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BLUEPRINTS FOR SOUND PUBLIC POLICY

THE USE OF UNLESS FACTORS IN NOVEL CIRCUMSTANCES IN MEDICAL ACCESSION REGULATIONS

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Context: In behind-the-scenes Pentagon debates during the 2015-2016 repeal process, the Palm Center worked to ensure that the Defense Department would treat transgender applicants for military service exactly the same as cisgender applicants. Our concern was that separate standards or special rights would doom inclusive policy to failure. Opponents of inclusive policy emphasized the complexity of accession standards, and advocated for separate rules for transgender applicants. The Palm Center argued that the military did not need any new accession standards for transgender applicants because the Defense Department had already had medical enlistment standards for all conditions potentially associated with a history of gender dysphoria (surgical complications, reliance on medications, mental health). We were unable to persuade officials, so we reverted to the backup position that if the Pentagon was to develop a separate accession standard for gender dysphoria, the standard should be modeled on medical accession standards used to assess other medical conditions at the time of enlistment. The best model (known as UNLESS FACTORS) is explained in this memo. Opponents responded that the Defense Department does not formulate accession standards based on UNLESS FACTORS for "novel medical conditions" (conditions with which military doctors had no experience) such as gender dysphoria. In this memo, which we provided to senior Defense Department officials, we showed that the military does in fact rely on UNLESS FACTORS to assess novel medical conditions. Ultimately, we prevailed, and the accession standard for gender dysphoria is now based on UNLESS FACTORS, as is the case for many other medical conditions.

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DOD medical accession standards often use conditional factors to guide enlistment examiners in qualifying candidates with a particular medical condition. These factors are phrased in terms of words like UNLESS, IF, WHEN, or DOES (sometimes capitalized, sometimes not). All fit the same purpose of determining when a particular condition is minor, stable, and/or corrected, and therefore unlikely to interfere with successful military service or cause undue burden.

A question has been raised whether UNLESS factors (and all similar words of conditional qualification) are inappropriate in circumstances that are new or novel to accession, including the evaluation of candidates with a history of gender dysphoria. The argument is that until DOD gains greater competence and familiarity with the evaluation and treatment of gender dysphoria, all candidates with that history should automatically be referred for special Service approval in addition to the usual MEPS evaluation.

This memo explains that 1) there has been at least one recent instance in which a new medical condition was evaluated by UNLESS factors upon first inclusion in accession standards; and 2) the medical evaluation of transgender candidates is not medically new or novel in most cases. There are a variety of ways to define what is "new" in medical accession standards, but only one of them—and then only to a limited degree—applies to evaluation of transgender applicants.

It is unusual to see new medical conditions added to accession standards. There is very little that is truly "new" in a medical sense about the human body, and very little that accession examiners do not see, because they see the full range of American youth. However, one recent example shows that sometimes—if infrequently—the military does begin evaluating a specific medical condition for the first time and uses UNLESS standards to guide medical examiners. This new standard did not require examiners to refer an applicant for special review by Service authority. Instead, it gave examiners factors to apply in assessing fitness despite the condition—even though accession regulations had not required examiners to make a judgment on that specific condition before.

In 2011, Change 1 to DODI 6130.03 added a section on Polycystic Ovarian Syndrome (PCOS), distinguishing this endocrine disorder from ovarian cysts in general (¶ 14h SMPG[*]). The conditional standard instructs medical examiners to determine whether a PCOS diagnosis is accompanied by metabolic complications, and if it is not, PCOS is not

[*] Paragraph numbers in citations refer to the accession medical standards in Enclosure 4 of DODI 6130.03. "SMPG" (if noted) indicates that USMEPCOM has issued Supplemental Guidance to DODI 6130.03 as an aid in interpreting the regulation.

disqualifying. Examiners can also rely on an assessment of comorbidity made by the applicant's primary care provider:

> h. Polycystic ovarian syndrome (256.4) with metabolic complications.
>
> SMPG: Metabolic complications are diabetes, obesity, hypertension, and hypercholesterolemia. The following are not metabolic complications: virilization, menstrual cycle changes, infertility, and acne. Applicants with suspected polycystic ovarian syndrome (PCOS) are referred to their primary care provider for evaluation. Confirmed PCOS meets the standard if the applicant's primary care provider has evaluated and ruled out metabolic complications in the last two years.

The standard permits MEPS examiners to evaluate PCOS and to qualify applicants with PCOS using conditional factors, even though the condition involves hormonal imbalance, is treated with hormone therapy, and may cause virilization in women. None of these consequences is disqualifying for military service, and none requires special Service review prior to enlistment.

The appearance of "new" medical conditions in DODI 6130.03 is unusual, however, and so examples of new medical conditions assessed with UNLESS standards will also be unusual. The more useful consideration is what it means to be "new" to military medical accession, since there are several different ways to define novelty and the presumed lack of experience or data that comes with novelty.

