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BLUEPRINTS FOR SOUND PUBLIC POLICY

DOES CONGRESS PROHIBIT THE VETERANS HEALTH ADMINISTRATION FROM PROVIDING GENDER-TRANSITION SURGERY TO TRANSGENDER VETERANS?

Context: In 2014, we learned that longstanding efforts to induce Veterans Affairs to include gender-affirming surgery in its medical benefits package were floundering due to an incorrect assumption that was prevalent among VA officials at the time, namely that federal statute precluded VA from offering such surgeries to veterans. Federal laws and regulations governing the extension of health care to transgender veterans, troops, and family members were complex, and Palm Center scholars suspected that officials were misunderstanding what the rules actually dictated. We engaged in extensive research to identify the source of any incorrect assumptions. We found that federal law controlling VA medical care, while it could appear to limit the extension of care to veterans, upon closer reading only limited the extension of VA care to survivors and dependents of certain veterans, but not to veterans themselves. We prepared this memo, which we circulated among VA officials, helping put the effort to induce VA to offer surgery back on track.

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DOES CONGRESS PROHIBIT THE VETERANS HEALTH ADMINISTRATION FROM PROVIDING GENDER-TRANSITION SURGERY TO TRANSGENDER VETERANS?

Veterans Health Administration (VHA) Directive 2013-003 states VHA policy on the treatment of transgender veterans:

> It is VHA policy that medically necessary care is provided to enrolled or otherwise eligible intersex and transgender Veterans, including hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex reassignment surgery. *Sex reassignment surgery cannot be performed or funded by VA.*[1]

The VHA denies gender-transition surgery to veterans under the authority of a Veterans Affairs (VA) regulation establishing the "medical benefits package" for enrolled veterans. This medical benefits package specifically excludes "gender alterations."[2]

However, no federal law enacted by Congress requires this limitation on medically necessary care for transgender veterans. Federal law controlling VA medical care defines "hospital care" and "medical services" without any limitation related to transgender medical care.[3] The only transgender-related limitation in federal law related to VA health care applies to "medical care for survivors and dependents of certain veterans," not the veterans themselves. This statute imposes limits on civilians dependent on veterans in the same way that federal law also imposes limits on civilian survivors and dependents of active duty and retired members of the Armed Forces:

> In order to accomplish the purposes of subsection (a) of this section, the Secretary [of Veterans Affairs] shall provide for medical care in the same or similar manner and subject to the same or similar limitations as medical care is furnished to certain dependents and survivors of active duty and retired members of the Armed Forces under chapter 55 of title 10 (CHAMPUS) . . ."[4]

Like the VA limitation, the Department of Defense (DOD) limitation in federal law applies to civilian survivors and dependents, not the active duty and retired members themselves. By law, when the Secretary of Defense establishes contracts for dependent medical care outside facilities of the uniformed services, those contracts cannot provide coverage for what the statute refers to as "sex gender changes."[5] Gender-transition surgery is listed in a category of "surgery which improves physical appearance but is not expected to significantly restore functions," along with "mammary augmentation" and "face lifts." It appears the restriction is based on a medically inaccurate assumption that gender-transition surgery is purely elective and not medically necessary. No similar limitation appears in the law applicable to dependent care provided within facilities of the uniformed services.[6]

A WESTLAW search of the entirety of the United States Code (permanent federal statutory law) revealed no other references related to military or veteran transgender health care.[7] A search was also made of appropriations bills and their funding restrictions, which would be enacted as Public Laws but not codified in the United States Code. The search of Public Laws from 1973 to the present revealed just one reference related to military or veteran transgender healthcare. From fiscal year 1976 to 1985, Department of Defense appropriations routinely contained a proviso stating that none of the funds could be used to provide gender-transition surgery to civilian survivors and dependents receiving medical care through CHAMPUS.

