



Webinar: Gender Based Discrimination in Health Care



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Pronouns: she/her/hers



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The Health Care Rights Law (Section 1557 of the Affordable Care Act)

- The Health Care Rights law prohibits discrimination on the basis of race, color, national origin, age, disability or sex in health programs or activities that receive federal financial assistance, were created by Title I of the ACA, or are administered by an executive agency.
- Gender based discrimination includes any discrimination due to pregnancy, termination of pregnancy, sex stereotyping, gender identity.
- Discrimination on the basis of gender includes sexual harassment.

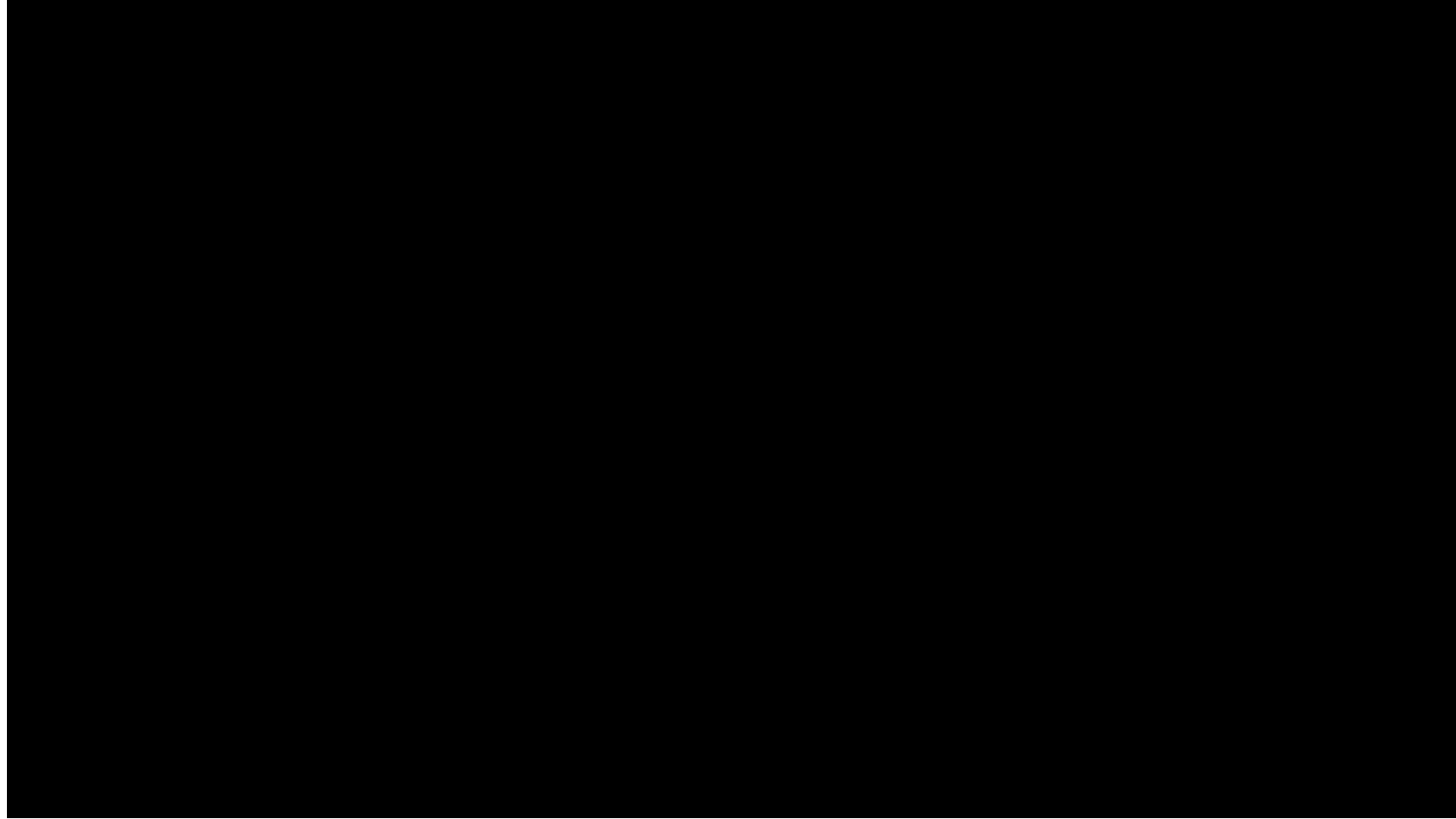
Who is Required to Comply with Health Care Rights Law?

