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Gender Identity, Health, and the Law: An Overview of Key Laws Impacting the Health of Transgender and Gender Non-Conforming People

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Gender Identity, Health, and the Law: An Overview of Key Laws Impacting the Health of Transgender and Gender Non-Conforming People

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Naomi Seiler, Amanda Spott, Mekhi Washington, Paige Organick-Lee, Aaron Karacuschansky, Gregory Dwyer, Katie Horton, and Alexis Osei

**GENDER IDENTITY, HEALTH, AND THE LAW: AN OVERVIEW OF
KEY LAWS IMPACTING THE HEALTH OF TRANSGENDER AND
GENDER NON-CONFORMING PEOPLE**

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ABSTRACT

A growing population of transgender, nonbinary, and other gender non-conforming Americans experience the burden of multiple physical and mental health inequities. Largely rooted in discrimination and stigma, these disparities are compounded by barriers to respectful, appropriate healthcare.

A range of new policies, including state laws attempting to limit access to gender-affirming care for minors, may further compound health disparities. However, in some states and at the federal level, protective laws seek to prohibit discrimination and support access to care. Meanwhile, the constitutional status of gender identity under the Equal Protection Clause, and the legality of certain

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federal protections challenged on various grounds, remain undecided. This Article offers a snapshot of this rapidly evolving legal landscape, as well as the challenges and opportunities it offers for the health of transgender, nonbinary, and other gender non-conforming people.

TABLE OF CONTENTS

I. INTRODUCTION	174
II. BACKGROUND: THE HEALTH OF TRANSGENDER AND GENDER NON-CONFORMING AMERICANS.....	175
III. EMERGING LAWS AND POLICIES IMPACTING TRANSGENDER AND GENDER NON-CONFORMING HEALTH.....	177
A. <i>Laws Regarding Insurance Coverage of Gender-Affirming Care</i>	178
1. Medicare	178
2. Private Insurance	180
3. Medicaid	181
B. <i>State Laws Targeting Transgender Youth Access to Gender-Affirming Care</i>	182
C. <i>State Laws Restricting Transgender Youth Participation in Sports</i>	186
D. <i>State Provider Competency Standards</i>	188
IV. DISCUSSION.....	190
A. <i>The Status of Gender Identity Under Equal Protection Jurisprudence</i>	190
B. <i>Gender Identity in Federal Antidiscrimination Statutes</i>	192
C. <i>Caselaw Regarding Gender Identity in Healthcare</i>	194
V. CONCLUSION.....	196

I. INTRODUCTION

An estimated 1.6 million people in the United States identify as transgender, and an overlapping 1.2 million identify as nonbinary.¹ Others identify as genderqueer, genderfluid or otherwise not fitting into traditional expectations of gender.² Transgender and gender non-conforming people experience the burden of multiple health disparities, including higher rates of violence, human immunodeficiency virus (“HIV”), and substance use disorder.³ These disparities reflect, and are exacerbated by, discrimination and stigma.⁴ Within the healthcare system, people who are transgender and gender non-conforming experience multiple barriers to accessing care, including a lack of trusted providers, bias among providers and other staff, and denials of coverage for gender-affirming care.⁵

A growing number of new policies, including state laws banning access to gender-affirming care for minors, threaten to exacerbate existing disparities, and compound stigma and discrimination.⁶ Conversely, some protective laws are emerging at the state and national levels to support access to appropriate care and to prohibit discrimination.⁷ This Article describes several components of this rapidly evolving legal landscape.

The Article begins with background information on healthcare disparities and healthcare access challenges experienced by transgender and gender non-conforming people in the United States. It then provides an overview of four evolving areas of law and policy, which impact the health of transgender and gender non-conforming people: (1) insurance laws and insurer coverage standards; (2) access to gender-affirming care for minors; (3) limits on transgender youths’ participation in sports; and (4) state provider competency standards. Next, the Article discusses the broader legal context by addressing the constitutional status of gender identity, recent judicial decisions involving gender identity under a range of federal anti-discrimination laws, and, in greater

1. Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA WILLIAMS INST. SCH. OF L. (June 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>; BIANCA D.M. WILSON & ILAN H. MEYER, *NONBINARY LGBTQ ADULTS IN THE UNITED STATES 2* (2021).

2. Michael E. Newcomb et al., *High Burden of Mental Health Problems, Substance Use, Violence, and Related Psychosocial Factors in Transgender, Non-Binary, and Gender Diverse Youth and Young Adults*, 49 ARCHIVES SEXUAL BEHAV. 645, 645 (2019).

3. *Id.* at 654.

4. Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 SOC. SCI. & MED. 222, 222 (2015).

5. Gilbert Gonzales & Carrie Henning-Smith, *Barriers to Care Among Transgender and Gender Nonconforming Adults*, 95 MILBANK Q. 726, 729 (2017).

6. Lindsey Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>.

7. *Id.*

depth, certain decisions affecting access to healthcare for people who are transgender and gender non-conforming. Finally, the Article concludes by urging policymakers to protect transgender and gender non-conforming people, even in the face of legal uncertainty, by advancing evidence-based policies that promote their health and well-being.

II. BACKGROUND: THE HEALTH OF TRANSGENDER AND GENDER NON-CONFORMING AMERICANS

The phrase “transgender and gender non-conforming” encompasses people who live in a gender different from that assigned to them at birth (transgender), and others who have a gender identity that differs from traditional gender roles, including people who identify as nonbinary (gender non-conforming).⁸ Although data is limited, this category includes an estimated 1.3 million adults in the United States who identify as transgender; of these individuals, approximately thirty-nine percent identify as transgender women, thirty-six percent as transgender men, and twenty-five percent as gender non-conforming.⁹ Meanwhile, in a survey of LGBTQ+ adults in the United States, 1.2 million identified as nonbinary.¹⁰ Because people can be both transgender and nonbinary, and because some people who are gender non-conforming do not identify as nonbinary, it is difficult to know the exact size of the transgender and gender non-conforming population.¹¹ However, given the high percentages (between two and ten percent) of youth identifying as gender minorities in recent national surveys—a percentage that is growing, likely due to growing social acceptance—it is probable that the population of transgender and gender non-conforming people in the United States is on the rise.¹²

Transgender and gender non-conforming people experience a myriad of disparities with regard to social determinants of health, including higher rates of

8. *When Health Care Isn't Caring: Transgender and Gender-Nonconforming People*, LAMBDA LEGAL 1 (July 21, 2014), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_transgender-and-gender-nonconforming-people.pdf.

9. Herman et al., *supra* note 1.

10. WILSON & MEYER, *supra* note 1, at 2.

11. Costanza Potter, *GPs Asked to Do 'Extensive Reviews' for Gender Identity Clinic Patients Facing Long Waits*, PULSE (Apr. 20, 2022), <https://www.pulsetoday.co.uk/news/referrals/gps-asked-to-do-extensive-reviews-for-gender-identity-clinic-patients-facing-long-waits/>.

