

Provider Regulation

Transgender Patients Face Barriers to Care Despite Civil Rights Protections of ACA

Hospitals should implement policies to guarantee that transgender patients are treated equitably and with respect, health care attorneys and compliance specialists told Bloomberg BNA.

Hospitals also should take steps to boost the cultural competencies of their front-line workers and implement transgender-affirming protocols to ensure they consistently provide nondiscriminatory patient care, they said.

According to some civil rights groups, transgender patients say they frequently are subject to discrimination and disparate treatment in the health care system, and that issue may heat up.

Discriminatory conduct directed at transgender patients may come into sharper focus this fall as the Department of Health and Human Services releases proposed rules under section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex, age or disability under any health program receiving federal financial assistance.

HHS clarified in a letter that section 1557's sex discrimination prohibition extends to claims based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.

In addition, civil rights groups hope to test the limits of section 1557 and develop legal precedents affirming the rights of transgender people.

Transgender men and women, people whose gender identity differs from their assigned or presumed sex at birth, continue to confront significant barriers to health services, the civil rights groups say. Such barriers can include basic misunderstandings of the cultural and medical issues affecting transgender people and also unlawful discrimination, harassment, humiliation and rough treatment in health care settings.

Earlier this year, Lambda Legal, a national organization advocating on behalf of lesbians, gay men, bisexuals and transgender people through education and litigation, filed the first case in the nation under section 1557 in U.S. District Court for the Central District of Illinois (*Taylor v. Lystila*, C.D. Ill., No. 14-2072, filed 4/15/14). Lambda officials told Bloomberg BNA they are eager to file companion suits in other jurisdictions.

"We were very much looking to help clarify the law and let people know they have protections in health care settings," M. Dru Levasseur, national director of Lambda's transgender rights project, said. "As the statistics show from national transgender discrimination surveys, there is a disproportionate rate of discrimination for transgender people. We would consider additional suits. This is definitely an area of priority for us."

Nondiscrimination Policies. "Health care companies are using resources from groups such as the Human Rights Campaign (HRC) and Lambda, as well as assistance from outside counsel, to educate and train staff on equitable care for all patients," Daniel Kuninsky, a health care attorney with Bass Berry & Sims PLC in Nashville, Tenn., said.

"As the federal rules related to anti-discrimination are finalized based on section 1557 of the Affordable Care Act, such policies and procedures that facilitate a welcoming environment for LGBT patients will hopefully become standard practice because persistent stigmas and inequities still lead to missed opportunities for care," he said.

Kuninsky, and advocates with Lambda and HRC, said hospitals' legal obligations with respect to transgender patients should be well understood.

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in hospitals across the country,
civil rights groups say.**

In 2011, The Joint Commission (TJC) issued a non-discrimination standard applicable to all accredited health care facilities. The standard directed hospitals to establish policies stating that they prohibit discrimination for several protected groups, including "gender identity or expression." TJC complemented the standard with its "LGBT Field Guide," which serves as a roadmap for implementing hospital processes, policies and programs that are sensitive and inclusive to LGBT patients and their families.

Christina L. Cordero, associate project director for TJC's Department of Standards and Survey Methods,

said the commission began surveying hospitals' nondiscrimination policies and procedures about a year after the standard was released. She said hospitals could lose their accreditation if commission auditors detect violations. To date, Cordero said, the commission has taken no such actions.

Civil Rights Complaints. The HHS Office for Civil Rights (OCR) has expressed its own views with respect to the civil rights of transgender patients.

In a letter dated July 12, 2012, the agency said, "we agree that section 1557's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and will accept such complaints for investigation." OCR also stressed that section 1557 prohibits sexual harassment and discrimination regardless of the actual or perceived sexual orientation or gender identity of the individual.

Dylan Nicole de Kervor, an attorney and civil rights analyst at OCR, said the government would flesh out its views on protections for transgender patients in the section 1557 rulemaking. Speaking during a webinar on transgender health care rights earlier this year, de Kervor added that OCR is accepting complaints under section 1557, and has several active investigations focusing on discriminatory conduct directed at transgender patients (23 HLR 481, 4/3/14).

The Transgender Law and Policy Institute notes that transgender patients enjoy legal protections under state and local laws. At least 16 states, the District of Columbia and 143 cities and counties bar discrimination in places of public accommodation based on gender identity or expression. The institute said such laws generally extend to hospitals in their provision of health services.

Also, Lambda, HRC and the New York City Bar Association laid out a menu of best practices in a report entitled "Creating Equal Access to Quality Health Care for Transgender Patients." Released in November 2013, the report points to eight specific policies hospitals can implement to stimulate an internal culture that ensures equitable and inclusive care.

Among other things, the equal access report recommends that hospitals establish gender identity nondiscrimination policies and protections tailored to transgender patients in their patients' bill of rights. In addition, the report suggests protocols for interactions with patients, admissions and registration, room assignments and access to bathrooms.

Transgender Discrimination Common. Despite these specific legal, regulatory and accreditation touchstones, civil rights groups told Bloomberg BNA that acts of overt and inadvertent discrimination are common in hospitals across the country.

