change in nearly every LGBTQ related law, [t]his includes both positive advances in multiple areas of law, as well as notable expansions in harmful religious exemption laws.”).

51. *Id.*

affirming care,⁵² and greater access to gender-affirming care,⁵³ despite the number of culturally and clinically competent providers remaining low.⁵⁴

Another noteworthy sign of transgender health progress in the United States was the end of the Department of Defense ban on transgender military service in June 2016.⁵⁵ The Department of Defense is the largest employer of transgender individuals in the United States.⁵⁶ The new regulation's immediate impact provided employment protection to the estimated 15,000 transgender military personnel and ensured their access to medically necessary care.⁵⁷ Prior to the change in regulations, transgender personnel were stigmatized within the military and had to forego seeking medically necessary healthcare lest their careers be jeopardized.⁵⁸ More broadly, the advances for diversity and inclusion within the military historically lead to progress in the civilian world. The military in reducing stigma and exemplifying a large employer providing medical care directly addressed known healthcare disparities.⁵⁹

D. Impact of the ACA on TGD Health

The ACA's enactment, arguably, has been the most significant event advancing transgender healthcare and care accessibility. The ACA expanded access to insurance coverage by prohibiting exclusions based on pre-existing conditions.⁶⁰ Prior to the ACA's implementation, insurance carriers routinely denied coverage to TGD individuals, citing gender identity disorder ("GID"), an older term in the *Diagnosics and Statistics Manual* ("DSM-IV") or gender

52. See MAP, *supra* note 50, at 13–14.

53. See Megan Lane et al., *Trends in Gender-Affirming Surgery in Insured Patients in the United States*, INT'L OPEN ACCESS J. OF THE AM. SOC'Y OF PLASTIC SURGEONS 1-1 (2018).

54. See Sarah Houssayni & Kari Nilsen, *Transgender Competent Provider: Identifying Transgender Health Needs, Health Disparities, and Health Coverage*, 11 KANS. J. MED. 1, 15 (2018).

55. See 2016 Secretary of Defense Memorandum, *supra* note 7.

56. See Ben Christopher, *How the Military Became the Country's Largest Employer of Transgender Americans*, PRICEONOMICS (Sept. 28, 2016), <https://priceonomics.com/how-the-military-became-the-countrys-largest/>.

57. See 2016 Secretary of Defense Memorandum, *supra* note 7.

58. See, e.g., *Report of the Transgender Military Service Commission*, PALM CTR. (Mar. 2014) https://www.palmcenter.org/wp-content/uploads/2014/03/Transgender-Military-Service-Report_1.pdf (stating "depriving transgender service members of medically necessary health care poses significant obstacles to their well-being"); see also *Transgender Military Service*, HRC (last updated Mar. 2, 2020) <https://www.hrc.org/resources/transgender-military-service> (stating "[f]or decades, transgender people were prohibited from serving openly in the U.S. military based on outdated and discriminatory medical standards").

59. Paula M. Neira, Clinical Program Director, Johns Hopkins Ctr. for Transgender Health, Plenary Address at the Ass'n of Nurses in AIDS Care (ANAC) Annual Conference: Service Beyond the Uniform: Military Service and the Path to a More Perfect Union (Nov. 10, 2018) (presentation slides available from author).

60. See The Patient Protection and Affordable Care Act of 2012, Pub. L. No. 111-48, § 1201, 124 Stat. 119 (to be codified at 42 U.S.C. § 18001).

dysphoria as a preexisting condition.⁶¹ If insurers did offer coverage, there were often broad “transgender exclusions” for gender-affirming care.⁶² Additionally, insurers often justified denial of coverage by claiming the care lacked medical necessity.⁶³ While §1201 of the ACA amended the Public Health Service Act to prohibit denial of insurance coverage based on pre-existing conditions, this section did not require affirmative coverage of gender-affirming treatments.⁶⁴

The section of the ACA that will likely have the greatest impact on TGD healthcare access is §1557, the nondiscrimination section which prohibits discrimination on the basis of sex.⁶⁵ During the Obama administration, HHS issued a final rule stating that sex-based discrimination included discrimination based on gender identity and sex stereotyping.⁶⁶ HHS also provided that healthcare providers and facilities must treat and identify patients according to their gender identity.⁶⁷ However, the rule’s implementation was enjoined by a federal district judge the day before it was to come into effect in *Franciscan Alliance, Inc. v. Burwell*.⁶⁸ The plaintiffs included a religiously-affiliated health system, Christian medical and dental associations, and several Republican-governed states.⁶⁹ The health-provider plaintiffs alleged that the rule prohibiting discriminating against transgender individuals and requiring the provision of transgender-related medical care infringed on their religious liberty.⁷⁰ The state plaintiffs alleged that the final rule infringed on states’ rights to “regulate healthcare, ensure appropriate standards of medical judgment, and protect its citizens constitutional and civil rights.”⁷¹

61. Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 AM. J. PUB. HEALTH, e31, e34 (2014)
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/>.

62. Katie Keith, *15 States and DC Now Prohibit Transgender Insurance Exclusions*, GEORGETOWN UNIV. HEALTH POL’Y INST.: CTR. ON HEALTH INS. REFORMS (Mar. 30, 2016), <http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/>.

63. TRANSGENDER L. CTR., TRANSGENDER HEALTH BENEFITS: NEGOTIATING FOR INCLUSIVE COVERAGE, <http://transgenderlawcenter.org/wp-content/uploads/2014/01/Health-Insurance-Exclusions-Guide-2-WEB.pdf> (last visited Aug. 7, 2020).

64. See Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1201, 124 Stat. 119, 154–62 (to be codified at 42 U.S.C. § 18001).

65. 45 C.F.R. § 92 (2016).

66. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375 (May 18, 2016) (repealed by the 2020 Section 1557 Final Rule).

67. *Id.* at 31427.

68. 227 F. Supp.3d 660 (N.D. Tex. 2016).

69. See Plaintiff Complaint at 4–7, *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 600 (N.D. Tex. 2016) (No. 7:16-cv-00108-O); see also Plaintiff’s First Amended Complaint at 4–8, *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 600 (N.D. Tex. 2016) (No. 7:16-cv-00108-O).

70. Plaintiff’s Amended Complaint at 3, *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 600 (N.D. Tex. 2016) (No. 7:16-cv-00108-O).

71. *Id.*

E. TGD Health Inequities by the Numbers

Beyond the stalled ability of the federal government to enforce non-discrimination in healthcare for TGD people as a result of the December 2016 injunction, the overall picture of TGD healthcare otherwise reflected some progress and the persistence of health disparities and health inequities.⁷² In its *Healthy People 2020* Mid-course Review, HHS found no increase in the collection of health data on the transgender community.⁷³ This lack of progress persisted through 2017, the latest year for which results are posted.⁷⁴ Despite problems being identified by HHS in 2010, five years later, the largest survey ever conducted on the transgender population in the United States⁷⁵ reported many persistently troublesome findings overall, with worse conditions for black and Latinx TGD people.⁷⁶ Among the most salient findings pertinent to the health-related deficiencies were:

- 25% were denied coverage for hormone therapy and 55% were denied coverage for gender-affirming surgery
- 33% had at least one negative healthcare experience due to their gender identity in the preceding twelve months
- 24% interacted with healthcare providers lacking cultural- or clinical-competency in transgender healthcare
- 77% of respondents who were perceived as transgender in school (between K-12 grades) experienced some form of mistreatment including verbal harassment, physical assault, and sexual assault. Mistreatment led 17% to leave school.
- 48% of Latinx and 53% of Black respondents had been sexually assaulted at some point in their life
- 30% had a negative job experience in the preceding twelve months (e.g., fired, denied promotion, workplace harassment)
- 29% lived in poverty, increasing to 38% for Blacks and 43% for Latinx
- 15% were unemployed, increasing to 20% for Black and 21% for Latinx (all well above the national averages)
- 33% did not seek medical care because they could not afford to pay for it

72. See *infra* notes 73 and 74.

73. Chapter 25: *Lesbian, Gay, Bisexual, and Transgender Health*, HEALTHY PEOPLE 2020 MIDCOURSE REV. (2016), <https://www.cdc.gov/nchs/data/hpdata2020/HP2020MCR-C25-LGBT.pdf>.

