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# TRANSGENDER LAW

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## I. INTRODUCTION

As the demographics of HIV infection have changed over time, certain communities have been disproportionately impacted. The 2001 Census Report estimates that six percent of all people living with HIV/AIDS in San Francisco are transgender. The transgender community in San Francisco is experiencing extremely high seroprevalence rates. Recent research found a 24 percent HIV infection rate among the estimated 5,000 transgender individuals in San Francisco.<sup>1</sup> Clearly an awareness of the legal issues related to this population is critical for legal practitioners.

Transgender people are those whose gender identity and/or expression does not (or is not perceived to) match stereotypical gender norms associated with our assigned gender at birth. There are many sub-categories of the umbrella term, “transgender,” including “transsexual,” which describes a person who has medical intervention in her or his gender identity (e.g., hormones or surgery). The existence of individuals who are gender non-conforming has been documented throughout human history.<sup>2</sup> In contrast, the contemporary medical treatments that comprise sex-reassignment have only been available for about forty years.

As a medical condition, transsexualism is defined as "the desire to change one's anatomic sexual characteristics to conform physically with one's perception of self as a member of the opposite sex."<sup>3</sup> Transsexualism is technically classified as a specific form of a broader psychiatric disorder termed "gender identity disorder," also known as "gender dysphoria."<sup>4</sup> Despite this classification, the favored treatment for transsexualism is medical, not psychiatric. The medically prescribed treatment for transsexualism consists of three components: (1) hormone therapy; (2) living as a member of the other sex (known as the "real life experience"); and (3) sex-reassignment surgeries.<sup>5</sup> As medical treatments for transsexualism have developed, transsexual people have sought—and, increasingly, received—legal protection in the areas of employment discrimination, marriage, child custody, health care, prison safety, hate crimes legislation, and asylum.<sup>6</sup>

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<sup>1</sup> San Francisco FY Title 1 Grant Application, p. 155.

<sup>2</sup> See, e.g., Leslie Feinberg, *Transgender Warriors: Making History from Joan of Arc to RuPaul* (1997).

<sup>3</sup> Stedman's Medical Dictionary 1841 (26<sup>th</sup> ed. 1995).

<sup>4</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV* (1994).

<sup>5</sup> See Harry Benjamin International Gender Dysphoria Association, *Standards of Care for the Diagnosis and Treatment of Gender Identity Disorders* <<http://www.hbgida.org/>> (6<sup>th</sup> ed. February 20, 2001).

<sup>6</sup> See *Transgender Law & Policy Institute* <<http://www.transgenderlaw.org/>> (last updated March 1, 2004) (The Transgender Law & Policy Institute provides regular updates on legislation and litigation affecting transsexual people).

## II. EMPLOYMENT and HOUSING DISCRIMINATION

### [1] Disability Discrimination Laws

This section discusses disability rights as they apply to transgender people. The exclusive use of the term “transsexual” is deliberate, since society perceives medical intervention as an indication of disability and the link is more easily established. Nonetheless, most of the analysis applies to transgender people as well.

#### [a] Federal Disability Laws

Transsexual people have no protection under federal laws that prohibit discrimination on the basis of disability. Transsexualism has been recognized as a medical condition for many years and is included as a psychiatric disorder in the Diagnostic and Statistical Manual of Mental Disorders under the rubric of "gender identity disorder." Nonetheless, both the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans with Disabilities Act ("ADA") explicitly *exclude* both "transsexualism" and "gender identity disorders not resulting from physical impairments" from protection.<sup>7</sup>

#### [b] State Disability Laws

Most states and the District of Columbia have statutes prohibiting employment discrimination on the basis of disability. Transsexual people are explicitly excluded from protection against employment discrimination in eight states. Even in the absence of a specific exclusion, a few courts have held that transsexualism is not a protected disability.<sup>8</sup>

More often, however, state courts and administrative agencies have found that transsexualism is a protected disability under state laws. For example, an appellate court in New Jersey and several courts in Massachusetts have held that transsexualism is a protected disability under state law.<sup>9</sup>

At the administrative level, state agencies responsible for enforcing state disability protection laws have issued favorable rulings for transsexual plaintiffs in at least five

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<sup>7</sup> See Rehabilitation Act, 29 U.S.C. § 706(8)(F)(i) (1997); Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (1997).