"The LGBT population as a whole has not really been on the hospital industry's radar and the T part of LGBT, in particular, has not been on their radar until very recently," Shane Snowdon, director of HRC's health and aging program, said.

"This usually comes to their attention because they had a 'bad incident' or they heard about a hospital featured in the news because of a 'bad incident.' So they are not coming to this realization through the regulators and accreditors," she said.

Snowdon pointed to surveys of transgender people that reveal a significant degree of discrimination in health care settings, leading to patterns of care denial, decisions to forgo medical treatment and poor health outcomes.

The 2011 National Transgender Discrimination Survey, sponsored by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, collected data from 6,000 transgender Americans on a range of issues. Several key health care findings emerged:

- 19 percent of respondents reported being refused medical care due to their transgender or gender nonconforming status;

- 28 percent of respondents reported postponing necessary medical care due to fears of discrimination;

- 50 percent of respondents reported having to teach their medical provider about appropriate transgender care; and

- Transgender people live with rates of HIV infection four times higher than the national average.

Lambda Legal's 2010 LGBT health survey, entitled "When Health Care Isn't Caring," reported even higher levels of discriminatory conduct.

Barriers to Care. The survey revealed 27 percent of transgender respondents reported being denied medical attention. Seventy percent of the respondents reported one or more negative experiences in a health care setting, including: needed medical care was refused; a health care professional refused to touch them or used excessive precautions; a health care professional used harsh or abusive language; patient were blamed for their health status; or a health care professional was physically rough or abusive.

In assessing the health care provided to transgender patients versus care provided to other vulnerable groups, the Lambda survey concluded, "in almost every category measured in this survey, transgender and gender-nonconforming respondents reported experiencing the highest rates of discrimination and barriers to care. Transgender and gender-nonconforming respondents reported facing barriers and discrimination as much as two to three times more frequently than lesbian, gay or bisexual respondents."

Advocacy groups say much of this conduct falls into categories that most observers would recognize as overtly discriminatory. Examples include: ridiculing, taunting or teasing a patient; denying care to a patient; and providing inferior care to a patient.

In Lambda's suit under section 1557 in the Central District of Illinois, a transgender woman named Naya Grace Taylor requested transition-related hormone

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treatment from Carle Health Care Inc. in Mattoon, Ill. Taylor's physician allegedly refused to provide any transition-related care and later a Carle patient services coordinator allegedly told her the facility was not obligated to treat "people like you" (23 HLR 865, 6/26/14).

Discriminatory treatment can be much more subtle but no less humiliating for transgender patients. These subtle or inadvertent forms of discrimination might include addressing the patient by the wrong gender-specific pronoun, barring the patient from using a gender-specific bathroom and admitting the patient to the wrong gender-specific room.

Medical Oddities. Anand Kalra, program administrator at the Transgender Law Center, said a common form of discriminatory conduct involves the treatment of transgender patients as medical oddities.

By way of example, Kalra recounted the experience of a transgender patient who sought treatment for bronchitis at a California hospital. After learning about the patient's transgender status, the treating physician called four other professionals, including medical students, into the examination room and conducted a genital examination. Kalra said the examination had nothing to do with the medical problem and left the patient feeling violated.

Lambda's Levasseur said such incidents also could constitute a breach of the hospital's confidentiality obligations under the Health Insurance Portability and Accountability Act (HIPAA).

"Transgender status is private medical information," Levasseur said. "There is not always an understanding or a cultural competency around the private nature of that information. So we have heard horror stories of: hospital personnel announcing this in front of other patients; outing people to staff unnecessarily; telling other providers; and, bringing others into the room as part of their own curiosity. It's just inhumane. This is not information to be shared unless it relates to treatment."

Cultural Awareness Gaps. HRC's Snowdon said many of these instances of subtle or inadvertent discrimination can be linked to weak levels of cultural awareness within the organization. She said hospitals can begin controlling these problems by directing their health care professionals to simply treat transgender patients with respect and communicate with them as the gender they prefer.

"For you to stay on the right side of the law and Section 1557 and The Joint Commission, as with every patient, you treat the patient as the gender they say that they are," she said.

At a more practical level, Snowdon said hospitals should adopt a menu of best practices designed to elevate the culture and the operational integrity of the institution.

Sensitizing the Staff. Snowdon and Levasseur also stressed the importance of formal training designed to sensitize the hospital staff to the specific needs of transgender patients. In particular, the training should introduce the staff to members of the local transgender community and raise the cultural competencies of front-line hospital employees.

"This is true not just for the providers and the doctors, but the entire staff of the hospital. So that includes security guards directing people to the bathroom and front desk receptionists who might be using the wrong

pronoun in discussions with a transgender patient," Levasseur said.

Levasseur and Snowdon pointed to guides developed by the Boston-based Fenway Institute's National LGBT Health Education Center as excellent tools for staff training. In April 2013 the institute released its "Affirmative Care for Transgender and Gender Non-Conforming People: Best Practices for Front-line Health Care Staff."

