

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Susan Neese, M.D; James Hurly, M.D.; and Jeffrey Barke, M.D., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Xavier Becerra, in his official capacity as Secretary of Health and Human Services; **United States of America**,

Defendants.

Case No. 2:21-cv-00163-Z

NOTICE TO THE COURT

On March 31, 2022, Assistant Attorney General Kristen Clarke sent a letter to all state attorneys general that endorses Secretary Becerra's interpretation of section 1557 and warns that "restricting an individual's ability to receive medically necessary care, *including gender-affirming care*, from their health care providers solely on the basis of their sex assigned at birth or their gender identity may also violate Section 1557." (emphasis added). A copy of this letter is attached as Exhibit 1. The Department of Health and Human Services' Office of Population Affairs has explained in a document that "[g]ender-affirming care is a supportive form of healthcare. It consists of an array of services that may Include medical, surgical, mental health, and non-medical services for transgender and nonbinary people." *See* Exhibit 2. The same document goes on to list categories of "gender-affirming care," including puberty blockers, hormone therapy, and gender-affirming surgeries. *Id.*

This letter from Ms. Clarke is another example of the current administration's efforts to impose its interpretation of section 1557 through guidance documents, and

its continued efforts to threaten health-care providers who refuse to provide puberty blockers or hormone treatments to children. Although the plaintiffs are not seeking relief against Ms. Clarke's letter in this lawsuit, it nonetheless aggravates the *in terrorem* effects created by Secretary Becerra's notification of May 10, 2021, and heightens the need for pre-enforcement relief from this Court.

Respectfully submitted.

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Dated: April 4, 2022

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CERTIFICATE OF SERVICE

I certify that on April 4, 2022, I served this document through CM/ECF upon:

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Civil Rights Division

Assistant Attorney General
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March 31, 2022

Dear State Attorneys General:

The U.S. Department of Justice (the Department) is committed to ensuring that transgender youth, like all youth, are treated fairly and with dignity in accordance with federal law. This includes ensuring that such youth are not subjected to unlawful discrimination based on their gender identity, including when seeking gender-affirming care. We write to remind you of several important federal constitutional and statutory obligations that flow from these fundamental principles.

People who are transgender are frequently vulnerable to discrimination in many aspects of their lives, and are often victims of targeted threats, legal restrictions, and anti-transgender violence.¹ The Department and the federal government more generally have a strong interest in protecting the constitutional rights of individuals who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender-nonconforming,² and in ensuring compliance with federal civil rights statutes. The Department is also charged with the coordination and enforcement of federal laws that protect individuals from discrimination in a wide range of federally-funded programs and activities.³

Intentionally erecting discriminatory barriers to prevent individuals from receiving gender-affirming care implicates a number of federal legal guarantees. State laws and policies that prevent parents or guardians from following the advice of a healthcare professional regarding what may be medically necessary or otherwise appropriate care for transgender minors may infringe on rights protected by both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. The Equal Protection Clause requires heightened scrutiny of laws that discriminate on the basis of sex⁴ and prohibits such discrimination absent an “exceedingly

¹ See, e.g., Michelle M. Johns et al., Ctrs. for Disease Control and Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, Morbidity and Mortality Weekly Report 68: 67-71 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm?s_cid=mm6803a3_w (finding that transgender youth reported higher levels of violence victimization compared to their cisgender peers).

² See, e.g., Exec. Order No. 13,988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021); Pamela S. Karlan, Principal Deputy Assistant Attorney General, Civ. Rts. Div., U.S. Dep’t of Justice, Memorandum, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

³ Exec. Order No. 12,250, § 1-201, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

⁴ See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610-13 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 2021 WL 2637992 (June 28, 2021); *Whitaker v.*

persuasive” justification.⁵ Because a government cannot discriminate against a person for being transgender “without discriminating against that individual based on sex,”⁶ state laws or policies that discriminate against transgender people must be “substantially related to a sufficiently important governmental interest.”⁷

A law or policy need not specifically single out persons who are transgender to be subject to heightened scrutiny. When a state or recipient of federal funds criminalizes or even restricts a type of medical care predominantly sought by transgender persons, an intent to disfavor that class can “readily be presumed.”⁸ For instance, a ban on gender-affirming procedures, therapy, or medication may be a form of discrimination against transgender persons, which is impermissible unless it is “substantially related” to a sufficiently important governmental interest.⁹ This burden of justification is “demanding.”¹⁰ Such a law or policy will not withstand heightened scrutiny when “the alleged objective” differs from the “actual purpose” underlying the classification.¹¹ In addition, the Due Process Clause protects the right of parents “to seek and follow medical advice” to safeguard the health of their children.¹² A state or local government must meet the heavy burden of justifying interference with that right since it is well established within the medical community that gender-affirming care for transgender youth is not only appropriate but often necessary for their physical and mental health.¹³