12. WILSON & MEYER, *supra* note 1, at 6. The underlying CDC survey cited in this footnote did not have an option to select nonbinary, or other gender nonconforming identities apart from transgender. See Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the U.S.*, N.Y. TIMES (June 10, 2022), <https://www.nytimes.com/2022/06/10/science/transgender-teenagers-national-survey.html> (discussing the factors underlying the increase in diverse gender identities among youth).

poverty and homelessness.¹³ The 2015 U.S. Transgender Survey found that poverty rates are extremely high for transgender individuals—twenty-nine percent, compared to only fourteen percent of the total United States population.¹⁴ The unemployment rate among transgender individuals was fifteen percent compared to five percent of the overall population, and about thirty percent of transgender individuals experienced lifetime homelessness, compared to twelve percent of the population.¹⁵

Research indicates that transgender and gender non-conforming people experience high rates of poverty, unemployment, homelessness, and justice system involvement in large part because of transphobia and discrimination by employers, housing providers, and law enforcement.¹⁶ Among the transgender and gender non-conforming population, people of color, people who are undocumented, and people with disabilities experience greater degrees of racial discrimination, ableism, xenophobia, and overall hardship.¹⁷

Transgender and gender non-conforming individuals are disproportionately impacted by a range of health challenges, including HIV, sexually transmitted infections, and poor mental health outcomes.¹⁸ A Centers for Disease Control (“CDC”) meta-analysis of eighty-eight studies on HIV prevalence in the United States concluded that transgender individuals are highly impacted by HIV, with a prevalence of 9.2% (14.1% for transgender women and 3.2% for transgender men) compared to less than 0.5% among all adults.¹⁹ A CDC National HIV Behavioral Surveillance Survey of transgender women in seven cities found that 42.2% of transgender women were living with diagnosed HIV.²⁰ Of the transgender women diagnosed with HIV, sixty-two percent were Black, thirty-five percent were Hispanic/Latinx, and seventeen percent were white.²¹

Discrimination based on gender identity contributes to negative mental health outcomes, including high rates of severe psychological distress and

13. Off. Disease Prevention & Health Promotion, *Healthy People 2030: Social Determinants of Health*, U.S. DEP’T HEALTH & HUM. SERVS., <https://health.gov/healthypeople/priority-areas/social-determinants-health> (last visited Feb. 11, 2023).

14. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., 2015 U.S. TRANSGENDER SURVEY 5 (2016).

15. *Id.*

16. *Id.* at 5, 13, 14.

17. *Id.* at 6.

18. *Id.* at 10.

19. CDC Issue Brief: *HIV and Transgender Communities*, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (2022), <https://www.cdc.gov/hiv/pdf/policies/data/cdc-hiv-policy-issue-brief-transgender.pdf>.

20. CTRS. FOR DISEASE CONTROL & PREVENTION, HIV SURVEILLANCE SPEC. REP. NO. 27, HIV INFECTION, RISK, PREVENTION, AND TESTING BEHAVIORS AMONG TRANSGENDER WOMEN 5 (2021).

21. *Id.*

suicidality, in transgender and gender non-conforming people.²² In the 2015 U.S. Survey of Transgender Health, thirty-nine percent of participants reported currently experiencing serious psychological distress, compared to five percent of the total population.²³ A 2016 study found that thirty-nine percent of surveyed nonbinary adults reported ever having attempted suicide, and ninety-four percent reported suicidal ideation.²⁴ Another study of transgender youth seeking treatment found that those who also identify as nonbinary reported higher rates of anxiety and depression than transgender youth who were not non-binary.²⁵

In addition to bearing the burdens of multiple health disparities, transgender and gender non-conforming people often face multiple barriers to accessing healthcare.²⁶ Research has identified barriers including a lack of clinical and cultural competence with regard to gender identity among providers; overt discrimination or hostility from healthcare providers; and fear of familial or social estrangement due to seeking care.²⁷ In addition, transgender adults are more likely to be uninsured than cisgender adults, whose gender identity aligns with the sex assigned to them at birth (nineteen percent versus twelve percent).²⁸

III. EMERGING LAWS AND POLICIES IMPACTING TRANSGENDER AND GENDER NON-CONFORMING HEALTH

In recent years, state legislation and proposed bills affecting the health and well-being of transgender and gender non-conforming people have

22. JAMES ET AL., *supra* note 14, at 112.

23. *Id.* at 5.

24. WILSON & MEYER, *supra* note 1, at 15.

25. Nat Thorne et al., *A Comparison of Mental Health Symptomatology and Levels of Social Support in Young Treatment Seeking Transgender Individuals Who Identify as Binary and Non-binary*, 20 INT'L J. OF TRANSGENDER HEALTH 241, 245 (2019).

26. LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY OF DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE WITH HIV 5 (2010).

27. *Id.* at 5; JAMES ET AL., *supra* note 14, at 4; Jae A. Puckett et al., *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 SEXUALITY RSCH. & SOC. POL'Y 48, 54 (2018); *Transgender Sexual and Reproductive Health: Unmet Needs and Barriers to Care*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Apr. 1, 2012), <https://transequality.org/issues/resources/transgender-sexual-and-reproductive-health-unmet-needs-and-barriers-to-care>.

28. Wyatt Koma et al., *Demographics, Insurance Coverage, and Access to Care Among Transgender Adults*, KAISER FAM. FOUND. (Oct. 21, 2020), <https://www.kff.org/health-reform/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults/>; Iore M. Dickey et al., *Health Disparities in the Transgender Community: Exploring Differences in Insurance Coverage*, 3 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 275, 276 (2016).

proliferated.²⁹ While some threaten to exacerbate existing health disparities, others seek to protect access to healthcare and other services.³⁰

A. *Laws Regarding Insurance Coverage of Gender-Affirming Care*

Gender-affirming care is defined by the World Health Organization (“WHO”) as the “range of social, psychological, behavioral, and medical interventions ‘designed to support and affirm an individual’s gender identity’ when it conflicts with the gender they were assigned at birth.”³¹ Gender-affirming medical care can include surgical procedures as well as non-surgical treatment such as hormone therapies, puberty blockers, or facial hair removal.³²

Not all transgender people want or seek medical services to transition.³³ However, evidence indicates that, for many, gender-affirming medical services reduces rates of suicidality, reduces substance use, increases HIV medication adherence, decreases depression and anxiety, and improves overall mental health for transgender and gender diverse people.³⁴ A national survey of transgender adults found engagement in gender-affirming medical procedures to be associated with lower anxiety and depression.³⁵

In recent years, insurance laws and policies regarding coverage of gender-affirming care have improved, but gaps remain.³⁶

1. Medicare

Medicare coverage of gender-affirming care has evolved rapidly in the past decade. The Medicare program is statutorily prohibited from covering services that are “not reasonable and necessary for the diagnosis or treatment of illness

29. Lindsey Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>.

30. *Id.*

31. *Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd> (last visited Jan. 22, 2023); Patrick Boyle, *What is Gender-Affirming Care? Your Questions Answered*, ASS’N OF AM. MED. COLLS. (Apr. 12, 2022), <https://www.aamc.org/news-insights/what-gender-affirming-care-your-questions-answered>.

32. Madeline B. Deutsch, *Overview of Gender-Affirming Treatments and Procedures*, UCSF TRANSGENDER CARE (June 17, 2016), <https://transcare.ucsf.edu/guidelines/overview>.

33. *Id.*

34. *Health Insurance Coverage for Gender-Affirming Care of Transgender Patients*, AM. MED. ASS’N 4 (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf>.

35. Jaclyn M.W. Hughto et al., *Social and Medical Gender Affirmation Experiences are Inversely Associated with Mental Health Problems in a U.S. Non-Probability Sample of Transgender Adults*, 49 ARCHIVES SEXUAL BEHAV. 2635, 2641, 2645 (2020).