<sup>8</sup> See *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*, 694 A.2d 1134 (Pa. Commw. 1997) (holding that transsexualism is not a protected disability under the Pennsylvania Human Rights Act); *Dobre v. National R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284 (E.D. Pa. 1993) (same); *Somers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983) (holding that transsexualism is not a protected disability under Iowa Civil Rights Act).

<sup>9</sup> See *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super 2001) (holding that transsexualism is a protected handicap under the New Jersey non-discrimination law); *Lie v. Sky Publishing Corp.*, 2002 Mass. Super. LEXIS 402 (Mass. Super. Oct. 7, 2002) (holding that a transsexual plaintiff had established a prima facie case of discrimination on the basis of handicap under state law); *Doe v. Yunits*, 2001 WL 664947 (Mass. Super. Feb 26, 2001). See also *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (holding that gender dysphoria was a covered disability, although ultimately concluding that the plaintiff had failed to prove that she was discriminated against because of her disability).

states.<sup>10</sup> In one case, the state agency's recognition of disability rights for transsexuals was immediately followed by the state legislature amending its disability law to exclude protection of transsexuals.<sup>11</sup> The new law continued to provide protection from wrongful termination and discrimination, but excluded the right to receive a reasonable accommodation associated with gender reassignment.

In 2001, Rhode Island's non-discrimination statute was amended to explicitly include "gender identity or expression" as a protected category.<sup>12</sup> In 2003, California and New Mexico changed their housing and employment discrimination laws to include gender identity (see Section III, question 2[1]).

### **[c] California Disability Laws**

A transsexual or transgender person may bring a claim for the disability protections under the California Fair Employment and Housing Act (FEHA).<sup>13</sup> This law prohibits discrimination in housing and employment based on an individual's disability. A reasonable accommodation is often requested for a person with a disability under this law. To bring a claim under the disability portion of FEHA, a client must have a diagnosis of gender dysphoria.

### **[2] Federal Sex Discrimination Laws**

#### **[a] Title VII of the 1964 Civil Rights Act**

Until very recently, federal courts uniformly held that transsexual people are not protected under Title VII's prohibition of sex discrimination. The reasoning was that "sex" must be narrowly construed to mean a person's biological sex at birth, and that congress did not intend Title VII to protect transsexual people.<sup>14</sup>

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<sup>10</sup> See Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues*, 2003, available at <<http://www.nclrights.org/publications/tgclients.html>>(discussing 1996 Oregon Bureau of Labor and Industry decision ruling that an individual who was fired as a result of her transition was protected from employment discrimination under Oregon disability law); *Smith v. City of Jacksonville Correctional Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (holding that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability); *Evans v. Hamburger Hamlet & Forncrook*, 1996 WL 941676 (Chi. Comm'n Hum. Rel. 1996)(denying defendant's motion to dismiss disability claim brought by transsexual plaintiff); *Jetter v. Honey Farms Mini Market*, 2001 Mass. Comm. Discrim. LEXIS 50 (Oct. 10, 2001) (holding that transsexual people are protected by state law prohibitions against sex and disability discrimination); *Jane Doe v. Electro-Craft Corporation*, No. 87-B-132 (N.H. Sup. Ct.1988) (holding that transsexualism is a disability within the meaning of the state employment discrimination statute).

<sup>11</sup> Oregon Rev. Stats. 659.439 (2) (1997).

<sup>12</sup> R.I. Gen. Laws § 11-24-2 (2001).

<sup>13</sup> Cal. Gov. Code §§ 12926, 12949 (West 2004).

<sup>14</sup> See *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that "the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., ... a person born with a female body who believes herself to be a male"). See also *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995); *Somers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975).