First, gender dysphoria itself is not new to DODI 6130.03 (putting aside the outdated terminology in the current regulation). DoD has been identifying and excluding people at accession based on gender dysphoria (and transgender identity) for decades. Second, gender dysphoria and its treatment are not new to medicine and research, as shown by the fact that the WPATH Standards of Care[1] for transgender medicine was first published in 1979 and is now in its seventh edition. Third, the potential comorbidities of gender dysphoria and its treatment are not new in the vast majority of cases, even to the military, because those comorbidities are not unique to transgender people and are routinely assessed in non-transgender people during the accession process. Only in a very small subset of circumstances would examiners need to make medical judgments they do not already make.

A longstanding policy of transgender exclusion has prevented the military from gaining experience in evaluating transgender applicants as individuals. When policy excludes persons as a group without exception and without regard for fitness, examiners have no reason to assess whether a history of gender dysphoria actually does affect fitness. In this sense, individual evaluation of persons with gender dysphoria is "new" to the military. However, in the vast majority of cases, the end of exclusionary policy would only require examiners to apply existing standards and tools to people who were previously disqualified automatically. It would not be a matter of new medical knowledge; it would be the same medical knowledge applied to more people. Exclusionary policy has

artificially prevented medical examiners from seeing the commonalities in medical issues between transgender and non-transgender applicants.

DODI 6130.03 frequently uses UNLESS-style conditional factors to channel MEPS evaluations toward objective and relatively simple assessments that are within the competence of examiners. The regulation provides a variety of tools to examiners in service of these goals.

> • MEPS can require records of civilian medical care and disqualify applicants if they do not produce them (¶¶ 4c3b SMPG (LASIK), 14a (abnormal menstruation), 14n SMPG (PAP smear)).
>
> • MEPS can in some cases rely on the medical judgment of the applicant's primary care or specialist providers, and can require applicants to submit outside evaluation and testing (¶¶ 4c3e SMPG (LASIK), 12p SMPG (tachycardia), 21b SMPG (hypertension), 25b4 SMPG (renal glycosuria), 25f SMPG (thyroid disorders)).
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> • Accession standards often cite and summarize research or practice standards from civilian medicine as an aid to examiners in understanding a particular medical condition (¶¶ 11h SMPG (chest wall malformation), 12a1 (heart murmur), 14a SMPG (abnormal menstruation), 14h SMPG (PCOS), 25b SMPG (diabetes)).
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> • Accession standards sometimes rely on simple passage of time (e.g., 6 months after breast/chest surgery, ¶ 11p) or ability to perform simple functional tasks (e.g., ability to drink from a straw after surgical repair of cleft lip or palate defects, ¶ 8a) as indicators of fitness and absence of persistent complications.
>
> • MEPS can refer unusual or outlier cases for review by outside specialists (¶¶ 4c3e SMPG (LASIK), 4h4 SMPG (ocular hypertension), 12a1 SMPG (heart murmur)).

Assuming the most challenging scenario that would apply in a minority of cases, gender dysphoria and its treatment present three potential areas for assessment of fitness: mental health, endocrine/hormones, and surgical recovery. Gender dysphoria is like many other medical conditions in that medical treatments received for the condition may raise fitness concerns in addition to those related to the condition itself.

I. Mental health: DODI 6130.03 already directs examiners to use conditional UNLESS factors in evaluating the severity and stability of certain mental health histories. Every diagnosis in DSM-5 involves a finding of "clinically significant distress or impairment in social, occupational, or other important areas of functioning," and so the task for accession examiners in these cases is to apply UNLESS factors to identify applicants whose mental health history is unlikely to interfere with successful military service. In general, the UNLESS factors explore whether impairment still exists or will be recurrent, probing circumstances such as success in school or work, prior need for hospitalization,

encounters with law enforcement, and need for psychiatric medication (¶¶ 29a (ADHD), 29b (learning disorder), 29g (depression), 29h (adjustment disorder), 29i (behavior disorder); 29p (anxiety disorder)).

Examiners have the authority to require applicants to submit Individualized Education Plans, other school records, counseling records, and medication records for the purpose of evaluating UNLESS factors (¶¶ 29a SMPG (ADHD), 29b SMPG (learning disorder)).

The UNLESS factors used in ¶ 29 to evaluate impairment are no more difficult to apply for transgender applicants than they are for non-transgender applicants. The factors rely in large part on success in life activities that are common to all applicants regardless of gender identity.

II. Endocrine/Hormones: In several instances in DODI 6130.03, standards for women appear to assume (without specifying) that applicants are being medically treated with hormones, because the standards apply to conditions that are typically treated with hormones. Use of hormones for these conditions is not disqualifying and is not directly evaluated during the accession process. The task for the MEPS examiner is only to confirm that the condition is responsive to treatment and unlikely to interfere with routine activities (¶¶ 14a (abnormal menstruation), 14d (dysmenorrhea), 14e (endometriosis), 14h (PCOS)). In addition, amenorrhea secondary to hormonal contraceptives like Depo-Provera is expressly not disqualifying (¶ 14c SMPG).