36. AM. MED. ASS’N, *supra* note 34, at 2.

or injury,”³⁷ with limited exceptions. In 1989, the Health Care Financing Administration, the predecessor to today’s Centers for Medicare and Medicaid Services (“CMS”), issued a National Coverage Determination (“NCD”) that denied Medicare coverage of all “transsexual surgery,” noting that “[b]ecause of the lack of well controlled, long-term studies of the safety and effectiveness of the surgical procedures and attendant therapies for transsexualism, the treatment is considered experimental.”³⁸

In 2013, in response to a complaint from an enrollee denied coverage for a physician’s order for transition-related surgery, the Department of Health and Human Services (“HHS”) Departmental Appeals Board undertook a reconsideration of the 1989 NCD.³⁹ Based on extensive scientific evidence and expert testimony, the Board determined in 2014 that the earlier NCD was no longer valid.⁴⁰ In addition to citing the large body of evidence supporting the long-term safety and effectiveness of the relevant surgical procedures, the Board noted:

Considerations of social acceptability (or nonacceptability) of medical procedures appear on their face to be antithetical to Medicare’s “medical necessity” inquiry, which is based in science, and such considerations do not enter into our decision that the NCD is not valid.⁴¹

As the Board noted in 2014, at that point, CMS could have undertaken a new National Coverage Analysis (“NCA”) to affirmatively require nationwide coverage of gender reassignment surgery in the Medicare program.⁴² In 2016, CMS undertook an NCA in response to a request, but ultimately decided not to issue an affirmative NCD, stating that “the clinical evidence [was] inconclusive for the Medicare population.”⁴³

In the absence of an NCD requiring coverage of a specific service, coverage decisions for the fee-for-service program, which covers just over half of Medicare beneficiaries, are made by Medicare Administrative Contractors (“MACs”).⁴⁴ There are currently twelve MACs serving different regions of the country, and at least three have developed specific guidelines for the coverage

37. 42 U.S.C. § 1395y(a)(1)(A) (2021).

38. NCD 140.3, Transsexual Surgery, Decision No. 2576, at 4 (Dep’t of Health & Hum. Servs. May 30, 2014).

39. *Id.* at 1.

40. *Id.*

41. *Id.* at 24.

42. *Id.* at 1.

43. CTRS. FOR MEDICARE & MEDICAID SERVS., CAG-00446N, FINAL DECISION MEMORANDUM ON GENDER REASSIGNMENT SURGERY FOR MEDICARE BENEFICIARIES WITH GENDER DYSPHORIA (2016), <https://www.cms.gov/medicare-coverage-database/view/ncaal-decision-memo.aspx?proposed=N&ncaid=282>.

44. *Id.*

of transgender-related care.⁴⁵ In addition, some Medicare Advantage plans (comprehensive managed care plans, which serve nearly half of Medicare beneficiaries)⁴⁶ have issued guidance regarding their coverage of gender-affirming interventions and transgender health services.⁴⁷ In CMS regions that do not provide explicit guidance regarding coverage of transgender-related services, transgender individuals might still be able to receive such services because coverage for transition-related care may be made on a case-by-case basis based on a medical necessity review by local MAC or by plans.⁴⁸

2. Private Insurance

As the primary regulators of private insurance, states have significant control over private coverage of gender-affirming care.⁴⁹ The Transgender Law Center's Movement Advancement Project ("MAP") has closely tracked state legislation in this area.⁵⁰ As of June 2022:

- Twenty-four states, and the District of Columbia, ban insurers from blanket denials of gender-affirming care.⁵¹ Insurers in these states can still apply medical necessity standards for specific instances of gender-affirming care.⁵²

45. *What's a Mac?*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare-Contracting/Medicare-Administrative-Contractors/What-is-a-MAC> (last modified Jan. 12, 2022, 9:44 AM); *Know Your Rights: Medicare*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/medicare> (last visited Jan. 22, 2023).

46. Meredith Freed et al., *Medicare Advantage in 2022: Enrollment Update and Key Trends*, KAISER FAM. FOUND. (Aug. 25, 2022), <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2022-enrollment-update-and-key-trends/>.

47. *Health Insurance Medical Policies*, TRANSGENDER LEGAL DEF. & EDUC. FUND, <https://transhealthproject.org/resources/health-insurance-medical-policies/views/medicare/> (last visited Feb. 13, 2023).

48. *Fact Sheet on Medicare Coverage of Transition-Related Care*, NAT'L CTR. FOR TRANSGENDER EQUAL. (May 2014), <https://www.hivlawandpolicy.org/sites/default/files/Fact%20Sheet%20on%20Medicare%20Coverage%20of%20Transition%20Related%20Care%20%28NCTE%29.pdf>; CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 43.

49. *Attacks on Gender-Affirming and Transgender Health Care*, AM. COLL. OF PHYSICIANS (Nov. 11, 2022), <https://www.acponline.org/advocacy/state-health-policy/attacks-on-gender-affirming-and-transgender-health-care>.

50. *Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/equality-maps> (last modified Feb. 11, 2023).

51. *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last modified Feb. 11, 2023).

52. Louise Norris, *Does Health Insurance Cover Transgender Health Care?*, VERYWELL HEALTH (June 23, 2021), <https://www.verywellhealth.com/transgender-healthcare-and-health-insurance-4065151>.

- Fifteen states, and the District of Columbia, prohibit private insurers from discriminating against people on the basis of sexual orientation or gender identity with regard to exclusion from coverage for all or some services.⁵³
- Seven additional states prohibit discrimination on the basis of gender identity with regard to exclusion from coverage for all or some services.⁵⁴

The majority of other states are silent on private insurance coverage of gender-affirming care.⁵⁵ However, an Arkansas law, enacted in 2021, specifically permits health plans to deny coverage of “gender transition procedures.”⁵⁶

3. Medicaid

As of August 2022, the Medicaid program covers over eighty-three million Americans.⁵⁷ Medicaid is a joint federal-state program, with certain coverage decisions left to the states.⁵⁸

Under 2016 regulations, which implemented Section 1557 of the Affordable Care Act (“ACA”), Medicaid programs (as well as plans offered through Health Insurance Marketplaces) were prohibited from having categorical exclusions of gender transition-related services.⁵⁹ As detailed in the discussion *infra*, this policy was reversed by the Trump Administration; however, the Biden Administration has proposed reinstating this and other protections.⁶⁰

At the state level, twenty-six states, and the District of Columbia, affirmatively cover gender-affirming care in their state Medicaid programs.⁶¹ Conversely, nine states explicitly exclude coverage for transgender care.⁶²

A number of Medicaid transgender care exclusions have been successfully challenged in court. In *Flack v. Wisconsin Department of Health Services*, two

53. MOVEMENT ADVANCEMENT PROJECT, *supra* note 51.

54. *Id.*

55. *Id.*

56. H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

57. *August 2022 Medicaid and CHIP Enrollment Trends Snapshot*, CTRS. FOR MEDICARE & MEDICAID (Aug. 2022), <https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/august-2022-medicaid-chip-enrollment-trend-snapshot.pdf>.

58. *Introduction to Medicaid*, CTR. ON BUDGET & POL. PRIORITIES (Apr. 14, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-medicaid.pdf>.

59. 45 C.F.R. § 92.2 (2022).

60. Mary Beth Musumeci et al., *Recent and Anticipated Actions to Reverse Trump Administration Section 1557 Non-Discrimination Rules*, KAISER FAM. FOUND. (June 9, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/>.

61. *Medicaid Regulations and Guidance States with Coverage*, TRANSGENDER LEGAL DEF. & EDUC. FUND, <https://transhealthproject.org/resources/medicaid-regulations-and-guidance/views/explicit-coverage/> (last visited Jan. 27, 2023).