74. See *Lesbian, Gay, Bisexual and Transgender Health*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, <https://www.healthypeople.gov/2020/data-search/Search-the-Data#topic-area=3494> (last updated Aug. 10, 2020).

75. James et al., *supra* note 15, at 4.

76. See SANDY. E. JAMES ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 2–3 (2017); SANDY. E. JAMES, & BAMBI SALCEDO, 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF LATINO/A RESPONDENTS 2–3 (2017).

- 40% had attempted suicide at one point in their lives; 39% suffered psychological distress in the preceding twelve months – due to the impact of stigma and discrimination
- 23% suffered from discrimination in housing
- 30% had been homeless at one point in their life; 26% avoided homeless shelters for fear of violence. Of those who did stay in a shelter in the preceding year, 70% reported being mistreated because of their gender identity⁷⁷

These statistics reflect the persistent and pernicious reality for most TGD people in the United States. The survey's next iteration was anticipated to be conducted in 2020; however, it has been delayed.⁷⁸ It has been a decade since the government recognized the need for policies, regulations, and legislation that address the social determinants of health and promote holistic health.⁷⁹ Yet, in the past three years, federal and state executive, legislative, and judicial branches have often proposed or enacted policies, or have rendered decisions resulting in exacerbations of known health disparities and perpetuating the stigma, discrimination, and oppression harmful to the TGD population's health.⁸⁰

II. RELIGIOSITY & POLITICS: AN UNHOLY ALLIANCE

The alliance between faith-based organizations and the Republican Party (“GOP”) long predated the Trump administration.⁸¹ The GOP's demonizing of sexual and gender minority communities to further partisan politics is not new.⁸² Yet, the toxic combination of religiosity and partisan politics embraced by the Trump administration, emboldened those who have harbored long-standing anti-TGD animus to seek actions designed to roll back or deny civil rights and services, including access to healthcare, to the TGD community.⁸³ In 2018, the

77. *Id.*

78. Kate Sosin, *The Only Comprehensive Study on Transgender People is Not Coming Out as Planned*, 19TH NEWS (Aug. 5, 2020), <https://19thnews.org/2020/08/the-only-comprehensive-study-on-transgender-people-is-not-coming-out-as-planned/>.

79. *See supra* note 45 and accompanying text.

80. *See infra* Section II.

81. *See Rivalry and Reform: Building a Movement Party – The Alliance between Ronald Reagan and the New Christian Right*, UVA MILLER CTR., <https://millercenter.org/rivalry-and-reform/building-movement-party> (last visited Aug. 6, 2020) (adapting chapter six of SIDNEY M. MILKIS & DANIAL J. TICHENOR, *RIVALRY AND REFORM: PRESIDENTS, SOCIAL MOVEMENTS, AND THE TRANSFORMATION OF AMERICAN POLITICS* (2018)).

82. *See* Patrick J. Buchanan, 1992 Republican National Convention Speech (Aug. 17, 1992) (averring that gay rights should not be tolerated in the United States); *see also History of the Anti-Gay Movement Since 1977*, S. POVERTY L. CTR. (SPLC) (Apr. 28, 2005), <https://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977> (quoting Gordon Wysong, Cobb County, Georgia Commissioner, “We should blame them [gays] for every social problem in America.”).

83. *See generally* Clyde Haberman, *Religion and Right-Wing Politics: How Evangelicals Reshaped Elections*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/religion-politics->

Kansas GOP state committee, voted to “oppose all efforts to validate transgender identity.”⁸⁴ In effect, the Kansas GOP sought to eliminate the existence of TGD people from society. In opposing the provision of medically necessary care to TGD people, the committee resolution affirmed that “God’s design for gender as determined by biological sex and not by self-perception.”⁸⁵ The Family Research Council, the Alliance Defending Freedom (ADF), and Liberty Counsel, all self-proclaimed to be faith-based organizations,⁸⁶ have championed actions that have direct and indirect negative health implications for TGD Americans.⁸⁷ These organizations are designated as anti-LGBTQ⁸⁸ hate groups by the Southern Poverty Law Center for their continued defamation, intentional misinformation, and willful intellectual dishonesty about TGD people.⁸⁹ While some of their efforts predate the 2016 elections,⁹⁰ Trump’s victory was a catalyst for furthering their agenda.

evangelicals.html; *see also Party Platform Comparison*, FAM. RSCH. COUNCIL, <https://www.frcaction.org/platforms> (last visited Aug. 7, 2020) (claiming “Family Research Council Action has a direct hand in shaping the most conservative Republican Party Platform in modern history.”). The Family Research Council (FRC) describes itself as an organization “. . . providing policy research and analysis for legislative, executive, and judicial branches of the federal government. . . from a biblical worldview.” *See About FRC*, FAMILY RESEARCH COUNCIL, <https://www.frc.org/about> (last visited Oct. 4, 2020).

84. Jonathan Shorman & Hunter Woodall, *Kansas GOP Votes to “Oppose All Efforts to Validate Transgender Identity,”* WICHITA EAGLE (Mar. 2, 2018), <https://www.kansas.com/news/politics-government/article200798114.html>.

85. *Id.*

86. *See Vision and Mission Statement*, FAM. RESEARCH COUNCIL, <https://www.frc.org/mission-statement> (last visited Aug. 6, 2020); *Who We Are*, ALL. DEFENDING FREEDOM, <https://www.adflegal.org/about-us> (last visited Aug. 6, 2020); *About Liberty Counsel*, LIBERTY COUNS., <https://lc.org/about> (last visited Aug. 6, 2020).

87. *See Gender Identity*, FAM. RSCH. COUNCIL, <https://www.frc.org/gender-identity> (last visited Dec. 1, 2020) (stating that FRC “does not believe that ‘gender identity’ should be included as a protected category in non-discrimination laws or policies” and stating “providing gender transition medical procedures such as hormones or surgery to minors should be prohibited”); *see Alliance Defending Freedom*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last visited on Dec. 1, 2020) (stating “ADF also works to develop ‘religious liberty’ legislation and case law that will allow the denial of services and goods to LGBTQ people on the basis of religion”); *see also* Charlie Butts, *Staver: LGBT ‘Rights’ Sneakily Added to Anti-Lynching Bill*, ONE NEWS NOW (Jan. 8, 2019), <https://onenewsnow.com/politics-govt/2019/01/08/staver-lgbt-rights-sneakily-added-to-anti-lynching-bill> (reporting that Liberty Counsel leader objects to inclusion of “homosexuals and transgenders” in anti-lynching bill and further reporting that “Liberty Counsel is talking to lawmakers in House in effort to convince them to strip the bill of the amendment before taking a vote.”).

88. Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning.

89. *See Anti-LGBTQ*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbtq> (last visited Aug. 6, 2020).

90. *See* Samantha Michaels, *We Tracked Down the Lawyers Behind the Recent Wave of Anti-Trans Bathroom Bills*, MOTHER JONES (Apr. 25, 2016), <https://www.motherjones.com/politics/2016/04/alliance-defending-freedom-lobbies-anti-lgbt-bathroom-bills/> (describing the anti-trans legislative advocacy effort prior to the Trump administration).

An agenda designed to harm TGD individuals by removing civil protections, denying medical care, and fostering societal stigmatization and discrimination, was first laid out in 2016 with the launch of “Project Blitz” during a teleconference between, the Congressional Prayer Caucus Foundation, the National Legal Foundation, and WallBuilders, all self-identified Christian organizations, and state legislators.⁹¹ Attacking TGD people is only part of a broader objective of imposing a sectarian-based government at all levels in the United States.⁹² Initially, these groups distributed a guide with twenty model bills to over 750 state legislators in 2018.⁹³ In 2019, Project Blitz, since renamed “Freedom for All,” produced an expanded guide with twenty-one model bills along with strategic guidance and talking points.⁹⁴ In 2020, Freedom for All was behind the majority of the 226 anti-LGBTQ bills proposed across the country in various state legislatures.⁹⁵ Approximately ninety of the bills can be considered anti-transgender.⁹⁶

III. EXEMPLARS OF HARMFUL POLICY

This section will discuss selected federal and state proposed or enacted policies which are harmful to the health of the TGD community. At the federal level, many Departments during the Trump administration attempted to impose rules or policy which are not grounded in medical science or are in direct conflict with evidence-based best practices. Specific discussion focuses on the Department of Health and Human Services, the Department of Education, and the Department of Housing and Urban Development. At the state level, representative actions across the states are discussed with attention to those actions negatively impacting social determinants of health, or harming TGD youth.

A. Federal Issues

Multiple executive-branch departments have proposed or enacted policies which negatively impact the health of the TGD community. The Department of

91. See *Project Blitz*, AM. UNITED, <https://www.au.org/tags/project-blitz> (last visited Aug. 7, 2020).

92. *Id.*

93. *Id.*

94. See generally CONGRESSIONAL PRAYER CAUCUS FOUNDATION, REPORT AND ANALYSIS ON RELIGIOUS FREEDOM MEASURES IMPACTING PRAYER AND FAITH IN AMERICA (2018-19 Version) (containing model bills with accompanying guidance and talking points).

95. Molly Sprayregen, *226 Bills Target LGBTQ Americans This Year. One Organization is Behind a Lot of Them*, LGBTQ NATION (Feb., 18, 2020), <https://www.lgbtqnation.com/2020/02/226-bills-target-lgbtq-americans-year-one-organization-behind-lot/>.

96. See *Anti-Transgender Bill Tracker*, EQUAL. FED’N, <https://www.equalityfederation.org/equality-tracker/anti-transgender/> (last visited Aug. 7, 2020) (tracking proposed and enacted anti-transgender legislation by state).

Justice (“DoJ”) has argued that Title VII and Title IX allow discrimination on the basis of sexual orientation and gender identity, rescinding previous guidance to the contrary.⁹⁷ The Department of Labor (“DoL”) regressed on employment non-discrimination rules governing federal contractors⁹⁸ and proposed to allow healthcare discrimination in military-dependent and retiree health coverage.⁹⁹ The State Department refused to issue passports recognizing non-binary individuals.¹⁰⁰ Further, the State Department’s Commission on Unalienable Rights has attempted to exclude TGD rights from the definition of human rights, while either ignoring LGBTQ rights or framing issues as fundamental as marriage equality as “social and political controversies.”¹⁰¹ The Department of Veterans Affairs continues to refuse to provide medically necessary, gender-affirmation surgery to eligible veterans.¹⁰² The Department of Defense (“DoD”) re-implemented a *de facto* ban on transgender military service¹⁰³ despite the lack of medical science or military evidence to support such a policy.¹⁰⁴ Multiple lawsuits are challenging the constitutionality of this misguided DoD policy.¹⁰⁵ On January 25, 2021, President Biden issued an Executive Order which effectively reversed the Trump administration’s policy and ordered the Secretaries of Defense and Homeland Security to report the status of implementing new regulations allowing for transgender military service within

97. *The Discrimination Administration*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/the-discrimination-administration> (last visited Aug. 5, 2020) [hereinafter NCTE].

98. *See id.* (reporting that the Department of Labor issued a directive on Aug. 10, 2018, granting broad religious liberty exemptions to federal contractors to allow for LGBTQ discrimination).

99. *See id.* (reporting that the Department of Labor proposed to allow TRICARE to be exempt from regulations prohibiting discrimination on the basis of sexual orientation and gender identity).

100. *Id.*

101. Michael K. Lavers, *State Department Human Rights Commission Report Largely Omits LGBTQ Issue*, WASH. BLADE (July 17, 2020, 11:25 AM), <https://www.washingtonblade.com/2020/07/17/state-department-human-rights-commission-report-largely-omits-lgbtq-issues/>; *see also* DRAFT REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2019), <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf> (last visited Aug. 6, 2020) (stating that same-sex marriage is a divisive social and political controversy that may be best left up to resolution through democratic processes rather than with the vocabulary of human rights).

102. *See* William M. Kuzon, Jr. et al., *Exclusion of Medically Necessary Gender-Affirming Surgery for America’s Armed Services Veterans*, AM. MED. ASS’N J. OF ETHICS 403, 403–13 (2018).

103. THE MAKING OF A BAN: HOW DTM-19-004 WORKS TO PUSH TRANSGENDER PEOPLE OUT OF MILITARY SERVICE, PALM CTR. 1 (Mar. 20, 2019).

104. *See generally* DOD’S RATIONALE FOR REINSTATING THE TRANSGENDER BAN IS CONTRADICTED BY EVIDENCE, PALM CTR. 1 (May 4, 2018) (assessing the plausibility of DoD’s justification for reinstating the ban on transgender military service and finding its rationale unpersuasive and contradicted by ample evidence).

105. *See* *Kamoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Stockman v. Trump*, 2017 U.S. Dist. LEXIS 221323 (C.D. Cal. Dec. 22, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017).

60 days.¹⁰⁶ Pending the new regulations, it is likely that the Executive Order and new regulations will make the litigation moot. Three other federal departments merit specific mention due to their role in guiding health policy (HHS) or because their policies impact the health and wellbeing of the most vulnerable of an already marginalized population, notably, youth (Department of Education (“DoE”)) and the homeless (Department of Housing and Urban Development (“HUD”)).

1. Department of Health and Human Services (HHS)

HHS is the chief federal department charged with protecting the health rights of, and to provide human services to, all Americans.¹⁰⁷ The Department administers programs dealing with health, health research, welfare, and health information.¹⁰⁸ A major role of HHS is to provide rules for the implementation of laws such as the ACA that directly impact the health of the TGD community.¹⁰⁹ Within its scope of authority, HHS addresses health insurance matters aimed at providing affordable health insurance, protecting individuals from insurance abuse, and strengthening Medicare.¹¹⁰ “The HHS Office for Civil Rights (“OCR”) enforces federal civil rights laws, conscience and religious laws, [as well as laws such as] the Health Insurance Portability and Accountability Act (HIPAA) . . . and the Patient Safety Act.”¹¹¹ However, under the Trump administration, HHS, with OCR as the main champion: (1) tried to define gender in its policies in a way that denies TGD existence;¹¹² (2) sought to allow healthcare practitioners, citing “religious liberty” or “freedom of conscious” to refuse care;¹¹³ (3) sought to exclude TGD health concerns from data collection;¹¹⁴ and (4) worked to remove non-discrimination protections for TGD people from the ACA.¹¹⁵ HHS targeted TGD people and their health,

106. Exec. Order No. 14004, Enabling All Qualified Americans to Serve Their County in Uniform, 86 Fed. Reg. 7471 (Jan. 28, 2021).