- Any health program or activity that receives federal financial assistance, such as hospitals, clinics, or insurance companies;
- Any program or activity administered by an executive agency, including federal health programs like Medicare, Medicaid, and Children's Health Insurance Program (CHIP); and
- Any program or activity created under Title I of the ACA, including the Health Insurance Marketplaces

What are the Different Kinds of Discrimination that Count as Gender Based Discrimination?

- Denials of care
- Denials of coverage
- Discriminatory treatment
- Sexual harassment by providers

Patients are Saying #MeToo





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Disparate Impact Claims Under
the Health Care Rights Law
Case Study: *Weinreb v. Xerox*

Michelle Banker

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Facts

- For over 16 years, Ms. Weinreb has suffered from a pregnancy-related condition called Global Diffuse Adenomyosis (GDA)
- As described in the complaint:
 - “Adenomas are benign tumors that are inoperable that secrete chemicals or hormones causing the body to continuously contract like a woman in the ***throes of active, transition-like labor*** . . . She suffers constant excruciating pain with no let up and her pain levels are astronomical.”

Court raises then rejects Section 1557 Claim

- April 2017: Court *sua sponte* asks parties to brief whether denial of coverage constitutes sex discrimination.
- August 2018: Court dismisses lawsuit with prejudice. *See Weinreb v. Xerox Bus. Servs., LLC Health & Welfare Plan*, 323 F. Supp. 3d 501 (S.D.N.Y. 2018).
- Court concludes that disparate impact sex discrimination claims are not cognizable under Section 1557.
 - “Section 1557 incorporates Title IX sex discrimination protection (and its accompanying pleading standards)... Section 1557 does not incorporate sex discrimination protection as defined under Title VII. . . . In effect, what this means is that a plaintiff suing for sex discrimination under the ACA is only able to put forward an intentional discrimination claim, not a disparate impact claim, because Title IX, unlike Title VII, does not provide for disparate impact theories.” *Id.* at 521.
 - Court concludes that the “Complaint alleges no facts to support a finding that Caremark intentionally discriminated against Mr. or Ms. Weinreb, nor that the discrimination was a substantial or motivating factor in Caremark’s actions.” *Id.* at 520.

Motion to alter or amend

- Argued that any Section 1557 plaintiff, regardless of their protected class status, may bring a claim for disparate impact discrimination under Section 1557.
- This is because Section 1557 must be interpreted to “create a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff’s protected class status,” in order to avoid absurd results.
 - *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *11. (D. Minn. Mar. 16, 2015).
- This argument derives from text and legislative history of Section 1557 and HHS regulations implementing Section 1557.

Section 1557 and Disparate Impact: Textual argument

- Section 1557 text: “The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.” 42 U.S.C. § 18116(a) (2010).
- Section 504 of the Rehabilitation Act permits claims for disparate impact discrimination, and this is incorporated into Section 1557. *See Davis v. Shah*, 821 F.3d 231, 260 (2d Cir. 2016); *see also Alexander v. Choate*, 469 U.S. 287, 299 (1985).
- Text does *not* state that only title IX enforcement mechanisms are available for claims of sex discrimination, as the district court held.

Textual argument, continued

- Court must interpret the statutory text to avoid “patently absurd” results. *United States v. Brown*, 333 U.S. 18, 27 (1948).
 - The “multiple standards” interpretation would yield the absurd and invidious result that individuals’ protections under Section 1557 would vary depending on their particular characteristics
 - Additionally, courts would have no guidance for evaluating a claim of discrimination on the basis of multiple characteristics.
- Additionally, Section 1557 is a civil rights statute embedded within a larger remedial statute, the ACA. Both civil rights statutes and remedial statutes must be broadly construed. *See Phillip v. Univ. of Rochester*, 316 F.3d 291, 296 (2d Cir. 2003); SUTHERLAND’S ON STATUTORY CONSTRUCTION, § 60:1 (7th ed. 2018).
 - Requiring all victims of sex discrimination to prove intentionality when the plain language does not so require flouts these canons of construction.

ACA and Section 1557 Legislative History

- Statement of Senator Patrick Leahy:
 - I am also proud that the bill explicitly prohibits discrimination on the basis of race, color, national origin, sex, disability or age in any health program or activity receiving Federal funds. These protections were necessary to remedy the shameful history of invidious discrimination **and the stark disparities in outcomes** in our health care system based on traditionally protected factors such as race and gender. The nondiscrimination provision makes clear that the enforcement mechanisms from other statutes prohibiting discrimination in federally funded programs, such as title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, apply with equal force to federally funded health programs and activities. . . [T]hese protections . . . ensure that all Americans are able to reap the benefits of health insurance reform **equally without discrimination**. 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (emphasis added).