In addition to these constitutional guarantees, many federal statutes require recipients of federal financial assistance to comply with nondiscrimination requirements as a condition of receiving those funds. Relevant statutes include:

- **Section 1557 of the Affordable Care Act**¹⁴ protects the civil rights of people—including transgender youth—seeking nondiscriminatory access to healthcare in a range of health

Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018); *see also* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees, *Brandt v. Rutledge*, No. 21-2875 (8th Cir. Jan. 21, 2022); En Banc Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee, *Adams v. School Board of St. John’s County*, No. 18-13592 (11th Cir. Nov. 26, 2021); Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees, *Corbitt v. Taylor*, No. 21-10486 (11th Cir. Aug. 2, 2021).

⁵ *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

⁶ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020).

⁷ *Grimm*, 972 F.3d at 608 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (internal quotations omitted)).

⁸ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.”).

⁹ *Virginia*, 518 U.S. at 533.

¹⁰ *Id.*

¹¹ *Miss. Univ.*, 458 U.S. at 730.

¹² *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

¹³ *See, e.g., Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891, 893 (E.D. Ark. 2021).

¹⁴ 42 U.S.C. § 18116.

programs and activities.¹⁵ Categorically refusing to provide treatment to a person based on their gender identity, for example, may constitute prohibited discrimination under Section 1557. As the U.S. Department of Health and Human Services has stated, restricting an individual's ability to receive medically necessary care, including gender-affirming care, from their health care providers solely on the basis of their sex assigned at birth or their gender identity may also violate Section 1557.¹⁶

- **Title IX of the Education Amendments of 1972**¹⁷ prohibits sex discrimination, including sex-based harassment, by recipients of federal financial assistance that operate education programs and activities.¹⁸ Policies and practices that deny, limit, or interfere with access to the recipient's education program or activity because students are transgender minors receiving gender-affirming care may constitute discrimination on the basis of sex in violation of Title IX.
- **The Omnibus Crime Control and Safe Streets Act of 1968**¹⁹ prohibits sex discrimination in certain law enforcement programs and activities receiving federal financial assistance.²⁰ If a law enforcement agency takes a transgender minor who is receiving gender-affirming care into custody or arrests the child's parents on suspicion of child abuse because the parents permitted such medical care, that agency may be violating the statute's nondiscrimination provision.
- **Section 504 of the Rehabilitation Act of 1973**²¹ protects people with disabilities, which can include individuals who experience gender dysphoria.²² Restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender

¹⁵ See, e.g., Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, reprinted at 86 Fed. Reg. 27,984 (May 25, 2021).

¹⁶ U.S. Dep't Health & Hum. Servs., *Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy* (Mar. 2, 2022), <https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf>.

¹⁷ 20 U.S.C. § 1681, *et seq.*

¹⁸ See Karlan, *supra* note 2; see also *Doe v. Snyder*, --- F.4th ---, 2022 WL 711420, at *9 (9th Cir. Mar. 10, 2022); *Grimm*, 972 F.3d at 619.

¹⁹ 34 U.S.C. § 10101, *et seq.*

²⁰ See 34 U.S.C. § 10228(c)(1); see also Kristen Clarke, Assistant Attorney General, Civ. Rts. Div., U.S. Dep't of Justice, Memorandum, *Interpretation of Bostock v. Clayton County regarding the nondiscrimination provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act* (Mar. 10, 2022), <https://www.justice.gov/crt/page/file/1481776/download>.

²¹ 29 U.S.C. § 794. Additionally, Title II of the Americans with Disabilities Act extends disability civil rights protections with respect to all programs, services and activities of state and local governments, regardless of the receipt of federal financial assistance. See 42 U.S.C. § 12132.

²² See, e.g., *Doe v. Penn. Dep't of Corrections*, No. 1:20-cv-00023-SPB-RAL, 2021 WL 1583556, at *12 (W.D. Pa. Feb. 19, 2021), report and recommendation adopted in relevant part, 2021 WL 1115373 (W.D. Pa. March 24, 2021); *Lange v. Houston Cnty.*, 499 F. Supp. 3d 1258, 1270 (M.D. Ga. 2020); *Doe v. Mass. Dep't of Correction*, No. 1:17-cv-12255-RGS, 2018 WL 2994403 at *6 (D. Mass. June 14, 2018); *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate Section 504.