107. *Department of Health and Human Services (HHS)*, PERFORMANCE.GOV, <https://obamaadministration.archives.performance.gov/agency/department-health-and-human-services.html> (last visited Aug. 9, 2020).

108. *Id.*

109. *Id.*

110. *Id.*

111. Office of Civil Rights. *About Us*, U.S. DEPT. OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/ocr/about-us/index.html> (last reviewed Oct. 8, 2019).

112. See Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

113. See NCTE, *supra* note 97.

114. *See id.*

115. *See id.*

perpetuating stigmatization of the community and reinforcing existing barriers to healthcare access.¹¹⁶

Starting in 2017, HHS sought to define “sex” under Title IX in a way that removed TGD people from official legal recognition.¹¹⁷ A leaked departmental memorandum stated, “[s]ex means a person’s status as male or female based on immutable biological traits identifiable by or before birth, . . . The sex listed on a person’s birth certificate, as originally issued, shall constitute definitive proof of a person’s sex unless rebutted by reliable genetic evidence.”¹¹⁸ Further, HHS sought concurrence for this definition from the Departments of Justice, Labor, and Education.¹¹⁹ Health professionals condemned the proposed definition for its lack of grounding in medical science and for the negative impact on TGD public health.¹²⁰ Another HHS attempt to prevent TGD healthcare was the issuance of its final Denial of Care rule in May 2019.¹²¹ HHS provided a basis for healthcare practitioners to deny care to TGD patients by citing religious or moral objections.¹²² This rule was condemned by healthcare professional organizations and was the subject of several court challenges grounded in constitutional and administrative matters.¹²³ Three different federal district courts struck down the proposed rule, recognizing the rule’s discriminatory effect.¹²⁴

While the Trump administration took broad steps to remove TGD people from data collection such as declining to include sexual and gender minority demographics from the 2020 census, HHS has consistently attempted to remove the TGD community from health data collection.¹²⁵ An early Trump administration action erased health data collection on transgender seniors¹²⁶ by

116. See Lucas Acosta, *The Real List of Trump’s “Unprecedented Steps” for the LGBTQ Community*, HUMAN RTS. CAMPAIGN: BLOG (June 11, 2020), <https://www.hrc.org/blog/the-list-of-trumps-unprecedented-steps-for-the-lgbtq-community>.

117. See Green et al., *supra* note 112.

118. *Id.*

119. *Id.*

120. AM. MED. ASS’N., *AMA Adopts New Policies at 2018 Interim Meeting* (Nov. 13, 2018), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-2018-interim-meeting>.

121. See NCTE, *supra* note 97.

122. See *id.*

123. See *Lambda Legal, Americans United and Center for Reproductive Rights Sue Administration to Block Denial of Care Rule*, LAMBDA LEGAL (May 28, 2019), https://www.lambdalegal.org/news/us_20190528_sue-trump-administration-block-denial-of-care-rule_.

124. *Lambda Legal, Victory! Third Judge Smacks Down Trump Administration’s “Denial of Care” Rule*, (Nov. 20, 2019), https://www.lambdalegal.org/blog/20191119_victory-third-judge-vacates-denial-of-care-rule.

125. See NCTE, *supra* note 97.

126. Sejal Singh et al., *The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults*, CTR. FOR AM. PROGRESS (Mar. 20, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>.

changing its annual consumer assessment survey for participants in programs funded under the Older Americans Act.¹²⁷ This survey gathers information on older adults who receive federally-funded aging services and assesses program benefits to the population.¹²⁸ Policymakers and advocates rely on this data to ensure programs meet their goals without excluding any particular population.¹²⁹ In *Healthy People 2030*, HHS removed the emphasis on health inequities and disparities for minority populations.¹³⁰ Policy makers and healthcare leaders use the data derived from this decennary healthcare strategic plan to evaluate and direct national efforts to improve health and well-being of all people.¹³¹ However, the Trump administration removed TGD people from consideration in areas such as youth data addressing suicidality or harassment and assault in school.¹³² HHS aimed to erase the experiences of TGD seniors and ignore data collection on TGD youth, thus impairing efforts to identify and end disparities and discrimination in government programs.¹³³

However, the most troubling action to perpetuate discrimination against TGD in healthcare was HHS's issuance of a final rule reinterpreting §1557 of the ACA. Under the Obama administration's guidance, discrimination on the basis of sexual stereotyping and gender identity was prohibited as forms of sex discrimination.¹³⁴ The definition of discrimination "on the basis of sex" encompassed discrimination on the basis of gender identity, "an individual's internal sense of gender, which may be male, female, neither or a combination of male and female."¹³⁵ In another attempt to redefine sex in a manner to remove non-discrimination protections, on June 12, 2020, HHS published a final rule removing all references to gender identity, sexual orientation, and TGD people.¹³⁶ In effect, by removing the guidance that discrimination based on sexual orientation and gender identity are forms of impermissible sex

127. *Id.*

128. *Id.*

129. *Id.*

130. Paula M. Neira, Clinical Program Dir., From Cradle to Grave: Policies Influencing Transgender Health across the Lifespan, Presented at the 2019 GLMA National Conference (Sept. 11-14, 2019) (presentation slides available from author).

131. *Healthy People 2030 Framework*, OFF. OF DISEASE PREVENTION, <https://www.healthypeople.gov/2020/About-Healthy-People/Development-Healthy-People-2030/Framework> (last updated Aug. 8, 2020).

132. *Proposed Healthy People 2030 Objectives by Topic Area*, DEPT. OF HEALTH AND HUMAN SERVICES 36, <https://www.healthypeople.gov/sites/default/files/ObjectivesPublicComment508.updated%2012.20.2018.pdf> (last visited Aug. 9, 2020).

133. See Neira, *supra* note 130.

134. Nondiscrimination in Health Programs and Activities, *supra* note 66, at 31375.

135. *Id.*

136. See Sula Malina et al., *Two Steps Back – Rescinding Transgender Health Protections in Risky Times*, NEW ENG. J. MED. (July 31, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2024745>.

discrimination, the final rule allows healthcare providers and insurers to deny routine care to TGD patients; impacting all insured patients under any HHS funded health program including Medicaid and Medicare.¹³⁷

Three days later, the Supreme Court announced its decision in *Bostock v. Clayton County*, which undercut these efforts by clearly defining that discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination.¹³⁸ While the decision pertained to Title VII, it will undoubtedly influence any definition of sex discrimination proposed under Title IX.¹³⁹ Further, the Trump administration's final rule on §1557 is being litigated.¹⁴⁰ On behalf of several organizational and individual plaintiffs a lawsuit was filed in the United States District Court for the District of Columbia on June 22, 2020.¹⁴¹ The complaint includes claims for equitable relief and injunctive relief due to violations of the Administrative Procedures Act as well as the First and Fifth Amendments of the Constitution.¹⁴² Further, the complaint seeks declaratory judgment that the Revised Rule is unconstitutional, and for enforcement be preliminary and permanent enjoined.¹⁴³

2. Department of Education (DoE)

TGD youth represent one of the most vulnerable groups in society. Up to 2% of high school age adolescents identify as TGD.¹⁴⁴ The Centers for Disease Control and Prevention ("CDC") reported that TGD high school students "face serious risk for violence victimization, substance use, and suicide. . . ."¹⁴⁵ Seventy seven percent of TGD people have been mistreated during their school years.¹⁴⁶ Sexual and gender minority youths comprise 40% of homeless

137. See generally *id.* ("In Donald Trump's United States, transgender people apparently do not have the same right as their cisgender counterparts to receive medically appropriate, patient-centered care — or, indeed, any health care at all.").