Over the past decade, however, the rationales in these decisions have been undercut by the Supreme Court's increasingly expansive interpretation of Title VII in other contexts.<sup>15</sup> As a result, both the Ninth Circuit and the First Circuit Courts of Appeals have issued favorable decisions with respect to transgender peoples' rights.<sup>16</sup>

The Ninth Circuit held that gender non-conforming persons are protected from discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) and other sex discrimination statutes, citing the United States Supreme Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that harassment directed at a person because that person does not conform to traditional sex stereotypes is covered by Title VII).

In the case *Schwenk v. Hartford*, the Ninth Circuit held that "sex" under the federal Gender Motivated Violence Act (GMVA) encompasses both sex and gender, and that gender is inclusive of 'gender identity.'<sup>17</sup> One year later, in *Nichols v. Azteca Restaurant Enterprises*, the Ninth Circuit held that harassment "based upon the perception that [the plaintiff] is effeminate" is harassment because of sex, and violates Title VII.<sup>18</sup>

Most recently, the Ninth Circuit reaffirmed the above holdings by noting that it had previously concluded that "same-sex gender stereotyping of the sort suffered by the [plaintiff] - i.e., gender stereotyping of a gay male employee by his male co-workers – 'constituted actionable harassment under . . . Title VII,'" as held in *Nichols*.<sup>19</sup> Therefore, both the Supreme Court and the Ninth Circuit Court of Appeals have held that gender non-conformity is protected under Title VII and GMVA. In addition, federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs and permitting such claims to proceed to trial.<sup>20</sup>

### **[b] Title IX of the 1964 Civil Rights Act**

In 1997, a federal district court in New York held that a transsexual woman could proceed with a sexual harassment suit against New York University under Title IX of the

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<sup>15</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine); see also *Oncala v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998) (Title VII prohibits men from sexually harassing other men, even though same-sex harassment was not the "principal evil" Congress intended to combat when it enacted Title VII).

<sup>16</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"). See also *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that she was denied an opportunity to apply for a loan because she was not dressed in "masculine attire").

<sup>17</sup> 204 F.3d 1187, 1201-1202 (9th Cir. 2000).

<sup>18</sup> 256 F.3d 864, 874-75 (9th Cir. 2001).

<sup>19</sup> *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002).

<sup>20</sup> See, e.g., *Doe v. United Consumer Financial Services*, Case No. 1:01CV1112 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations indicated that her termination may have been based, "at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations (particularly in light of United Consumer's alleged inability to categorize her as male or female 'just from looking')"). For a complete list of federal cases holding that discrimination on the basis of gender non-conformity and/or transgender status is a form of sex discrimination, see <<http://www.transgenderlaw.org/cases/federalcases.htm>>. For an exception to this trend, see *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. LA, Sept. 16, 2002) (denying Title VII protection to a male Winn-Dixie employee who wore female clothing off the job).

Education Amendments Act, which prohibits sex discrimination in public education.<sup>21</sup> In addition, at least one federal district court has recognized that harassment based on failure to conform to gender stereotypes is prohibited under Title IX.<sup>22</sup>

### **[3] Sex Discrimination Laws**

#### **[a] Federal Protection from Sexual Discrimination**

As it was written, the federal constitution does not prohibit sex discrimination. Women's rights advocates have relied on the Fourteenth Amendment, the 1964 Civil Rights Act, and other statutes to successfully challenge discriminatory behavior and regulations. Although these laws do provide some protection, passage of the Equal Rights Amendment was proposed as the only way to guarantee gender equality. After being passed by Congress, it failed in 1982, three states short of ratification.<sup>23</sup>

It is argued that current federal laws addressing sex discrimination are not sufficient because the U.S. Supreme Court uses only the intermediate standard of review when the laws are challenged. Even though the Court recognizes sex as a "suspect class," it declines to use "strict scrutiny," the highest level of review and the most difficult for defendants to overcome. The sex classification in question "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>24</sup> The Court then engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.<sup>25</sup>

This is important to transgender clients because of the increasing trend to view sexual identity discrimination as a facet of sex discrimination. As complainants have more success with this strategy, the limitations of federal sex discrimination prohibitions will begin to hinder the transgender movement for equality.