All persons should be free to access the services, programs, and activities supported by federal financial assistance without fear that they might face unlawful discrimination for doing so. Courts have held that many nondiscrimination statutes contain an implied cause of action for retaliation based on the general prohibition against intentional discrimination, and agencies have made this clear in regulations.²³ Thus, any retaliatory conduct may give rise to an independent legal claim under the protections described above.

* * *

Thank you for your continued commitment to improving the well-being of children and their families. The Department is always available to help ensure that state and local governments, many of which are recipients of federal financial assistance, meet their obligations under federal law. Please feel free to contact the Department's Civil Rights Division for assistance if you have further questions.

Sincerely,



Kristen Clarke
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

²³ See, e.g., *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 173 (2005) (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination...”). Examples of agency regulations that prohibit retaliation include 24 C.F.R. § 1.7(e) (Dep’t of Housing and Urban Development); 34 C.F.R. § 100.7(e) (Dep’t of Education); 38 C.F.R. § 18.7(e) (Dep’t of Veterans Affairs); and 45 C.F.R. § 80.7(e) (Dep’t of Health and Human Services). Other relevant regulations can be found in the Civil Rights Division’s Title VI Legal Manual. Civ. Rts. Div., U.S. Dep’t of Justice, *Title VI Legal Manual*, Section VIII, <https://www.justice.gov/crt/book/file/1364106/download>.



Gender-Affirming Care and Young People

What is gender-affirming care?

Gender-affirming care is a supportive form of healthcare. It consists of an array of services that may include medical, surgical, mental health, and non-medical services for transgender and nonbinary people.

For transgender and nonbinary children and adolescents, early gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent to focus on social transitions and can increase their confidence while navigating the healthcare system.

Why does it matter?

Research demonstrates that gender-affirming care improves the mental health and overall well-being of gender diverse children and adolescents.¹ Because gender-affirming care encompasses many facets of healthcare needs and support, it has been shown to increase positive outcomes for transgender and nonbinary children and adolescents. Gender-affirming care is patient-centered and treats individuals holistically, aligning their outward, physical traits with their gender identity.

Gender diverse adolescents, in particular, face significant health disparities compared to their cisgender peers. Transgender and gender nonbinary adolescents are at increased risk for mental health issues, substance use, and suicide.^{2,3} The Trevor Project's 2021 *National Survey on LGBTQ Youth Mental Health* found that 52 percent of LGBTQ youth seriously considered attempting suicide in the past year.⁴

A safe and affirming healthcare environment is critical in fostering better outcomes for transgender, nonbinary, and other gender expansive children and adolescents. Medical and psychosocial gender affirming healthcare practices have been demonstrated to yield lower rates of adverse mental health outcomes, build self-esteem, and improve overall quality of life for transgender and gender diverse youth.^{5,6} Familial and peer support is also crucial in fostering similarly positive outcomes for these populations. Presence of affirming support networks is critical for facilitating and arranging gender affirming care for children and adolescents. Lack of such support can result in rejection, depression and suicide, homelessness, and other negative outcomes.^{7,8,9}

Common Terms: (in alphabetical order)

Cisgender: Describes a person whose gender identity aligns with their sex assigned at birth.

Gender diverse or expansive: An umbrella term for a person with a gender identity and/or expression broader than the male or female binary. Gender minority is also used interchangeably with this term.

Gender dysphoria: Clinically significant distress that a person may feel when sex or gender assigned at birth is not the same as their identity.

Gender identity: One's internal sense of self as man, woman, both or neither.

Nonbinary: Describes a person who does not identify with the man or woman gender binary.

Transgender: Describes a person whose gender identity and/or expression is different from their sex assigned at birth, and societal and cultural expectations around sex.