HHS Regulations Adopt the Singular Standard Approach to Section 1557 Claims

- In 2016, HHS issued final rules implementing Section 1557
- Comments submitted to HHS during the rulemaking process asked for clarification that “all enforcement mechanisms available under the statutes listed in Section 1557 are available to each Section 1557 plaintiff, regardless of the plaintiff’s protected class.” HHS responded in the affirmative:
 - **[HHS’ Office for Civil Rights] interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation**

Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375-01, 31,439.



Dale Melchert

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ROADMAP

- I. Legal protections for transgender people in healthcare
- II. Why this matters
- III. Best Practices working with transgender and gender non-conforming people

But first some terminology...

- “Transgender”:

A transgender person is someone whose gender identity is different than their assigned gender at birth—for example, someone who was assumed to be a boy at birth but who is actually a girl. Conversely, someone who is “cisgender” identifies with the sex they were assumed to be at birth.

- “Gender non-conforming”:

Someone whose gender identity and/or expression does not fit within the stereotypical and societal expectations of how a man or woman should act or present themselves.

- “TGNC”:

Abbreviation for “transgender or gender non-conforming”

- “Gender dysphoria”:

A condition many (but not all) transgender people experience that is recognized by the medical community as a marked, persistent distress resulting from the incongruity between a person’s assigned gender at birth and their gender identity.

Sources of Legal Protections

The Patient Protection and Affordable Care Act 42 U.S.C.A. § 18116(a) (West)

- “Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 ([42 U.S.C. 2000d et seq.](#)), title IX of the Education Amendments of 1972 ([20 U.S.C. 1681 et seq.](#)), the Age Discrimination Act of 1975 ([42 U.S.C. 6101 et seq.](#)), or section 504 of the Rehabilitation Act of 1973 ([29 U.S.C. 794](#)), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”

Protections include

- prohibitions against blanket bans of coverage of gender affirming care
- refusing to cover a procedure that is typically covered for one gender (for example a pap smear for a transgender man or prostate exam for a transgender woman)
- refusing to enroll an applicant, cancelling coverage or charging more for coverage because of transgender status.

Courts disagree as to whether the prohibition on sex discrimination encompasses transgender people or not:

- Rumble v. Fairview Health Services, 2015 WL 1197415, at 25 (D.Minn.,2015) (denying defendants' motion to dismiss of transgender plaintiff's claim under 1557)
- Prescott v. Rady Children's Hosp.-San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (holding that a medical facility violated the Act by misgendering a transgender patient who made out a cognizable claim for sex discrimination under sex stereotyping theory).
- Cruz v. Zucker, 195 F. Supp. 3d 554 (S.D. N.Y. 2016), on reconsideration, 218 F. Supp. 3d 246 (S.D. N.Y. 2016) (state Medicaid regulations that categorically banned cosmetic surgery for persons diagnosed with gender dysphoria violated the federal Medicaid Act and discrimination on the basis of gender identity was sex discrimination, within the meaning of the Affordable Care Act).
- In Tovar v. Essentia Health, 857 F.3d 771, 779 (8th Cir 2017) the Eight Circuit reversed and remanded the dismissal of a claim for discrimination for transgender status under the ACA brought by the mother of a transgender child who was refused insurance coverage of HRT by her employer provided health plan.
- Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931 (W.D. Wis. 2018) (granting a preliminary injunction of Wisconsin's blanket Medicaid exclusion of transition related care noting a reasonable likelihood of success on the merits of plaintiff's affordable care act claim).
- Boyden v. Conlin, 341 F. Supp. 3d 979 (W.D. Wis. 2018) (granting summary judgment to plaintiffs holding exclusion of gender transition treatment from insurance coverage for transgender state employees violated Title VII and ACA anti-discrimination provision).

Compare with:

- Baker v. Aetna Life Insurance Co., 228 F.Supp.3d 764 (N.D.Tex., 2017) (dismissing claim by transgender woman against insurance company for refusing to cover breast augmentation holding that the prohibition against sex discrimination does not encompass discrimination on the basis of gender identity).

HHS Regulations

- 45 C.F.R. § 92.4 provides: “Gender identity means an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. The way an individual expresses gender identity is frequently called “gender expression,” and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth.”

Keep in mind:

- Injunction against enforcing HHS' regulations
- Religious exemptions and refusal
- Uncertainty interpreting the ACA's protections of transgender people
- Look for state and local protections on the basis of gender identity

Why are protections for
transgender people in healthcare
so important?

Transgender people have several unique medical needs and face barriers to accessing care.