In 1976, the initial funding restriction stated: "None of the funds contained in this Act available for the Civilian Health and Medical Program of the Uniformed Services [CHAMPUS] under the provisions of section 1079(a) of title 10, United States Code, shall be available for … reconstructive surgery justified solely on psychiatric needs including, but not limited to, mammary augmentation, face lifts, and sex gender changes.[8] By 1985, the annual funding restriction had evolved to "surgery which improves physical appearance but which is not expected to significantly restore functions including, but not limited to, mammary augmentation, face lifts, and sex gender changes," and similar language was enacted into permanent statutory law, as discussed above.[9]

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 a single managed health care program known as TRICARE.[10] CHAMPUS/TRICARE rules deny coverage for all medical treatments related to gender identity, surgical or non-surgical,[11] even though federal law only bars gender-transition surgery, and only for dependents. Similarly, VA regulations deny gender-transition surgery to veterans even though federal law only restricts such treatment for their dependents.

The mistaken perception that Congress prohibits the VHA from providing gender-transition surgery to transgender veterans may be based on a misinterpretation of federal statutes that prohibit DOD and the VA from covering gender-transition surgery for civilian survivors and dependents. These statutes do not prevent such care for veterans or members of the military. However, because TRICARE serves as an overall managed care plan for both service members and their dependents, it is possible that its prohibitions on transgender-related care foster the misperception that Congress has prohibited such care for everyone associated with the military or with veterans.

Current VHA rules bar gender-transition surgery, but they do so only under the authority of VA regulation, not federal law. The only restrictions in federal law relating to gender-transition surgery prohibit DOD and the VA from providing such services to survivors and dependents of persons who serve, or have served, in the military. Beyond that, the decision to deny transgender medical services to both service members and veterans rests solely with DOD and the VA.

[1] Department of Veterans Affairs, Veterans Health Administration, VHA Directive 2013-003, *Providing Health Care for Transgender and Intersex Veterans* (February 8, 2013), § 3 (emphasis added).
[2] 38 C.F.R. [Code of Federal Regulations] § 17.38(c)(4).
[3] 38 U.S.C. [United States Code] § 1701(5), (6).
[4] 38 U.S.C. § 1781(b). CHAMPUS is the Civilian Health and Medical Program of the Uniformed Services. It is the program authorized by 10 U.S.C. § 1072(4) that permits the Secretary of Defense to contract for medical care for dependents of members of the uniformed services. See 32 C.F.R. Part 199 for Department of Defense regulations governing CHAMPUS. An analogous program, CHAMPVA, is authorized for certain dependents of veterans. 38 C.F.R. § 17.270(a).
[5] 10 U.S.C. § 1079(a)(12).
[6] 10 U.S.C. § 1077.
[7] Search terms, both plural and singular, included "change of gender"; "change of sex"; "gender alteration"; "gender change"; "gender dysphoria"; "gender identity"; "intersex"; "sex change"; "transsexual!" (any form of the word); and "transvest! (any form of the word).
[8] Department of Defense Appropriations Act for FY 1976, P.L. 94-212, February 9, 1976, § 751.
[9] Joint Resolution Making Continuing Appropriations for FY 1985, P.L. 98-473, October 12, 1984, § 8032; Department of Defense Appropriations Act for FY 1985, P.L. 98-525, October 19, 1984, § 1401(e)(4) (enacting restriction into permanent law).
[10] TRICARE is "the managed health care program that is established by the Department of Defense … and includes the competitive selection of contractors to financially underwrite the delivery of health care services under the Civilian Health and Medical Program of the Uniformed Services [CHAMPUS]." 10 U.S.C. § 1072(7). However, TRICARE is not limited to CHAMPUS-eligible persons. TRICARE manages health care for all persons affiliated with the uniformed services, including both service members and CHAMPUS-eligible beneficiaries. 32 C.F.R. § 199.17(a)(6)(i).
[11] 32 C.F.R. §§ 199.4(e)(7); 199.4(e)(8)(ii)(A); 199.4(e)(8)(iv)(P), (Q), (R); 199.4(g)(29); TRICARE Policy Manual 6010.57-M (2008), Chapter 1, § 1.2, ¶ 1.1.29.