62. *Healthcare Laws and Policies: Medicaid Coverage for Transgender-Related Care*, MOVEMENT ADVANCEMENT PROJECT (Aug. 20, 2022), <https://www.lgbtmap.org/img/maps/citations-medicaid.pdf>.

plaintiffs challenged the state's categorical exclusion of gender-affirming services from coverage.⁶³ The plaintiffs relied on Section 1557 of the ACA, which, as discussed further *infra*, prohibits discrimination on the basis of sex.⁶⁴ A federal district court agreed and permanently enjoined the Wisconsin Medicaid program from categorically excluding gender-affirming services from coverage.⁶⁵ The state did not appeal.⁶⁶ In West Virginia, a federal judge ruled in August 2022 that a similar exclusion “invidiously discriminate[d] on the basis of sex and transgender status.”⁶⁷

B. State Laws Targeting Transgender Youth Access to Gender-Affirming Care

Approximately 300,000 youth, or about 1.4% of all children age thirteen to seventeen years old in the United States, identify as transgender.⁶⁸ Transgender and gender non-conforming adolescents are at an increased risk for mental health issues, substance use, and suicide.⁶⁹ According to the Trevor Project's 2021 National Survey on LGBTQ Youth Mental Health, about forty-two percent of LGBTQ+ youth seriously considered attempting suicide within the past year.⁷⁰ Gender-affirming care for youth is linked to reduced negative mental health outcomes, including a reduction in suicidal ideation and depression.⁷¹ Major medical professional organizations, including the American Academy of Pediatrics and the Pediatric Endocrine Society, have published statements or guidelines regarding gender-affirming care for youth that urge providers to work with patients and their families to identify age-appropriate gender-affirming care that supports their mental and physical health.⁷²

63. *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1003 (W.D. Wis. 2019).

64. *Id.* at 1014.

65. *Id.* at 1022.

66. See *Flack v. Wisconsin Department of Health Services*, RELMAN COLFAX, <https://www.reلمانlaw.com/cases-flack> (last visited Feb. 13, 2023).

67. *Fain v. Crouch*, No. 3:20-0740, 2022 WL 3051015, at *1, *14 (S.D. W. Va. Aug. 2, 2022).

68. Herman et al., *supra* note 1.

69. OFF. OF POPULATION AFF., *Gender-Affirming Care and Young People*, U.S. DEP'T HEALTH & HUM. SERVS., <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf> (last visited Feb 13, 2023).

70. TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2021 at 2 (2021).

71. Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643, 644 (2022); Jack L. Turban et al., *Access to Gender-Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults*, PLOS ONE, Jan. 12, 2022, at 1, 2, No. e0261039; Diana M. Tordoff et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, JAMA NETWORK OPEN, Feb. 25, 2022, at 1, 2, No. e220978; OFF. OF POPULATION AFF., *supra* note 69.

72. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 4, 10, No. e20182162; Sarah Hart-

Despite this extensive body of evidence, states have passed, or considered, numerous laws in recent years specifically limiting transgender youths' access to gender-affirming care.⁷³ As of June 2022, Alabama, Texas, Arizona, and Arkansas all had laws or directives preventing transgender minors from receiving any gender-affirming care, including puberty blockers, hormone therapy, and surgery:⁷⁴

- Alabama has made “engaging in or causing” a minor to receive any of these treatments a felony.⁷⁵
- Arkansas has prevented medical providers from making referrals to other providers for minors seeking transgender services or care.⁷⁶
- Arizona’s law bans physicians from providing gender-affirming surgeries for transgender youth under age eighteen, regardless of parental consent.⁷⁷
- In February 2022, Texas Governor Greg Abbott issued a directive defining gender-affirming care services for youth as child abuse; the law would penalize healthcare professionals.⁷⁸ In September 2022, a district judge issued a temporary injunction against this ban for families who are members of PFLAG, an LGBTQ+ advocacy group.⁷⁹
- Florida’s governor-appointed Board of Medicine has banned medications, including puberty blockers and hormones, as well as procedures, including surgery, for transgender youth seeking gender-affirming care.⁸⁰

As of December 2022, bills blocking some or all gender-affirming care for youth has been introduced in seventeen other states.⁸¹

Unger & Stephanie Roberts, *Introduction to Health for Transgender Youth*, PEDIATRIC ENDOCRINE SOC’Y (June 17, 2020), <https://pedsendo.org/patient-resource/transgender-care/>.

73. Dawson et al., *supra* note 6.

74. *Id.*

75. S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

76. H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

77. S.B. 1138, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

78. Letter from Greg Abbott, Governor, Tex. to Hon. Jaime Masters, Comm’r, Tex. Dep’t of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-Masters_Jaime202202221358.pdf.

79. Andrew DeMillo, *Texas Judge Blocks Investigations of Trans Youth Families*, AP NEWS (Sept. 16, 2022), <https://apnews.com/article/texas-lawsuits-d2af85158fd7dd1660b9d18871e0e7b0>.

80. Azeen Ghorayshi, *Florida Restricts Doctors from Providing Gender Treatments to Minors*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/health/florida-gender-care-minors-medical-board.html>.

81. Dawson et al., *supra* note 6.

States can also take indirect, but targeted, actions to limit such care.⁸² For example, Oklahoma Governor Kevin Stitt refused to provide \$108 million in pandemic relief funds to the Oklahoma University Medical Center unless it agreed to stop providing gender-affirming medical care to transgender minors.⁸³ The hospital elected to halt this care, impacting approximately 100 children, rather than lose the \$108 million for cancer care, pediatric mental health needs, and other services.⁸⁴

Proponents of such laws and executive actions offer a range of justifications. Some argue that minors are too young to make medical decisions regarding gender-affirming care, or that minors who undergo such treatment may regret their decision later in life.⁸⁵ There are valid clinical questions about potential side effects of puberty blockers and hormone therapies, including decreased bone density.⁸⁶ There is also ongoing debate within the community of providers who care for transgender children and adolescents about appropriate age thresholds, screening procedures, and other requirements.⁸⁷

However, these concerns do not point toward a legislative ban. As the American Medical Association (“AMA”) noted in a statement urging governors to veto laws that block gender-affirming care:

Empirical evidence has demonstrated that trans and non-binary gender identities are normal variations of human identity and expression. For gender diverse individuals, standards of care and accepted medically necessary services that affirm gender or treat gender dysphoria may include mental health counseling, non-medical social transition, gender-affirming hormone therapy, and/or gender-affirming surgeries. Clinical guidelines established by professional medical organizations for the care of minors promote these supportive interventions based on the current evidence and that enable young people to explore and live the gender that they choose. Every major medical association

82. Sri Ravipati, *Oklahoma Hospital System Halts Some Trans Youth Care After State Funding Threat*, AXIOS (Oct. 5, 2022), <https://www.axios.com/2022/10/05/oklahoma-hospital-gender-affirming-care>.

83. *Id.*

84. *Id.*

85. Orion Rummeler, *Republicans Split on Whether the Government Should Block Crucial Gender-Affirming Care, Poll Shows*, THE 19TH (Mar. 9, 2022, 3:51 PM), <https://19thnews.org/2022/03/republicans-split-blocking-gender-affirming-care-trans-youth-poll/>.

86. Daniel Klink et al., *Bone Mass in Young Adulthood Following Gonadotropin-Releasing Hormone Analog Treatment and Cross-Sex Hormone Treatment in Adolescents with Gender Dysphoria*, J. CLINICAL ENDOCRINOLOGY & METABOLISM, Feb. 2015, at E270, E273; Mariska C. Vlot et al., *Effect of Pubertal Suppression and Cross-Sex Hormone Therapy on Bone Turnover Markers and Bone Mineral Apparent Density (BMAD) in Transgender Adolescents*, 95 BONE 11, 18 (2017); Philip J. Cheng et al., *Fertility Concerns of The Transgender Patient*, 8 TRANSLATIONAL ANDROLOGY & UROLOGY 209, 211 (June 2019).