The Report of the U.S. Transgender Survey 2015— National Center For Transgender Equality

- Nearly 1 in 5 (19 percent) reported being refused care outright because they were transgender or gender non-conforming.
- Survey participants reported very high levels of postponing medical care when sick or injured due to discrimination and disrespect (28 percent).
- Harassment: 28 percent of respondents were subjected to harassment in medical settings.
- Significant lack of provider knowledge: 50 percent of the sample reported having to teach their medical providers about transgender care.
- Despite barriers, the majority has accessed some form of transition-related medical care, but only a minority has had any surgery, despite the fact that a strong majority stated wanting to have it someday.

- Respondents reported more than four times the national average of HIV infection, 2.64 percent in our sample compared to 0.6 percent in the general population, with rates for transgender women at 3.76 percent, and with those who are unemployed (4.67 percent) or who have engaged in sex work (15.32 percent) even higher.
- Over a quarter of the respondents reported misusing drugs or alcohol specifically to cope with the discrimination they faced due to their gender identity or expression.
- A staggering 41 percent of respondents reported attempting suicide compared to 1.6 percent of the general population.

The report also includes critical public policy recommendations, such as the urgent need to train medical professionals about how to effectively and respectfully treat transgender and gender non-conforming patients; an end to the discriminatory practice of transgender exclusion from health care coverage; the development transgender-specific programs to address suicide; the spread of HIV, and other health risks; and increased research that focuses specifically on health needs of the transgender population.

Trans people are disproportionately affected by HIV

- “The HIV epidemic weighs heavily on transgender people, especially transgender women of color. Globally, transgender women are 49 times more likely to be living with HIV than other adults, and in some countries, their HIV prevalence rate is 80 times higher than the general population. In the U.S., black transgender people living in the South comprise more than half of the 2,300 transgender people diagnosed with HIV, 84% of whom are transgender women.”

Chung, Cecilia; Kalra, Anand; Sprague, Laurel; and Bré Campbell. (2016). *Positively Trans: Initial report of a national needs assessment of transgender and gender non-conforming people living with HIV*. Oakland, California: Transgender Law Center. Retrieval at: <https://transgenderlawcenter.org/programs/positively-trans/research>

According to this survey conducted of transgender Americans living with HIV

- 41% of respondents had gone without medical care after HIV diagnosis for six months or more.
- Respondents who had been incarcerated or detained were significantly more likely to have gone without medical care for more than 6 months (51% of those detained versus 35% of those never detained).
 - Respondents attributed this to the following reasons:
 - “previous or anticipated discrimination by a healthcare provider (29%).
 - Other reasons included having too many other things to deal with (20%), economic barriers (health care costs, transportation) (17%), not having a health care provider (12%), and fear that someone they knew would see them (8%).”

Chung, Cecilia; Kalra, Anand; Sprague, Laurel; and Bré Campbell. (2016). *Positively Trans: Initial report of a national needs assessment of transgender and gender non-conforming people living with HIV*. Oakland, California: Transgender Law Center. Retrievable at:

<https://transgenderlawcenter.org/programs/positively-trans/research>

Best Practices Working With TGNC People

Use Correct Pronouns, Titles And Names

- Respect self-identification & self-determination
- Ask all potential clients during intake process about their gender identity, pronouns, legal and preferred names
 - Include fields in intake forms and databases
 - Reflect language clients use for themselves
- Avoid assumptions about gender identity
 - You can never know what a person's gender identity is by simply looking at them.
 - Transgender people can “come out” at any time, people transition as young as 6 and we have known many people to transition in their 60s or 70s.
- If you make a mistake, apologize and continue to use the correct pronouns

Practice Speaking in an Inclusive Way

- Avoid gender binaries. If you don't know a person's pronouns, say "they" or "them" instead of "he" or "she," etc. But once you know, use the correct pronoun. Generally, it is not considered rude to ask someone what pronouns they use
- Avoid terms like "Ladies," "Boys," "Guys" unless you know those terms are ok with everyone
- Avoid gendered language, and terms like "Ms." or "Sir" unless you know the person uses those terms

Make Bathrooms Safe & Affirming

- Create at least one single-stall bathroom or space where clients and staff can use a bathroom without fear of harassment or violence
- Ideally de-gender bathrooms so that clients and staff get used to multiple-gender space
- Post signs clearly stating that clients and staff can use bathrooms consistent with their gender identity
- Educate non-transgender clients about bathroom policies and staff so they are prepared

Other Ways of Supporting TGNC Clients:

- Assess your own values/beliefs regarding gender identity
- Address your internal biases
- Familiarize yourself with TGNC issues. Educate yourself - don't tokenize/objectify clients
- Acknowledge what you don't know
- Know your personal limits
 - Seek support/supervision
- Be cautious of stereotypes
- Confront discrimination & prejudice (jokes, comments)

THANK YOU

Merci beaucoup

Thank You

お疲れ様

Danke

Gracias

Grazie

谢谢你

Dank u

Thanks

Obrigado