138. *Id.*

139. See Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/>.

140. Motion for Prelim. Injunction at 1, *Whitman-Walker Clinic v. HHS*, No. 1:20-cv-01630 (D.D.C. filed June 22, 2020).

141. *Id.*

142. Plaintiff's Complaint, 70-82, *Whitman-Walker Clinic v. HHS*, No. 1:20-cv-01630 (D.D.C. filed June 22, 2020).

143. *Id.*

144. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017*, CDC MORBIDITY AND MORTALITY WKLY. REP. (Jan. 25, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

145. *Id.*

146. See James et al., *supra* note 15.

youth.¹⁴⁷ The American Academy of Pediatrics calls for actions to provide safe and supportive environments for TGD youth to improve their health.¹⁴⁸ Yet, the Trump Department of Education, working in conjunction with DoJ, intending to reverse Obama-era guidance designed to protect TGD youth, took actions to remove protections for TGD youth despite warning from experts about the harm such policy threatens to the youths' psychological and physical health.¹⁴⁹

The rollback of protections for TGD youth began within one month of Donald Trump's inauguration with the reversal of the guidance from 2016 requiring schools to protect transgender youth under Title IX.¹⁵⁰ In 2018, DoE announced that it would no longer pursue civil rights complaints from transgender students who were denied access to facilities aligned with their gender identity.¹⁵¹ In 2019, the Department enacted a final rule granting private religious schools an exemption from nondiscrimination standards which otherwise would protect TGD students.¹⁵² The attacks on TGD children continued in 2020. In May, the Department published a final rule that would undermine protections for students who report being the victims of sexual violence and harassment.¹⁵³ The rule eliminated provisions that encouraged reporting from faith-based schools to the Department and the general public that the school would discriminate on the basis of sex utilizing a waiver from Title IX requirements.¹⁵⁴

The most recent DoE action targeted transgender student athletes.¹⁵⁵ In March 2020, the DoJ and DoE, intentionally misgendering transgender youth, publicly stated that biological males who identify as women should not be

147. Human Rights Campaign Staff, *New Report on Youth Homeless Affirms That LGBTQ Youth Disproportionately Experience Homelessness*, HUMAN RTS. CAMPAIGN: BLOG (Nov. 15, 2017), <https://www.hrc.org/blog/new-report-on-youth-homeless-affirms-that-lgbtq-youth-disproportionately-ex>, (reporting on a recent study from Chapin Hall, University of Chicago, which found higher rates of homelessness among LGBTQ youth).

148. See generally Jason Rafferty, *Position Statement Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142(4) PEDIATRICS 1 (Oct. 2018), <https://pediatrics.aappublications.org/content/pediatrics/142/4/e20182162.full.pdf>.

149. See generally NCTE, *supra* note 97.

150. See *id.*

151. See Moriah Balingit, *Education Department No Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018), <https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/> (quoting DoE spokeswoman Elizabeth Hill, "Title IX prohibits discrimination on the basis of sex, not gender identity.").

152. See NCTE, *supra* note 97.

153. *Id.*

154. *Id.*

155. See Statement of Interest at 2, *Soule v. Conn. Ass'n of Schs, Inc.*, No. 3:20-cv-00201 (D. Conn. filed Mar. 24, 2020) (claiming that transgender female student athletes should not compete against cisgender female student athletes).

classified as girls when it comes to athletics.¹⁵⁶ In a thirteen-page brief, the DoJ averred that Title IX does not prohibit discrimination on the basis of gender identity.¹⁵⁷ DoJ further claimed that including TGD females in sex-segregated athletic competitions would be inconsistent with Title XI requirements because it would impair a cisgender female athlete's chance to compete.¹⁵⁸ In May, DoE sent a letter to various Connecticut school districts and an interscholastic athletic association that threatened to withhold federal financial support from various Connecticut jurisdictions unless they prohibited transgender student athletes from competition aligned with their gender identity.¹⁵⁹ This letter also alleged violations of cisgender civil rights and threatened to refer matters for civil action by DoJ.¹⁶⁰ The organization instigating the legal challenges and filing complaints with the DoE Office of Civil Rights seeking to bar the participation of transgender student athletes, and which the DoE is explicitly supporting, is the aforementioned anti-TGD hate group, the ADF.¹⁶¹

3. *The Department of Housing and Urban Development (HUD)*

Given previous HUD Secretary, Ben Carson's history of anti-transgender commentary,¹⁶² it is not surprising that HUD ignored the negative impact on health caused by permitting homeless shelter providers to discriminate against homeless TGD people. On July 1, 2020, HUD announced a proposed rule modification to the Equal Access rule which mandated that HUD-funded housing services cannot discriminate on the basis of gender identity.¹⁶³ The original 2012 final rule, entitled "Equal Access to Housing in HUD Programs Regardless of

156. *See id.* (claiming that Title XI defines sex as one's physiological reproductive function, not their gender identity).

157. *Id.* at 3.

158. *Id.* at 2–3.

159. Letter from Timothy C. J. Blanchard, N.Y. Office Dir., U.S. Dept. of Educ., to Lori Mizerak, Assitant Corp. Counsel, City of Hartford, et al. (May, 15, 2020) (on file with the American Civil Liberties Union); *see also* Scott Skinner-Thompson, *Trump Administration Tells Schools: Discriminate Against Trans Athletes or We'll Defund You*, SLATE (June 4, 2020, 4:33 PM), <https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html>.

160. Blanchard, *supra* note 159.

161. *See Taking a Stand to Defend Female Students*, ALL. DEFENDING FREEDOM, <https://www.adflegal.org/selina-soule-track-athlete-story> (last visited Aug. 5, 2020).

162. *See, e.g.,* Zack Ford, *Ben Carson: Transgender People are "the Height of Absurdity,"* THINK PROGRESS (July, 20, 2016, 1:43 PM), <https://archive.thinkprogress.org/ben-carson-transgender-people-are-the-height-of-absurdity-62a6054e0534/> (quoting Ben Carson, "You know, we look at this whole transgender thing. I got to tell you: For thousands of years, mankind has known what a man is and what a woman is. And now, all of a sudden[,] we don't know anymore. Now, is that the height of absurdity? Because today you feel like a woman, even though everything about you genetically says that you're a man or vice versa?").

163. Press Release, U.S. DEPT. OF HOUS. AND URB. DEV., HUD Updates Equal Access Rule, Returns Decision Making to Local Shelter Providers (July 1, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_099.