87. Emily Bazelon, *The Battle Over Gender Therapy*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html>.

in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.⁸⁸

In its statement, the AMA cited a strong body of research exhibiting the positive outcomes of providing gender-affirming care for transgender youth.⁸⁹ Research indicates that improved self-esteem after receiving gender-affirming care acts as a protective factor against poor mental health and supports transgender children's familial and social relationships.⁹⁰ The AMA also cited research finding that gender-affirming care dramatically reduces the number of suicide attempts and decreases rates of anxiety and depression, and that most patients who receive gender-affirming care reported improved mental health and function afterwards.⁹¹ Finally, the AMA indicated that the provision of medically supervised care can reduce rates of self-prescribing hormones, using construction-grade silicone injections, and other dangerous interventions that can cause harm to patients.⁹²

While supporters of laws blocking gender affirming care for youth cite a concern for their well-being, this argument is undermined by the proposal and enactment of additional laws that create dangerous social environments for transgender children.⁹³ For example, Alabama law requires school officials, nurses, and counselors to inform a minor's parents that the child is transgender, which could "out" the child to their family and impact their safety.⁹⁴ This policy may also reduce the child's likelihood of visiting the nurse or counselor for other health needs, which would further exacerbate health disparities.⁹⁵ Similarly, six states have enacted laws banning classroom discussion of sexual orientation and

88. James L. Medara, *AMA to States: Stop Interfering in Health Care of Transgender Children*, AM. MED. ASS'N (Apr. 26, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children>.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See Brooke Migdon & Emily Brooks, *Marjorie Taylor Greene Introduces Bill to Make Gender-Affirming Care for Transgender Youth a Felony*, THE HILL (Aug. 19, 2022), <https://thehill.com/changing-america/respect/equality/3607955-marjorie-taylor-greene-introduces-bill-to-make-gender-affirming-care-for-transgender-youth-a-felony/> (citing Marjorie Taylor Greene's statement that gender-affirming care is akin to "child abuse"); see also Koko Nakajima & Connie Hangzhang Jin, *Bills Targeting Trans Youth are Growing More Common — and Radically Reshaping Lives*, NPR (Nov. 28, 2022, 5:00 PM), <https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports> (finding that state lawmakers introduced over 200 bills targeting trans youth since 2020).

94. S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

95. Kelly Davio, *Transgender Youth Face Health Disparities, and It's Up to Providers to Address Them*, AJMC (Feb. 7, 2018), <https://www.ajmc.com/view/transgender-youth-face-health-disparities-and-its-up-to-providers-to-address-them>.

gender identity, which threaten to negatively impact transgender and gender non-conforming children's mental health and well-being.⁹⁶

C. State Laws Restricting Transgender Youth Participation in Sports

Research suggests affirming transgender youth in their gender improves physical and mental health outcomes.⁹⁷ Part of this affirmation comes from allowing and supporting a child to be their self-identified gender in all aspects of their life, including in school sports.⁹⁸ As a health matter, school sports increase social competence,⁹⁹ and reduce anxiety and depression scores.¹⁰⁰ Yet, transgender youth are less likely to play sports than their cisgender peers, likely in part because transgender athletes are often bullied or harassed by teammates or coaches if they disclose their identity.¹⁰¹ Approximately sixty percent of transgender youth avoid gym classes, and seventy percent report avoiding school locker rooms due to safety concerns.¹⁰²

Policies that make schools and athletics more welcoming and supportive for transgender and gender non-conforming children could help ensure student safety, and encourage access to the physical and mental health benefits of participation in sports.¹⁰³ Yet, many states have enacted, or are considering, laws blocking transgender youths' ability to play sports matching their gender.¹⁰⁴ Eighteen states have enacted laws banning transgender girls or all transgender students from participating in sports consistent with their gender identity.¹⁰⁵ The scope and extent of these state policies vary. For example, some policies require youths to participate in the sport that aligns with their birth certificate, some

96. NAT'L ACADS. OF SCI., ENG'G, & MED., UNDERSTANDING THE STATUS AND WELL-BEING OF SEXUAL AND GENDER DIVERSE POPULATIONS 2 (2020), <https://www.nationalacademies.org/our-work/understanding-the-status-and-well-being-of-sexual-and-gender-diverse-populations>; *LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws (last modified Feb. 13, 2023).

97. *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbtq-rights/the-coordinated-attack-on-trans-student-athletes>.

98. Shoshana K. Goldberg, *Fair Play*, CTR. FOR AM. PROGRESS (Feb. 8, 2021), <https://www.americanprogress.org/article/fair-play/>.

99. See Chloe Bedard et al., *A Longitudinal Study of Sport Participation and Perceived Social Competence in Youth*, 66 J. ADOLESCENT HEALTH 352, 359 (2020).

100. Matt Hoffman et al., *Associations Between Organized Sport Participation and Mental Health Difficulties: Data from Over 11,000 US Children and Adolescents*, PLOS ONE, June 1, 2022, at 1, 9, No. e0268583.

101. Goldberg, *supra* note 98.

102. *Id.*

103. *Transgender Inclusion in High School Athletics*, GLSEN (July 2019), <https://www.glsen.org/sites/default/files/2019-10/GLSEN-Transgender-Inclusion-High-School-Athletics.pdf>.

104. See Nakajima & Hangzhang Jin, *supra* note 89.

105. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/sports_participation_bans (last modified Feb. 13, 2023).

require parental approval for youth to participate in the sport that matches their gender identity, and some require gender-affirming surgery before participation.¹⁰⁶

Idaho was the first state to take this step. In 2020, Idaho enacted a law mandating that “[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.”¹⁰⁷ Any “dispute regarding a student’s sex” can require a student to undergo an examination of their “reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels”¹⁰⁸—effectively coercing children into invasive medical procedures based on a challenge to their sex.¹⁰⁹ Since 2020, seventeen additional states have followed Idaho’s lead and enacted similar legislation; governors in several other states have vetoed such laws.¹¹⁰

Some state legislators are positioning themselves as “saving women’s sports,”¹¹¹ saying that transgender girls have higher levels of testosterone and other hormones which give them an unfair advantage.¹¹² Setting aside discussions of elite adult sports, these arguments are not persuasive regarding children. Studies show no difference in athletic performance or advantage based on sex for prepubescent youth; for pubescent and post-pubescent youth, evidence is mixed.¹¹³ However, from a public health perspective, any average advantage is outweighed against the harms of excluding transgender children or subjecting them to traumatic examinations or tests.

106. See Mike Bunge, *Iowa Governor Signs Law That School Sports Competition Must Be Based on Biological Sex*, KIMT3 (Mar. 3, 2022), https://www.kimt.com/news/iowa-governor-signs-law-that-school-sports-competition-must-be-based-on-biological-sex/article_2fcb1de8-9b20-11ec-a564-4b49fcad821f.html; see also Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (June 7, 2022), https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation.

107. H.B. 500, 65th Leg., 2nd Reg. Sess. (Idaho 2020).

108. *Id.*

109. See Brenna M. Moreno, “Women Enough” to Win? *An Analysis of Sex Testing in College Athletics*, 15 ST. LOUIS U. J. HEALTH L. & POL’Y 509, 528 (2022) (for a discussion of “sex testing” in sport and sex discrimination).

110. MOVEMENT ADVANCEMENT PROJECT, *supra* note 105.

111. See, e.g., “We Did It!”, IND. FAM. INST., <https://hoosierfamily.org/news/%EF%BF%BCwe-did-it-20220525/> (last visited Feb. 14, 2023) (stating, upon passage of Indiana’s ban, “[t]his is a huge step forward to saving women’s sports.” The organization went on to state that “We are in the midst of a cultural battle in which our opponents fly in the face of reality and God’s design.”).

112. Abigail Shrier, *Joe Biden’s First Day Began the End of Girls’ Sports*, WALL ST. J. (Jan. 22, 2021, 1:44 PM), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066>.