Vanderbilt Program. Kuninsky said Vanderbilt University Medical Center in Nashville frequently is cited as a national leader in terms of inclusive and respectful care for transgender patients. The evolution began more than five years ago with various curricular reforms, but was formalized in 2012 under the Vanderbilt Program for LGBTI Health. The program seeks to improve health outcomes for all lesbian, gay, bisexual, transgender and intersex (LGBTI) patients, and foster research on care for LGBTI patients and families.

Dr. Jesse M. Ehrenfeld, co-director of the Program for LGBTI Health and an associate professor of anesthesiology at Vanderbilt, said the program has six core focus areas, including patient care, health education, institutional climate, community outreach, policy reform and visibility.

Ehrenfeld said Vanderbilt has several policies and program activities to implement its mission. These practical efforts include: nondiscrimination policies with respect to employment and patient care; "cultural fluency training" for faculty and staff; a policy permitting patients to define their families broadly to support medical decision-making; updates to all electronic and printed materials to reflect LGBTI inclusivity; new patient intake protocols; and converting all single-stall public restrooms to gender-neutral facilities.

In addition, Ehrenfeld said Vanderbilt is preparing to launch a "Transbuddy Program," which will enable transgender patients to select a trained volunteer to accompany them during outpatient clinic appointments. He said volunteers will permit patients to enjoy a "smoother, more consistent, experience" when receiving care at Vanderbilt.

Ehrenfeld said the efforts have improved the curative climate for transgender patients, but also have made Vanderbilt a more tolerant and caring institution for all patients.

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The Joint Commission: Advancing Effective Communication, Cultural Competence, and Patient and Family Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide, is available at <http://op.bna.com/hl.nsf/r?Open=byul-9m2u7h>.

The National Transgender Discrimination Survey can be found at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Lambda Legal's report "When Health Care Isn't Caring" can be found at http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

Recommendations for Equal Access to Quality Care for Transgender Patients

Lambda Legal, the Human Rights Campaign and the New York City Bar Association recently released a guidance document to direct hospitals toward equitable and respectful health care for transgender patients. The report, entitled “Creating Equal Access to Quality Health Care for Transgender Patients,” highlights eight specific policies hospitals can implement to stimulate an internal culture that ensures equitable and inclusive care for all transgender patients. The equal access report recommends:

- **Gender Identity and Gender Expression Nondiscrimination Policy.** The report recommends specific language in the hospital’s nondiscrimination policy stating the institution, “does not discriminate against any person on the basis of gender identity or gender expression.”

- **Patients’ Bill of Rights.** Language specific to transgender patients should be folded into the hospital’s bill of rights. Such language should include an explanation that the hospital will provide “competent, considerate and respectful care in a safe setting that fosters patient’s comfort and dignity.” The bill of rights should also ensure the right to privacy and confidentiality.

- **Protocols for Interaction With Transgender Patients.** The hospital should adopt a policy that directs the staff to communicate with the transgender patient, “on the basis of their self-identified gender, using their preferred pronouns and name, regardless of the patient’s appearance, surgical history, legal name or sex assigned at birth.” In cases where a family member suggests a gender identity different from the patient’s designation, the patient’s view should be honored. In addition, the policy should specify that hospital staff won’t use language that demeans or questions the patient’s gender identity or expression.

- **Admitting/Registration Records Policy.** The hospital should adopt admitting and registration policies that record the patient’s gender as the designation of male or female that appears on the medical insurance record or legal identification record. The admission and registration system should also provide a third field permitting the choice of transgender male (female to male) or transgender female (male to female). Patients should be asked whether they prefer a male or female pronoun in communication with the hospital staff.

- **Room Assignments Policy.** Hospitals should establish policies that assign rooms based on the patient’s self-identified gender, “regardless of whether this gender accords with their physical appearance, surgical history, genitalia, legal sex, sex assigned at birth, or name and sex as it appears in hospital records.” The suggested policy describes a series of procedures that directs transgender patients to a room with a roommate of the patient’s same gender identity. Transgender patients may also be assigned to a private room in cases where such rooms are available.

- **Access to Restrooms Policy.** The suggested policy states, “all patients of the hospital may use the restroom that matches their gender identity, regardless of whether they are making a gender transition or appear to be gender-nonconforming.” The policy also suggests hospitals consider the establishment of private unisex bathrooms.

- **Guidance for Compliance With Privacy Laws.** The guidance reflects the view that a patient’s transgender status or history of transition-related treatment may constitute protected health information under the HIPPA implementing regulation, also known as the “privacy rule.” Accordingly, the hospital should develop written privacy rules under HIPPA that discuss when a patient’s transgender status and transition-related care are considered protected health information.

- **Guidance for Insurance Coverage.** Hospitals should strive to minimize gaps in public and private insurance policies that deny coverage for gender-transition health services, including sex reassignment surgery and hormone treatments.

The report “Creating Equal Access to Quality Health Care for Transgender Patients” can be found at http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_transgender-affirming-hospital-policies.pdf.

The Fenway Institute’s report “Affirmative Care for Transgender and Gender Non-Conforming People:

Best Practices for Front-line Health Care Staff” can be found at http://www.lgbthealtheducation.org/wp-content/uploads/13-017_TransBestPracticesforFrontlineStaff_v9_04-30-13.pdf.