DODI 6130.03 requires examiners to assess several other maintenance medications and determine whether the course of treatment is stable (e.g., no side effects for 6 months from cholesterol drugs, ¶ 25i; asymptomatic while taking GERD medication, ¶ 13a SMPG). With a small amount of training on medical standards of care for transgender individuals, combined with references to clinical research that are commonly included in DODI 6130.03, examiners are competent to determine whether hormone treatment is stable and effective. Examiners also have the authority to require applicants to submit pertinent records, testing, evaluation, and opinion from civilian providers if needed.

III. Surgical recovery: Many surgical procedures are not permanent disqualifications under DODI 6130.03. When UNLESS factors are used, they typically rely on one or both of two indicators that rule out functional limitations or persistent complications. One possible factor is the passage of time (e.g., 6 months after abdominal surgery, open or laparoscopic, ¶ 13f); the other enumerates the limitations or complications that the examiner should look for in assessing fitness.

Some surgeries are common to transgender and non-transgender applicants. For example, chest wall surgery (including breast) is not disqualifying if more than six months have passed and no functional limitations persist (¶ 11p). The reason for surgery would differ between transgender and non-transgender applicants, but the surgery itself would be evaluated in the same way under existing standards. No new medical knowledge or standard would be required for assessment of chest or breast surgery in transgender applicants.

Genital surgeries may in some cases raise issues that are not common to transgender and non-transgender applicants, but only a small percentage of transgender persons will have genital surgery at any time in their lives (approximately 25% for MTF, and less than 5% for more complicated FTM surgeries).[2] The expected number who would present at accession having had genital surgery would be even lower, given the typical age range for enlistment.

While the surgical procedures differ, the limitations or complications that can result from surgical procedures are similar for transgender and non-transgender persons. DODI 6130.03 relies on UNLESS factors to evaluate fitness in comparable post-surgical circumstances. For example, penile hypospadias reconstruction is not disqualifying unless accompanied by evidence of urinary tract infection, urethral stricture, or voiding dysfunction (¶ 15e). The point is not that hypospadias reconstruction is comparable to genital surgery for purposes of gender transition, but that existing UNLESS standards require examiners to evaluate similar consequences or complications of surgery. Complications related to infection, urethral stricture, or voiding dysfunction are not unique to men or to women, and they are not unique to transgender or to non-transgender people. Similarly, DODI 6130.03 requires examiners to assess whether applicants have "current or recurrent urethral or ureteral stricture or fistula involving the urinary tract" (¶ 16g). If these conditions can be evaluated in some applicants, they can be evaluated in other applicants.

Finally, earlier versions of DODI 6130.03 suggested that genital surgery for the purpose of "change of sex" was disqualifying only if complications persisted. Of course, whether surgical complications persisted was not relevant under policy that otherwise automatically excluded all applicants with a gender identity different from gender assigned at birth. However, the inclusion of a conditional UNLESS-style factor suggests that accession examiners were once considered competent to assess complications resulting from such genital surgeries. The following is a quote from the 2004 version of DODI 6130.03 (then DODI 6130.4), ¶¶ E1.12.13, E1.13.10:

> Major Abnormalities and Defects of the Genitalia, Such as a Change of Sex. A history thereof, or dysfunctional residuals from surgical correction of these conditions.

The prior Army medical enlistment standard that applied to all enlistees prior to the establishment of a common DOD standard in 1986 (AR 40-501, ¶ 2-14s, first issued in 1961) was even more detailed in the description of potential complications:

> *Major abnormalities and defects of the genitalia* such as a change of sex, a history thereof, or complications (adhesions, disfiguring scars, etc.) residual to surgical correction of these conditions.

Conclusion

In summary, the definition of what it means to be "new" to military medical accession requires a broader perspective than whether a particular condition is being evaluated for the first time. If persons with a history of gender dysphoria would be evaluated for present mental health under the same factors used for other DSM-5 diagnoses subject to UNLESS factors, then the evaluation is not new. If medical treatments for a particular condition–and potential complications from treatment—are identical or similar to treatments or complications that are currently evaluated by accession examiners, then the treatments or complications are not new.

To the extent that gender dysphoria would require accession examiners to apply new knowledge, a variety of tools are already in use under DODI 6130.03 to achieve competence in most areas of unfamiliarity. If only a very small percentage of transgender applicants present issues that are truly new to military accession, it is unnecessary and inappropriate to create a new and separate process that requires every one of them to obtain Service pre-approval.

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[1] Eli Coleman et al. (2011). Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7, *International Journal of Transgenderism*, 13: 165-232.

[2] Jaime M. Grant, Lisa A. Mottet and Justin Tanis (2011). Injustice at Every Turn: A Report of the National Transgender Discrimination Survey. Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force, page 79.