113. David J. Handlesman et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REVS. 803, 821 (2018).

State laws targeting transgender women may have a disproportionately harmful impact on Black and Brown women and girls.¹¹⁴ For example, the National Women's Law Center, the Lawyers' Committee for Civil Rights Under Law, and others have noted that racist and sexist conceptions that Black female athletes are more "masculine" than other female athletes will sway how coaches and others decide who should be excluded or forced to undergo testing.¹¹⁵

The American Civil Liberties Union challenged the Idaho law on behalf of Lindsay Hecox, a transgender woman who wanted to run track on the women's team at Boise State University.¹¹⁶ The district court issued a preliminary injunction in favor of Hecox on equal protection grounds, noting, in its analysis: "Because Proponents [of the Idaho law] fail to show that participation by transgender women athletes threatened sexual equality in sports or opportunities for women under these pre-existing policies, the Act's proffered justifications do not appear to overcome the inequality it inflicts on transgender women athletes."¹¹⁷ As of fall 2022, the case is on appeal to the Ninth Circuit.¹¹⁸

The landscape continues to evolve rapidly. On April 6, 2023, the U.S. Department of Education issued proposed rules that would deem blanket bans of trans athletes a violation of Title IX.¹¹⁹ However, the proposal would also permit the establishment of specific criteria for exclusion in the context of specific sports, levels of competition, and level.¹²⁰ On the same day, the Supreme Court declined to immediately reinstate West Virginia's blanket ban while appeals are pending.¹²¹

D. State Provider Competency Standards

As discussed *supra*, people who are transgender and gender non-conforming face multiple barriers to quality healthcare, including interacting with providers who are discriminatory, hostile, or who lack clinical or cultural competence in gender affirming care.¹²²

114. Brief for Nat'l Women's L. Ctr. et al. as Amici Curiae Supporting Appellees at 5, *Hecox v. Little*, No. 1:20-cv-00184-DCN (9th Cir. Dec. 21, 2020).

115. *Id.* at 21.

116. *Hecox v. Little*, 479 F. Supp. 3d 930, 946 (D. Idaho 2020).

117. *Id.* at 982.

118. *Hecox v. Little*, ACLU (Jan. 12, 2023), <https://www.aclu.org/cases/hecox-v-little>.

119. Sex-Related Eligibility Criteria for Male and Female Athletic Teams, ED-2022-OCR-0143 (proposed Apr. 6, 2023) (to be codified at 34 C.F.R. pt. 106).

120. *Id.*

121. *West Virginia v. B.P.J.*, No. 22A800, slip op. at 1 (U.S. Sup. Ct., Apr. 6, 2023) (Alito, J., dissenting).

122. LAMBDA LEGAL, *supra* note 26, at 5, 10–11; JAMES ET AL., *supra* note 14, at 93, 96; PUCKETT ET AL., *supra* note 27, at 53; NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 27.

This is an area ripe for policy improvements, and various professional organizations—including the American Psychological Association,¹²³ the American Medical Student Association,¹²⁴ and the Association of American Medical Colleges,¹²⁵—support the creation of educational resources to educate the healthcare workforce about transgender healthcare.

One such tool that could be useful in educating providers is Continuing Medical Education (“CME”). States have established, by law, requirements for CME that healthcare providers must complete to maintain their licensure to practice.¹²⁶ States typically have requirements for various categories of providers, including physicians, nurses, physician assistants, and others.¹²⁷ These CME requirements provide a lever for states to ensure medical education meets community healthcare needs.¹²⁸ To date, only the District of Columbia and California affirmatively require providers to study sexual and gender minority inclusive/protective content:

- The District of Columbia requires physicians, nurses, and physician assistants to complete at least two hours of LGBTQ+ cultural competency training as part of their CME requirements.¹²⁹
- In September 2022, Governor Gavin Newsom signed California’s TGI Inclusive Care Act, which mandates that physician CME requirements include evidence-based, culturally-competent training for the care of transgender, gender diverse, and intersex individuals; and requires that

123. Barry S. Anton, *Proceedings of the American Psychological Association for the Legislative Year 2008: Minutes of the Annual Meeting of the Council of Representatives, February 22–24, 2008, Washington, DC, and August 13 and 17, 2008, Boston, MA, and Minutes of the February, June, August, and December 2008 Meetings of the Board of Directors*, 64 AM. PSYCH. 372, 442 (2009).

124. AM. MED. STUDENT ASS’N, *Purposes and Principles*, in 2022 AMSA PREAMBLE, PURPOSES AND BYLAWS (2006), https://www.amsa.org/wp-content/uploads/2021/09/FY2021_22_PPP.pdf (“urg[ing] Medical Schools to include training in healthcare issues facing minority populations within the Lesbian, Gay, Bisexual and Transgender community as part of its mandatory curriculum”).

125. ANDREW D. HOLLENBACK ET AL., IMPLEMENTING CURRICULAR AND INSTITUTIONAL CLIMATE CHANGES TO IMPROVE HEALTH CARE FOR INDIVIDUALS WHO ARE LGBT, GENDER NONCONFORMING, OR BORN WITH DSD 2 (2014).

126. *State CME Licensure Requirements*, UNIV. KY., <https://www.cecentral.com/licensure/cme/> (last visited Jan. 24, 2023).

127. *Continuing Medical Education (CME) Resources & Requirements for Physicians, PAs & NPs*, STAFF CARE: LOCUM TENENS BLOG (Apr. 20, 2017), <https://www.staffcare.com/locum-tenens-blog/news/cme-resources-for-physicians-physician-assistants-nurse-practitioners/>.

128. David W. Price et al., “Systems-Integrated CME”: *The Implementation and Outcomes Imperative for Continuing Medical Education in the Learning Health Care Enterprise*, NAT’L ACAD. OF MED. (Oct. 4, 2021), <https://nam.edu/systems-integrated-cme-the-implementation-and-outcomes-imperative-for-continuing-medical-education-in-the-learning-health-care-enterprise/>.

129. D.C. Code § 3–1205.10(b)(5) (2016).

health insurance companies provide such training to staff, and list in-network providers who offer gender-affirming services.¹³⁰

Overall, CME requirements remain an untapped opportunity to promote provider awareness and competency for treating transgender and gender non-conforming patients.

IV. DISCUSSION

A. *The Status of Gender Identity Under Equal Protection Jurisprudence*

The Equal Protection Clause of the Fourteenth Amendment protects certain classes of people from discriminatory government laws and actions.¹³¹ Generally, if a law targets a “suspect class” —race, religion, national origin, or alienage—a court will apply strict scrutiny: looking for a compelling state interest, asking if the action or law was necessary to meet that interest, and querying if any less restrictive approach was available.¹³²

Sex is considered a “quasi-suspect class.”¹³³ Laws that discriminate on the basis of sex are subject to intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment: The law must be substantially related to an important government interest to be upheld as constitutional.¹³⁴

If no suspect or quasi-suspect class is at issue, courts use a rational basis test: If the government can point to any rational reason for the law, it will be upheld.¹³⁵

The status of sexual orientation and gender identity under the Equal Protection Clause remains somewhat murky. Some commentators and litigants have argued that sexual orientation and gender identity should warrant at least intermediate scrutiny because they are, fundamentally, discrimination on the basis of sex.¹³⁶ For example, one author stated with regard to sexual orientation:

As a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex.¹³⁷

130. S.B. 923, 2021–22 Leg., Reg. Sess. (Cal. 2022).

131. U.S. CONST. amend. XIV, § 1.

132. Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 125, 134, 135 (1989).

133. *Id.* at 124.

134. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

135. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

136. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 219 (1994).

137. *Id.* at 208. Koppelman further argues that discrimination on the basis of sexual orientation should be considered sex discrimination because it serves to police the boundaries, and thus the power differential, between males and females. *Id.* at 202.