Sexual Orientation or Gender Identity,” generally restricted homeless shelter providers from making inquiries into a person’s gender identity when determining eligibility and placement for services.¹⁶⁴ In 2016, the original rule was clarified by a final rule entitled, “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” which made it impermissible to inquire about an individual’s sex and directed placement be based on an individual’s gender identity without being subjected to “intrusive questioning or [being] asked to provide anatomical information or documentary, physical, or medical evidence of their gender identity.”¹⁶⁵

HUD now proposes to allow homeless shelter providers to elect criteria to effectively refuse to provide appropriate shelter to TGD persons based on their sex “without regard to their gender identity.”¹⁶⁶ HUD’s major rationale to support this change is that the current rule, which was meant to protect vulnerable individuals, places an undue burden on the religious liberty of faith-based providers of homeless services.¹⁶⁷ HUD alleges that the Free Exercise Clause is violated because providers would have to provide services to transgender women even when the provider contends its interpretation of scripture holds that these are not women but instead are males.¹⁶⁸ Disingenuously, HUD asserts that the proposed revision keeps in place the prohibition against discrimination on the basis of gender identity while, arguably, allowing discrimination against transgender individuals based on their anatomy or their genetics.¹⁶⁹ Further, HUD would allow shelter providers to use such attributes as an individual’s height, facial hair growth, prominence of their thyroid cartilage (Adam’s apple), or other physical characteristics to determine an applicant’s sex and thus deny services in a gender-segregated facility.¹⁷⁰ Such an assertion ignores medical science and uses stereotypes that will likely also result in discrimination against cisgender women who look “too masculine” for a shelter staff member.

164. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012) (codified at C.F.R. pt. 5).

165. 24 C.F.R. § 5.106 (2016).

166. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811, 44812 (July. 24, 2020) (to be codified at 24 C.F.R. pt. 5) (“The proposed rule would maintain requirements from HUD’s 2012 final rule entitled ‘Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity’ and would require shelters to uniformly and consistently apply any such policy the shelter develops.”).

167. *Id.*

168. *Id.* at 44814.

169. *Id.* at 44812.

170. *Id.* at 44816.

4. Federal Summary

Rather than enacting policy designed to improve the health and wellbeing of the TGD population, the Trump administration ignored medical expertise, science, and public outcry. In pandering to partisan politics, it attempted, at every turn, to increase barriers to healthcare and exacerbate negative social determinants of health for the TGD community.¹⁷¹ A host of lawsuits challenging these actions are in progress across the federal judiciary – a judiciary which the Trump administration sought to pack with unqualified jurists, many of whom harbor anti-TGD animus at the behest of its partisan base.¹⁷² While the *Bostock* decision offers some hope for progress, there will be much litigation to ensue.¹⁷³ As a result of the November 2020 Presidential election, there is great hope that the Biden administration will halt the federal attacks on TGD people, including the homeless, children, military service members, and veterans.¹⁷⁴

B. State Issues

1. Actions Negatively Impacting Social Determinants of Health

While some states improved the landscape for the TGD community,¹⁷⁵ more have proposed or enacted legislation that targeted TGD individuals and increased barriers to their overall health. The first wave of state-level legislation targeting TGD people were a host of “bathroom bills” introduced in at least sixteen states in 2017 and 2018.¹⁷⁶ Many of these attempts were patterned upon North Carolina’s HB2[1], which limited access to multi-occupancy bathrooms based on sex as assigned at birth,¹⁷⁷ effectively denying transgender individuals,

171. See *supra* Section II A.1–3.

172. See NCTE, *supra* note 97 (citing nominations of Mark Norris, Jeff Mateer, Matthew Kacsmaryk, and Gregory Katsas for appointment to the federal judiciary).

173. See Timothy J. Stanton & Hillary M. Sizer, *Post-Bostock Ruling Does Little to Resolve Health Plan Uncertainty*, NAT’L L. REV., <https://www.natlawreview.com/article/post-bostock-ruling-does-little-to-resolve-health-plan-uncertainty> (Aug. 28, 2020) (stating “[i]t is safe to say that there will be more to come for employers on the application of sex discrimination law to health plans as a handful of other lawsuits challenging the new rule make their way through the federal court system”).

174. See NCTE: *Biden’s Election Puts an LGBTQ Advocate in the White House*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/press/releases/ncte-biden-s-election-puts-an-lgbtq-advocate-in-the-white-house> (Nov. 7, 2020) (stating that NCTE is “looking forward to working with a new Biden administration to improve the lives of transgender people”).

175. See Virginia Human Rights Act, VA. CODE ANN., §§2.2-3900-3909. (2020) (adding sexual orientation and gender identity to the state’s nondiscrimination law); see also *Pro-Transgender Equality Tracker*, EQUAL. FED’N, <https://www.equalityfederation.org/equality-tracker/pro-transgender/> (last visited Aug. 9, 2020).

176. Diana Ali, *The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans and Gender Non-Binary People*, NASPA (Apr. 2, 2019), <https://nasp.org/blog/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-and-gender-non-binary-people>.

177. *Id.*

including those whose legal sex had been updated, from using bathrooms aligned with their gender identity.¹⁷⁸ Proponents of these bills admitted that the argument that such legislation was needed for public safety was a sham meant to disguise anti-LGBTQ animus.¹⁷⁹

Numerous bills that continue the stigmatization of, and discrimination directed towards, TGD people are at some stage of consideration in twenty six states.¹⁸⁰ A sampling of these actions include: (a) proposing to remove civil rights protections,¹⁸¹ (b) allowing for discrimination based on “religious liberty” or “freedom of conscience,”¹⁸² (c) denying insurance coverage for gender-affirming care under state-funded programs,¹⁸³ (d) denying access to medically necessary care to state prisoners,¹⁸⁴ and (e) denying the ability to amend legal records to reflect their legal sex or non-binary gender identity.¹⁸⁵ All of these actions negatively affect the social determinants of health known to be vital to comprehensive health.¹⁸⁶ Those aimed to deny access to medically-necessary, gender-affirming care exacerbate existing barriers to care.¹⁸⁷

2. Actions Specifically Targeting TGD Youth

The most odious state-level actions being taken are those that specifically target TGD children and adolescents. Studies show that as many as 60% of TGD youth have suicidal ideation because of stigmatization, discrimination, and lack

178. See 2016 N.C. Sess. Laws 2016-3 (stating that bathroom use be based on an individual’s ‘biological sex’ as stated on their birth certificate while also ignoring that not all jurisdictions allow sex to be updated on birth certificates).

179. See *Massachusetts Voters Overwhelmingly Say “Yes” to Transgender “Bathroom” Law. What Happened?*, MASS RESISTANCE (Nov. 9, 2018), <https://www.massresistance.org/docs/gen3/18d/NoTo3/election-analysis.html> (“Our side concocted the ‘bathroom safety’ male predator argument as a way to avoid an uncomfortable battle over LGBT ideology, and still fire up people’s emotions. It worked in Houston a few years ago.”).

180. See *Anti-Transgender Equality Tracker*, EQUAL. FED’N, <https://www.equalityfederation.org/equality-tracker/anti-transgender/> (last visited Aug. 9, 2020) (search by state for legislative tracking).

181. See *id.* (identifying various legislation such as Iowa HF2164 which proposes to remove gender identity as a protected class under the Iowa Civil Rights Act).

182. See *id.* (citing legislative actions in Iowa (HF2273), Arizona (HB2082), and Colorado (HB1033)).

183. See *id.* (citing Alaska (HB5)).

184. See *id.* (identifying an Idaho resolution, (SCR135) supporting the Governor and Department of Corrections of Idaho in denying a prisoner gender-affirming surgery).

