PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

CONGRESSIONAL RESEARCH SERVICE GUIDANCE ON MEDICAL TREATMENT FOR TRANSGENDER SERVICE MEMBERS

July 2015

Context: In July 2015, the Congressional Research Service published a study stating, inaccurately, that any changes to the military's provision of medical benefits to transgender troops would require congressional authorization. This statement had the potential to thwart repeal because the Defense Department had announced in July that it would review the transgender ban, but if officials came to believe that the military could not offer healthcare without congressional authorization, they would be unlikely to support lifting the ban. Palm Center scholars determined that the CRS analysis was inaccurate. We prepared this memo explaining how and why CRS had erred, and distributed the paper to military and Congressional leaders as well as CRS, whose scholars ultimately agreed with our analysis and removed the reference to congressional authorization from the study.

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

CONGRESSIONAL RESEARCH SERVICE GUIDANCE ON MEDICAL TREATMENT FOR TRANSGENDER SERVICE MEMBERS

July 21, 2015

On July 15, 2015, the Congressional Research Service (CRS) released a new report on transgender military service, *CRS Insights: What are the Department of Defense (DOD) Policies on Transgender Service?* (IN10264), updating an April 28, 2015 report (same title and number) to reflect Secretary of Defense Ashton Carter's July 13 announcement of a DOD working group to study the policy excluding transgender individuals.

The July 15 CRS update revised its language concerning medical treatment for transgender service members. The new language is highlighted in italics:

> In cases where medical treatments are required, the DOD might need to review military heath insurance (TRICARE) benefits that currently do not cover treatments or surgery related to transsexualism or gender dysphoria *to determine whether these treatments should be covered. Changes to TRICARE benefits would require congressional authorization.*

As explained below, this new language was incorrect. Changes to TRICARE rules that currently deny medically necessary care for transgender service members do not require congressional authorization.

On July 21, 2015, CRS published a revised report (still dated July 15, with the same title and number) that corrected this inaccuracy. The July 21 version deletes the statement about congressional authorization and accurately reports that TRICARE rules under DOD control are the only obstacle to providing medically necessary care:

> In cases where medical treatments are required, the DOD might need to review military heath insurance (TRICARE) benefits that currently do not cover treatments or surgery related to transsexualism or gender dysphoria to determine whether these treatments should be covered.

No federal law enacted by Congress requires TRICARE to limit medically necessary care for transgender service members. The only potential DOD limitation in federal law applies to civilian survivors and dependents of service members, not the service members themselves. 10 U.S.C. § 1079(a)(11) states that when the Secretary of Defense establishes contracts for dependent medical care outside facilities of the uniformed services, those contracts cannot provide coverage for certain elective surgeries. The statute lists

"mammary augmentation, face lifts, and sex gender changes" as examples of surgery "which improves physical appearance but is not expected to significantly restore functions." It appears this provision is based on a medically inaccurate assumption that gender-transition surgery is purely elective and not medically necessary. No similar limitation appears in 10 U.S.C. § 1077, the law applicable to dependent care provided *within* facilities of the uniformed services.

One factor that confuses the effect of federal law on military health care is that all individuals affiliated with the uniformed services—both service members and their civilian dependents—are enrolled in TRICARE, a single managed health care program. The TRICARE Policy Manual denies coverage for all medical treatments related to gender identity, surgical or non-surgical. Because TRICARE serves as an overall managed care plan for both service members and their dependents, it is possible that its non-statutory prohibitions on transgender-related care foster the misperception that Congress has prohibited such care for everyone associated with the military. The July 15 CRS report (and the July 21 revision) both link to DOD rules (32 C.F.R. Part 199) governing medical services for civilian dependents of service members, and so this is the likely source of the mistaken conclusion that federal law prohibits transgender-related care for service members.

There is no restriction in federal law barring transition-related medical treatment within DOD. The decision to deny medical care to transgender individuals serving in uniform rests solely with DOD and can be changed by DOD without congressional authorization. Indeed, given its inaccurate assumption about medical necessity, the elective-surgery restriction contained in 10 U.S.C. § 1079(a)(11) does not prohibit gender-transition surgery even for dependents of service members. The focus of this section is to exclude coverage for certain elective procedures, and "sex gender changes" are only offered as an example of what an elective procedure might be. Given the scientific consensus that transition-related care is medically necessary, the example is medically inaccurate and should be disregarded, and the general rule of 10 U.S.C. § 1077 to provide all medically necessary care for dependents should prevail.

In short, federal law does not prohibit DOD from providing all medically necessary, transition-related care to either transgender service members or the transgender dependents of all service members.