The same reasoning can be applied to anti-transgender discrimination.¹³⁸ Today, a long list of district and circuit court decisions agree that federal sex discrimination laws apply to discrimination against transgender people.¹³⁹ Meanwhile, the Supreme Court's decision in *Price Waterhouse v. Hopkins*, holding that sex discrimination includes gender stereotyping, suggests that discrimination based on sexual orientation or gender identity is sex discrimination because it too is based on gender stereotyping.¹⁴⁰

Alternatively, the Court's own analysis of suspect classes¹⁴¹ should arguably support applying at least intermediate scrutiny to discrimination on the basis of sexual orientation or gender identity, even without deeming such discrimination a form of sex-based discrimination. LGBTQ+ people have experienced a long history of obvious and traumatic discrimination and disempowerment: Since the founding of the U.S., LGBTQ+ people have suffered violence solely because of their identities,¹⁴² and this violence continues, particularly for transgender and gender non-conforming people of color.¹⁴³ This discrimination was also historically legitimized by the government through laws, like sodomy prohibitions targeted specifically at preventing homosexual conduct.¹⁴⁴ While sexual orientation and gender identity may not be "highly visible" or outwardly obvious, sexual orientation and gender identity are characteristics central to one's identity that give rise to differential treatment (regardless of one's views regarding how the concept of "immutability" intersects with transgender and gender non-conforming identities).¹⁴⁵

138. Ian S. Thompson, *Let's Be Clear: Transgender Discrimination IS Sex Discrimination*, ACLU (Aug. 8, 2012), <https://www.aclu.org/news/lgbtq-rights/lets-be-clear-transgender-discrimination-sex-discrimination>.

139. See *Federal Case Law on Transgender People and Discrimination*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination> (last visited Jan. 24, 2023).

140. TAYLOR FLYNN ET AL., *Federal Equal Protection*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE, 15-5 (Christine Michelle Duffy et al., eds., 2014); see also Suzanne A. Kim et al., *Equal Protection*, 1 GEO. J. GENDER & L. 213, 235 (2000).

141. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 437 (1985).

142. John W. Davidson, *A Brief History of the Path to Securing LGBTQ Rights*, ABA: HUM. RTS. MAG. (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/; *LGBTQ Rights Timeline in American History*, OUR FAM. COAL., <https://www.lgbtqhistory.org/lgbt-rights-timeline-in-american-history/> (last visited Feb. 2, 2023).

143. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2022*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2022> (last visited Feb. 14, 2023).

144. Davidson, *supra* note 142; *LGBTQ Rights Timeline in American History*, *supra* note 139.

145. See, e.g., Silver Flight, *Gender: The Issue of Immutability*, U. CIN. L. REV. BLOG (Nov. 12, 2021), <https://uclawreview.org/2021/11/12/gender-the-issue-of-immutability/>.

However, in cases involving sexual orientation and gender identity, the Supreme Court has generally declined to apply or declare a consistent level of scrutiny for sexual orientation or gender identity.¹⁴⁶ In *Romer v. Evans*, the Court, invoking the Equal Protection Clause, invalidated a state law that barred protections for gays, lesbians, and bisexuals, but did not specify a level of scrutiny.¹⁴⁷ In *United States v. Windsor*, the Court, striking down a section of the Defense of Marriage Act which defined “spouse” as a person of the opposite sex, noted that laws of an “unusual character” warrant more careful scrutiny,¹⁴⁸ but did not establish exactly what level of scrutiny applies to laws that discriminate based on sexual orientation.¹⁴⁹ Two years later, in *Obergefell v. Hodges*, the Court recognized the fundamental right¹⁵⁰ of same-sex couples to marry under the Fourteenth Amendment, but declined to define sexual orientation as a suspect or quasi-suspect class under the Equal Protection Clause.¹⁵¹

B. Gender Identity in Federal Antidiscrimination Statutes

Few federal statutes contain language explicitly including sexual orientation and gender identity, leaving the question of whether and how sexual orientation and gender identity is addressed by those laws largely up to statutory interpretation by the courts.¹⁵² As noted *supra*, many, though not all, of these cases have led to determinations by district or circuit courts that a statutory prohibition against sex discrimination also extends to discrimination on the basis of sexual orientation or gender identity.¹⁵³

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

147. *Romer v. Evans*, 517 U.S. 620, 620 (1996).

148. *U.S. v. Windsor*, 570 U.S. 744, 770 (2013) (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

149. *See U.S. v. Windsor*, 570 U.S. 744, 794 (Roberts, J., dissenting) (2013).

150. When fundamental rights are implicated, courts generally apply strict scrutiny: the law must be narrowly tailored to serve a compelling government interest to be constitutional. *See* Rodney M. Perry, *Obergefell v. Hodges: Same Sex Marriage Legalized*, CONG. RSCH. SERV. (Aug. 7, 2015), <https://sgp.fas.org/crs/misc/R44143.pdf>; *see generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

151. *See* Perry, *supra* note 150; *see generally* *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

152. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §2000e(k) (2018); Fair Housing Act, 42 U.S.C. § 3604 (2018). *See generally* *Know Your Rights: Sex Discrimination*, ACLU <https://www.aclu.org/know-your-rights/sex-discrimination#im-experiencing-sex-based-discrimination-on-campus> (last visited Feb. 14, 2023); *Gender Identity and Discrimination*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/workplace-gender-identity-discrimination> (last visited Feb. 14, 2023).

153. *See* discussion *supra* Section VI.A.

In the first such case to reach the Supreme Court, *Bostock v. Clayton County*, the Supreme Court held that firing an employee “merely for being gay or transgender” constitutes discrimination “because of such individual’s . . . sex” in violation of Title VII of the Civil Rights Act of 1964.¹⁵⁴ *Bostock* combined three cases wherein individuals were fired based on their sexual orientation or gender identity, including *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment and Opportunity Commission*, where a transgender woman was fired based on her gender identity.¹⁵⁵ While *Bostock* does not directly implicate the Equal Protection Clause, the majority stated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹⁵⁶

However, questions remain about whether the *Bostock* holding is broadly applicable to laws outside of the employment context.¹⁵⁷ Some lower courts have applied *Bostock*’s reasoning to other federal statutes.¹⁵⁸ Months after *Bostock* was decided, a federal judge issued a preliminary injunction against the Idaho law, discussed *supra*, which banned transgender women and girls from participating on sports teams.¹⁵⁹ In issuing the injunction, the judge applied heightened scrutiny (following Ninth Circuit precedent), and found that the plaintiffs were likely to prevail in their argument that the law violated the Equal Protection Clause.¹⁶⁰ In its reasoning, the court cited the *Bostock* Court’s statement that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”¹⁶¹

In another prominent case, *Grimm v. Gloucester County School Board*, the Fourth Circuit held that a Virginia School Board’s restroom policy, barring a transgender male student from using the boy’s bathroom, constituted sex-based discrimination in violation of the Equal Protection Clause.¹⁶² Importantly, the Fourth Circuit specifically relied on *Bostock* in holding that Title IX, which bars sex discrimination in educational programs and activities receiving federal financial assistance, also includes gender identity in its prohibition of discrimination on the basis of sex.¹⁶³ The court also specified in *Grimm* that

154. *Bostock v. Clayton Cnty, Ga.*, 140 S. Ct. 1731, 1734 (2020).

155. *Id.* at 1737, 1738.

156. *Id.* at 1741 (emphasis added).

157. Christine J. Back & Jared P. Cole, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, CONG. RSCH. SERV. (July 2, 2021), <https://crsreports.congress.gov/product/pdf/R/R46832>.

158. *Id.*

159. See discussion *supra* Section III.C; *Hecox v. Little*, 479 F. Supp. 3d 930, 988 (D. Idaho 2020).

160. *Id.* at 975.

161. *Id.* at 974 (citing *Bostock v. Clayton Cnty, Ga.*, 140 S. Ct. 1731 (2020)).

162. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020).

163. *Id.* at 616. X is also at issue in the *Hecox* case, discussed *supra*, though the preliminary injunction in favor of *Hecox* was issued solely on constitutional grounds.

transgender people constitute a quasi-suspect class, entitling them to greater constitutional protections.¹⁶⁴ The Supreme Court denied a writ of certiorari,¹⁶⁵ leaving in place *Grimm*'s expansion of *Bostock* to extend to cover public school bathrooms.