Additional Information

- [Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline](#)
- [Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents | American Academy of Pediatrics](#)
- [Standards of Care \(SOC\) for the Health of Transsexual, Transgender, and Gender Nonconforming People | World Professional Association for Transgender Health](#)

Gender-Affirming Care and Young People

Affirming Care	What is it?	When is it used?	Reversible or not
Social Affirmation	Adopting gender-affirming hairstyles, clothing, name, gender pronouns, and restrooms and other facilities	At any age or stage	Reversible
Puberty Blockers	Using certain types of hormones to pause pubertal development	During puberty	Reversible
Hormone Therapy	Testosterone hormones for those who were assigned female at birth Estrogen hormones for those who were assigned male at birth	Early adolescence onward	Partially reversible
Gender-Affirming Surgeries	“Top” surgery – to create male-typical chest shape or enhance breasts “Bottom” surgery – surgery on genitals or reproductive organs Facial feminization or other procedures	Typically used in adulthood or case-by-case in adolescence	Not reversible

Resources

- [Discrimination on the Basis of Sex | HHS Office of Civil Rights](#)
- [Lesbian, Gay, Bisexual, and Transgender Health | Healthy People 2030](#)
- [Lesbian, Gay, Bisexual, and Transgender Health: Health Services | Centers for Disease Control and Prevention](#)
- [National Institutes of Health Sexual & Gender Minority Research Office](#)
- [Family Support: Resources for Families of Transgender & Gender Diverse Children | Movement Advancement Project](#)
- [Five Things to Know About Gender-Affirming Health Care | ACLU](#)
- [Gender-Affirming Care is Trauma-Informed Care | The National Child Traumatic Stress Network](#)
- [Gender-Affirming Care Saves Lives | Columbia University](#)
- [Gender Identity | The Trevor Project](#)
- [Genderspectrum.org](#)
- [Glossary of Terms | Human Rights Campaign](#)
- [Health Care for Transgender and Gender Diverse Individuals | ACOG](#)
- [Transgender and Gender Diverse Children and Adolescents | Endocrine Society](#)

¹ Green, A. E., DeChants, J. P., Price, M. N., & Davis, C. K. (2021). Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth. *Journal of Adolescent Health*, 70(4). <https://doi.org/https://doi.org/10.1016/j.jadohealth.2021.10.036>

² Rimes, K., Goodship N., Ussher, G., Baker, D. and West, E. (2019). Non-binary and binary transgender youth: Comparison of mental health, self-harm, suicidality, substance use and victimization experiences. *International Journal of Transgenderism*, 20 (2-3); 230-240.

³ Price-Feeney, M., Green, A. E., & Dorison, S. (2020). Understanding the mental health of transgender and nonbinary youth. *Journal of Adolescent Health*, 66(6), 684–690. <https://doi.org/10.1016/j.jadohealth.2019.11.314>

⁴ Trevor Project. (2021). *National Survey on LGBTQ Youth Mental Health 2021*. Trevor Project. <https://www.thetrevorproject.org/survey-2021/>.

⁵ Wagner J, Sackett-Taylor AC, Hodax JK, Forcier M, Rafferty J. (2019). Psychosocial Overview of Gender-Affirmative Care. *Journal of pediatric and adolescent gynecology*, (6):567-573. doi: 10.1016/j.jpap.2019.05.004. Epub 2019 May 17. PMID: 31103711.

⁶ Hughto JMW, Gunn HA, Rood BA, Pantalone DW. (2020). Social and Medical Gender Affirmation Experiences Are Inversely Associated with Mental Health Problems in a U.S. Non-Probability Sample of Transgender Adults. *Archives of sexual behavior*, 49(7):2635-2647. doi: 10.1007/s10508-020-01655-5. Epub 2020 Mar 25. PMID: 32215775; PMCID: PMC7494544.

⁷ Brown, C., Porta, C. M., Eisenberg, M. E., McMorris, B. J., & Sieving, R. E. (2020). Family relationships and the health and well-being of transgender and gender-diverse youth: A critical review. *LGBT Health*, 7, 407-419. <https://doi.org/10.1089/lgbt.2019.0200>

⁸ Seibel BL, de Brito Silva B, Fontanari AMV, Catelan RF, Bercht AM, Stucky JL, DeSousa DA, Cerqueira-Santos E, Nardi HC, Koller SH, Costa AB. (2018). The Impact of the Parental Support on Risk Factors in the Process of Gender Affirmation of Transgender and Gender Diverse People. *Front Psychol*, 27;9:399. doi: 10.3389/fpsyg.2018.00399. Erratum in: *Front Psychol*. 2018 Oct 12;9:1969. PMID: 29651262; PMCID: PMC5885980.

⁹ Sievert ED, Schweizer K, Barkmann C, Fahrenkrug S, Becker-Hebly I. (2021). Not social transition status, but peer relations and family functioning predict psychological functioning in a German clinical sample of children with Gender Dysphoria. *Clin Child Psychol Psychiatry*, 26(1):79-95. doi: 10.1177/1359104520964530. Epub 2020 Oct 20. PMID: 33081539.