185. See *id.* (citing legislation enacted in Idaho (H0509) and proposed in Arizona (HB 2080 and HB2081) as examples).

186. *Social Determinants of Health*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION (Sept. 25, 2020), <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health>.

187. See *supra* Section III.

of familial and societal support of their gender identity.¹⁸⁸ Up to 77% of TGD individuals report mistreatment in school.¹⁸⁹ Studies show that being supportive of a child's gender identity with actions such as social transition, using correct pronouns, access to facilities and activities aligned with their gender identity, and age-appropriate medical intervention (which is only considered when a child is peri-pubertal) reduce levels of anxiety, depression, and suicidality.¹⁹⁰ In willful ignorance of medical science and best practices, many legislatures are considering, and in some cases have enacted, legislation that will only make it worse for TGD youth.

Under the Obama administration, the DoE and DoJ provided guidance in support of TGD youth having access facilities aligned with their gender identity.¹⁹¹ However, some states expressed concern that various school districts and the DoE in trying to protect transgender students under Title IX have overreached their authority.¹⁹² Consequently, Texas and ten other states filed suit seeking relief and alleging federal overreach in interpreting the law regarding transgender students.¹⁹³ A federal district court in Texas issued a preliminary injunction in August 2016 effectively barring consideration of gender identity within the purview of sex discrimination under Title IX.¹⁹⁴ Under the Trump administration, as discussed earlier, DoE and DoJ reversed positions and did not protect children in state-level public and private schools from discrimination or harassment on the basis of gender identity.¹⁹⁵

The most direct threat to TGD youths' health are attempts in various states by Republican legislators, emboldened by the Trump administration, to bar the

188. Brian C. Thoma et al., *Suicidality Disparities Between Transgender and Cisgender Adolescents*, 144 PEDIATRICS 1, 6 (Nov. 2019).

189. SANDY E. JAMES, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 131 (2015).

190. Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS 1, 1 (Mar. 2016); Amanda M. Pollitt et al., *Predictors and Mental Health Benefits of Chosen Name Use Among Transgender Youth*, YOUTH & SOCIETY (June 16, 2019), <https://journals.sagepub.com/doi/pdf/10.1177/0044118X19855898>; Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 PEDIATRICS e20191725 (Feb. 2020).

191. Pace Law School Library, *Student Project: Title IX and Transgender Students: Obama Administration*, PACE U. (Apr. 8, 2020 6:57 PM), <https://libraryguides.law.pace.edu/c.php?g=731201&p=5277099>.

192. See Bradley Domangue, *Transgender Issues in Public Schools*, STATE BAR OF TEX., <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=34301> (last visited Aug. 9, 2020) (stating that various school districts and the Department of Education have overreached in their Title IX protections for transgender students).

193. *Id.*; see also Plaintiff's Complaint, at 30–32, *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (No: 7:16-cv-00054-O) (alleging defendant's interpretation of Title VII and Title IX is incompatible with Congressional text). The case was voluntarily dismissed and closed Mar. 3, 2017 after the Trump administration took office. *Id.*

194. *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

195. See *supra* notes 150–51 and accompanying text.

provision of medically necessary, gender-affirming care in an age appropriate manner.¹⁹⁶ Some states have proposed to add to the law that provision of this care, recognized by medical science as a best practice and medically necessary, is a form of child abuse.¹⁹⁷ Others have proposed criminalizing or otherwise penalizing practitioners who seek to provide care to TGD youth.¹⁹⁸ For example, a proposed Georgia bill, HB1060, would make the provision of gender-affirming care to a minor under the age of 18 a felony punishable by a prison term of up to 10 years, a civil violation allowing for a private cause of action, and allows for licensure revocation by the governing professional boards.¹⁹⁹ The Republican legislator who sponsored the legislation is supported by the leader of another anti-LGBTQ hate group, the American College of Pediatricians,²⁰⁰ an organization with a long history of willful intellectual dishonesty concerning the medical care of TGD youth.²⁰¹ These legislative attempts to create further barriers to care for TGD youth have been widely condemned by reputable medical professional organizations.²⁰²

State legislators also target TGD youth by seeking to bar them, particularly transgender girls, from competing in interscholastic athletics aligned with their gender-identity. Idaho has enacted a law that bars transgender girls from competing against cisgender girls, arguing that the competition is unfair.²⁰³

196. See Roman Stubbs, *As Transgender Rights Debate Spills Into Sports, One Runner Finds Herself at the Center of a Pivotal Case*, WASH. POST (July 27, 2020), <https://www.washingtonpost.com/sports/2020/07/27/idaho-transgender-sports-lawsuit-hecox-v-little-hb-500/> (stating that Republican legislators aimed to bar gender-affirming care for transgender youth).

197. See *Anti-Transgender Equality Tracker*, *supra* note 180 (citing New Hampshire HB163).

198. H.R. 1365, 2020 Reg. Sess. (Fla. 2020) (making the provision of gender affirming care to minors a felony). The bill died in committee on March 14, 2020. *Id.*

199. H.R. 1060, 2020 Reg. Sess. (Ga. 2020) (prohibiting licensed health professionals from providing certain care to minors).

200. Patrick Saunders, *Atlanta Doctor Who Backs Anti-Trans Bill Leads Hate Group*, PROJECT Q ATLANTA (Nov. 1, 2019), <https://www.projectq.us/experts-knock-atlanta-doctor-hate-group-leader-on-trans-bill/>.

201. See *American College of Pediatricians*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians> (last visited Aug. 9, 2020) (claiming the former resident of the American College of Pediatricians made misleading and false claims about hormone treatment for transgender children).

202. See *Southern Medical Professionals Oppose Legislation Prohibiting Medically Necessary Care for Transgender Youth*, CAMPAIGN FOR S. EQUAL., <https://southernequality.org/southern-medical-professionals-oppose-legislation-prohibiting-treatment-of-transgender-young-people/> (last visited Aug. 9, 2020) (opposing legislation prohibiting medically necessary care for transgender youth); see also *AACAP Statement Responding to Efforts to Ban Evidence-based Care for Transgender and Gender-diverse Youth*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Nov. 8, 2019), https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx (opposing legal or legislative efforts blocking transgender youth from supportive interventions).

203. See Stubbs, *supra* note 196 (reporting on a law that disallows transgender girls from competing against cisgender girls).

Litigation challenging the law was filed and the Federal district court granted a preliminary injunction prohibiting enforcement of the law in August 2020. The state of Idaho has appealed the decision to the Ninth Circuit Court of Appeals in November 2020.²⁰⁴ In Connecticut, which has a law permitting transgender youth to compete aligned with their gender identity, a lawsuit has been filed.²⁰⁵ The plaintiff's attorneys are the aforementioned hate-group, ADF.²⁰⁶ The Trump administration threatened to withhold federal funding from any state that did not prohibit TGD youth from competition.²⁰⁷

3. Recommendations for Legal Professionals

Lawyers play an essential role in improving TGD health and reducing systemic health inequities. The connections between the law and the holistic health of TGD people are inseparable. Healthcare is delivered within a societal framework driven by legislation, policy formulation, and judicial decisions impacting social determinants of health and access to care. Our legal profession can pursue several actions aimed at improving TGD healthcare. First, cultural competency regarding the TGD community should be mandated within legal education and licensure. The fair administration of policy and justice requires members of the legal profession to understand the language needed to interact with the community with dignity and respect while having a grasp of the historical and societal conditions that shape the lived experience of the TGD population.