C. Caselaw Regarding Gender Identity in Healthcare

As noted *supra*, the Obama Administration most saliently addressed gender identity discrimination in healthcare in the context of implementing the ACA.¹⁶⁶ Section 1557 of the ACA prohibits healthcare programs that receive federal funding from discriminating based on sex, among other categories.¹⁶⁷ Section 1557 does not mention sex directly, but prohibits discrimination on grounds prohibited by, among other statutes, Title IX.¹⁶⁸

In 2016, HHS issued a regulation defining sex discrimination under Section 1557 to include discrimination on the basis of gender identity and sexual orientation.¹⁶⁹ Subsequently, a group of healthcare providers with religious affiliations joined with five states to challenge this interpretation in *Franciscan Alliance v. Burwell*.¹⁷⁰ The plaintiff healthcare providers alleged that the 2016 rule violated the Administrative Procedure Act ("APA") by defining "sex discrimination" incompatibly with the statutory authority conveyed via Section 1557 from Title IX, which provided the statutory basis for the rule.¹⁷¹ They also argued that the rule violated the Religious Freedom Restoration Act ("RFRA") by forcing them to perform gender reassignment surgeries (as well as abortion services) against their religious beliefs.¹⁷²

In 2019, after President Trump took office, his Administration informed the court that they would no longer be enforcing the provisions at issue and would not define "sex" to include gender identity.¹⁷³ Later that year, the district court issued a final order officially vacating the relevant portion of the Obama

164. *Id.* at 607.

165. See Docket for Gloucester Cnty. Sch. Bd. v. Grimm, No. 20-1163 (U.S. Sup. Ct., June 28, 2021), <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1163.html> (petition for certiorari denied).

166. Section 1557 of the Patient Protection and Affordable Care Act, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last modified Feb. 3, 2023).

167. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31376 (May 18, 2016).

168. 20 U.S.C. § 1681 *et seq.*

169. Nondiscrimination in Health Programs and Activities, *supra* note 60, at 31467.

170. *Franciscan All. v. Azar*, 414 F. Supp. 3d 928, 928 (N.D. Tex. 2019).

171. *Id.* at 935.

172. Order at 1, *Franciscan All., Inc. v. Azar*, No. 7:16-cv-00108-O (N.D. Tex. Nov. 21, 2019), ECF No. 182.

173. *Id.*

Administration's 2016 rule.¹⁷⁴ The court found that HHS should have limited its definition of "sex" discrimination to include only biological males and females, indicating that the statute does not cover discrimination on the basis of gender identity.¹⁷⁵

In 2020, HHS issued its own final rule vacating the 2016 rule and implementing its own interpretation of Section 1557.¹⁷⁶ In contrast to the 2016 rule, the 2020 rule cited *Franciscan Alliance* and explicitly eliminated the prohibition on discrimination based on gender identity and sex stereotyping in healthcare programs and insurance coverage.¹⁷⁷ The 2020 rule further eliminated prohibitions on discrimination based on gender identity in ten additional federal healthcare regulations.¹⁷⁸ As a result, healthcare providers could refuse to provide services to people with non-traditional gender identities, and health plans could exclude or limit coverage for services related to gender dysphoria and transition.¹⁷⁹

Following promulgation of the 2020 rule, but before the changes were implemented, the Supreme Court decided *Bostock*, which called into question the rule's viability.¹⁸⁰ As a result, two federal courts issued preliminary injunctions barring, among other things, the implementation of the provisions of the 2020 rule that removed sex stereotyping from the definition of sex discrimination.¹⁸¹ When President Biden took office in January 2021, he attempted to clarify the convoluted legal landscape by issuing an Executive Order,¹⁸² declaring that his Administration would interpret *Bostock* broadly and apply the holding to other statutes prohibiting sex discrimination.¹⁸³

In April 2021, *Franciscan Alliance* was remanded to the district court due to the rapidly changing legal landscape.¹⁸⁴ While waiting on the district court's decision, HHS issued guidance ("2021 Guidance Document") stating that, consistent with *Bostock*, it will interpret Section 1557's ban on sex

174. *Id.*

175. *Franciscan All.*, 414 F. Supp. 3d at 946.

176. Nondiscrimination in Health and Health Education Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020).

177. *Id.* at 37164.

178. MaryBeth Musumeci et al., *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Under the ACA and Current Status*, KAISER FAM. FOUND. (Sept. 18, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/>.

179. *Id.*

180. *Id.*

181. *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 64 (D.D.C. 2020).

182. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

183. *Id.*

184. *Franciscan All., Inc. v. Becerra*, 843 Fed. Appx. 662, 663 (5th Cir. 2021).

discrimination to include sexual orientation and gender identity.¹⁸⁵ In August 2021, despite the 2021 Guidance Document, the district court in *Franciscan Alliance* issued a permanent injunction against any interpretation of Section 1557 that would require an organization to perform gender-affirming surgeries.¹⁸⁶ HHS appealed the district court's decision and, in March 2022, issued new guidance ("2022 Guidance Document") stating that providers who attempt to restrict gender-affirming care are "likely" in violation of Section 1557.¹⁸⁷

In August 2022, the Fifth Circuit largely affirmed the district court's ruling in *Franciscan Alliance*.¹⁸⁸ Specifically, with regard to the RFRA claim, the court upheld the permanent injunction against interpreting Section 1557 to prohibit discrimination based on sexual orientation or gender identity.¹⁸⁹ Further, in November 2022, a different federal judge, in *Neese v. Becerra*, invalidated HHS's 2022 Guidance Document, stating that: "the court will not export *Bostock*'s reasoning to Section 1557 or Title IX."¹⁹⁰

V. CONCLUSION

More and more Americans, particularly young people, identify as transgender or gender non-conforming. They face a barrage of hostile laws—particularly at the state level—affecting their access to and insurance coverage of gender-affirming services, their participation in sports, and their ability to access healthcare, in general, free of discrimination. These legal attacks come against a backdrop of discrimination, heightened health risks, and an elevated risk of experiencing violence.

Some states have chosen to enact specific non-discrimination protections, expansive insurance regulations, and other policies, such as provider education requirements; but the national picture remains a patchwork of supportive states and hostile ones. Meanwhile, the very status of gender identity as a protected class remains in question: Efforts to either attain the protected status of sex, or to otherwise argue for heightened scrutiny, have met with inconsistent results and an ongoing lack of clarification from the Supreme Court.

185. HHS Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, U.S. DEP'T OF HEALTH & HUM. SERVS. (May 10, 2021), <https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf>.

186. *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361 (N.D. Tex. 2021), *amended*, 7:16-CV-00108-O, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021), and *aff'd in part, dismissed in part*, 47 F.4th 368 (5th Cir. 2022).

187. HHS NOTICE AND GUIDANCE ON GENDER AFFIRMING CARE, CIVIL RIGHTS, AND PATIENT PRIVACY, U.S. DEP'T HEALTH & HUM. SERVS. 2 (2022).

188. *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 371 (5th Cir. 2022).

189. *Id.* at 377.

190. *Neese v. Becerra*, 2:21-CV-163-Z, 2022 WL 16902425, at *7 (N.D. Tex. Nov. 11, 2022).

Clarity from the Court regarding the level of appropriate scrutiny would help, as would clarity as to whether “sex discrimination” in Section 1557 includes discrimination on the basis of sexual orientation and gender identity. But policymakers need not wait for the judiciary to sort out these issues. In the face of legal uncertainty, the time to shore up protections for the transgender and gender non-conforming community—assuring access to non-discrimination in healthcare, allowing evidence-based guidelines to guide care, providing robust insurance coverage of gender-affirming care, educating doctors and other healthcare providers, and encouraging all youth to participate in sports—is now.