There is no mandate that cultural competency education be included in academic programs leading to licensure. The American Bar Association's ("ABA") accrediting standards include cultural competency as a type of "other professional skill," leaving academic programs to decide whether to include such education in the curricula.²⁰⁸ Once licensed, continuing education requirements

204. Appellants' Opening Brief, *Hecox v. Little*, Case nos. 20-35813, 20-35815, U.S. Ninth Circuit Court of Appeals (Nov. 12, 2020).

205. Kathleen Megan, *A Federal Agency Says Connecticut Must Keep Trans Students from Girls' Sports. The State Disagrees*, CT. MIRROR (Jun. 15, 2020), <https://ctmirror.org/2020/06/15/a-federal-agency-says-connecticut-must-keep-trans-students-from-girls-sports-the-state-disagrees/>.

206. See *Taking a Stand to Defend Female Students*, *supra* note 1611.

207. See, e.g. Timothy C. J. Blanchard, Letter to Various Connecticut Jurisdictions, <http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>, (May 15, 2020) (threatening that the "OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance [to jurisdictions in Connecticut allowing transgender athletes to compete in alignment with their gender identity]").

208. *Chapter 3: Standard 302 – Learning Outcomes*, A.B.A. at 16 (2018-2019), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf (interpreting Standard 302(d) to include cultural competency).

are determined by each state.²⁰⁹ While the ABA has recognized the need for cultural competency training, such training, specifically training addressing TGD communities, is often missing.²¹⁰ Some states mandate a minimal level of continuing education each reporting period aimed at the “elimination of bias in the legal profession and in the practice of law.”²¹¹ However, gender identity is not included as a basis of bias to address.²¹² In contrast, Washington, D.C. requires health professionals to have LGBTQ-specific competency training each reporting period in order to renew licensure.²¹³

Second, a nondiscrimination rule, expressly including protections on the basis of gender identity and gender expression, should be included in the respective state codes of ethical conduct. The fundamental duty owed to the legal system and to individuals is to act ethically; in essence, this is a duty to act with honor and integrity.²¹⁴ Other nations’ codes of legal ethics make this clear and include advancing human rights and social justice.²¹⁵ In Japan, the first article of basic ethics for attorneys is that “an attorney shall be aware that his or her mission is to protect fundamental human rights, to realize social justice, and to strive to attain this mission.”²¹⁶ In the U.K., the Barristers’ Code of Conduct states that a barrister must not discriminate unlawfully against any person and explicitly includes TGD people.²¹⁷ A model rule proposed by the ABA which includes a prohibition on discrimination based on gender identity²¹⁸ has been rejected by

209. See *Mandatory CLE*, A.B.A., <https://www.americanbar.org/events-cle/mcle/> (last visited on Dec. 1, 2020).

210. See e.g. MIN. STATE BD. OF CONTINUING LEGAL EDUC., *Rules of the Board for Continuing Education: Rule 2G* (Jul. 1, 2016), <https://www.cle.mn.gov/rules/>.

211. See MINN. R. 9(B)(2) (2016) (stating that all lawyers must complete a minimum of two credit hours in courses pertaining to the elimination of bias in the legal profession).

212. *Id.* at Rule 2(G).

213. LGBTQ Cultural Competency Continuing Education Amendment Act of 2016, 63 D.C. Reg. 2203 (Apr. 6, 2016).

214. See Code of Conduct for Legal Professionals GN 40610 of GG 38022 (Feb. 10, 2017) (stating that lawyers have a duty to act ethically with honor and integrity).

215. See *id.* at §3.3.1 et seq; see also Australian Solicitors Conduct Rules 2015 (NSW & VR) (Austl.); Lawyers and Conveyancers Act 2006, s 4 (N.Z.) (stating that the fundamental laws of New Zealand include non-discrimination as part of their Bill of Rights).

216. Kyoko Ishida, *Ethical Standards of Japanese Lawyers: Translation of the Ethics Code for Six Categories of Legal Service Providers*, 14 PAC. RIM L & POL’Y J. 383, 387 (2005).

217. BAR STANDARDS BOARD, THE BAR STANDARDS BOARD HANDBOOK: VERSION 4.4, at Rule C12, <https://www.barstandardsboard.org.uk/uploads/assets/f0d114af-9c5a-4be4-9dbffa9f80b1e47f/61c4ef29-7f00-4e6f-8f6839b68cb63e93/Part-2-Code-of-Conduct18092019092228.pdf>, (listing that barristers “must not discriminate against, victimize or harass any person on the grounds of...sex, gender, gender re-assignment, [or] sexual orientation. . .”).

218. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018).

many jurisdictions.²¹⁹ Some states include antidiscrimination rules within their respective codes, however, the majority do not explicitly prohibit discrimination based on gender identity.²²⁰ California Rule 8.4.1 is an exception.²²¹

Third, codes of ethical conduct should clarify that intentional misrepresentation is professional misconduct. For example, in the U.K., the Bar Standards Board state that barristers “must not knowingly or recklessly mislead or attempt to mislead the court,” including “being complicit in another person misleading the court.”²²² More broadly the standards, in support of honorable practice and integrity, prohibit knowingly or recklessly misleading anyone.²²³ In Maryland, misrepresentation may be considered professional misconduct.²²⁴ Arguably, these sections of the code of conduct are relevant for attorneys who will advocate in judicial proceedings, administrative tribunals, or craft governmental policy which will impact TGD health. Our ethical codes of conduct should deter advocacy and legal argumentation founded upon pseudoscience rejected by peer-reviewed science, willful ignorance of, or intentional intellectual dishonesty about, the medical science and evidence-based practice that ground TGD healthcare.

IV. CONCLUSION

The state of TGD health in 2020 was precarious. The Trump administration’s ascent was a catalyst for advancing a sectarian-based, partisan agenda designed to regress TGD civil rights and to enhance existing barriers to medical care. Despite the government’s own findings, medical experts’ advice, and public opposition, multiple federal departments and state legislatures, then controlled by the Republican party, proposed or enacted policy and law that will impair the health of already-marginalized individuals and populations. There is hope that the Biden administration will reverse these harmful policies and will work with Congress to put in place legislation that will protect TGD people from future assaults on their rights and their health. For legal professionals and our

219. Scott Flaherty, *More States Reject Anti-Bias ABA Ethics Rule*, AM. LAW., (Sept. 25, 2018, 3:24 PM), <https://www.law.com/americanlawyer/2018/09/25/more-states-reject-aba-anti-bias-ethics-rule/?srlreturn=20190221145444>.

220. See, e.g. Code of Conduct for Legal Professionals, *supra* note 214 (“knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this section”) (omitting gender identity).

221. RULES OF PROF’L CONDUCT r. 8.4.1(c)(1) (STATE BAR OF CAL. 2018).

222. See BAR STANDARDS BOARD, *supra* note 217, at rC3, gC4 (stating that barristers must not mislead the court in any manner).

223. See Australian Solicitors Conduct Rules 2015 (NSW & VR) § 19 (Austl.) (prohibiting solicitors from engaging in misleading conduct).

224. MD. R. §19-308.4.

profession collectively, we can take actions to stem these attacks by increasing our cultural competence on TGD issues, and by strengthening our codes of conduct to deter advocacy, argument, and policy development grounded in an unscientific, narrow-minded, willfully ignorant worldview.