#### **[b] State Sex Discrimination Laws**

In the past, employment discrimination cases brought by transgender people under state laws prohibiting sex discrimination have been unsuccessful.<sup>26</sup> More recently, however,

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<sup>21</sup> *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997).

<sup>22</sup> *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975 (D.N.H. 2001) (holding that harassment based on "sex-typed stereotypes of masculinity" is actionable under Title IX).

<sup>23</sup> <[http://search.eb.com/women/articles/Equal\\_Rights\\_Amendment.html](http://search.eb.com/women/articles/Equal_Rights_Amendment.html)>.

<sup>24</sup> <<http://caselaw.lp.findlaw.com/data/constitution/amendment14/#f46>>.

<sup>25</sup> <<http://caselaw.lp.findlaw.com/data/constitution/amendment14/#f49>>.

<sup>26</sup> See *Conway v. City of Hartford*, 1997 Conn. Super. LEXIS 282 (Feb. 4, 1997) (dismissing sex discrimination claim alleging violations of Connecticut Fair Employment Practice Act); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994) (dismissing sex discrimination claim alleging violations of the D.C. Human Rights Act); *Dobre v. National R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284 (E.D. Pa. 1993) (dismissing claim brought under sex discrimination provision of Pennsylvania Human Rights Act); *Kirkpatrick v. Seligman*, 636 F.2d 1047 (5th Cir. 1981) (no violation under the federal Equal Protection Clause or under state law prohibiting sex discrimination where employer fired plaintiff when plaintiff notified employer of her intent to undergo sex reassignment, began living and dressing as a female, and refused to comply with employer's requirement that she must wear male clothing to work).

courts<sup>27</sup> and administrative agencies<sup>28</sup> have uniformly interpreted state and local sex discrimination laws to include transsexual people. Based on this favorable trend, state sex discrimination claims are currently the most viable avenue of protection for transgender and transsexual employees.

#### [4] Sexual Orientation Laws

##### [a] Federal

The federal government has no law prohibiting discrimination on the basis of sexual orientation. The “Don’t Ask, Don’t Tell” policy is about as far as the government will go regarding legal issues surrounding homosexuality. The U.S. Supreme Court has considered some cases alleging sexual orientation discrimination, one under the rubric of same-sex sexual harassment (it was decided favorably).<sup>29</sup> Despite individual victories based on specific fact patterns, federal courts and the Supreme Court have been resistant to creating case law that would advance the rights and privileges of lesbians, gay men, and bisexuals.

Of course, the language of the Fourteenth Amendment, the 1964 Civil Rights Act, and other federal laws did not include homosexuals among the classes to be protected from discrimination. Courts have used “original intent” of these laws to justify their conclusion that homosexuals are not entitled to protection. Being denied status as a “suspect class” is devastating to the movement for sexual orientation equality.

Since gender identity is often confused with sexual orientation, laws prohibiting discrimination against homosexuals could be interpreted as encompassing transgender people. Demanding protection under laws that already exist is an excellent way to open the door to new civil rights challenges. Unfortunately, the federal government fails to protect homosexuals, leaving the transgender community even further behind in the struggle for equality.

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<sup>27</sup> See *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination); *Lie v. Sky Publishing Corp.*, 2002 Mass. Super. LEXIS 402 (Mass. Super. Oct. 7, 2002) (holding that a transsexual employee had stated a viable sex discrimination claim under state law); *Doe v. Yunits*, 2000 WL 33162199, at \*3-4 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm'n*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (holding that a transgender student had stated a viable sex discrimination claim under state law); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's sex discrimination claim under the New York State and New York City Human Rights Laws); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (Sup. Ct. 1995) (holding that city ordinance prohibiting "gender" discrimination protects transsexuals). See also *McGrath v. Toys "R" Us, Inc.*, 2002 U.S. Dist. Lexis 22610 (E.D. NY October 16, 2002) (awarding attorneys' fees to plaintiffs in the first public accommodations case in which the rights of transsexuals were vindicated under the New York City Human Rights ordinance).

<sup>28</sup> See *In the Matters of HCRC No. 9951, et al.*, D.R. No. 02-0015 (Hawaii Civil Rights Commission, June 28, 2002) (holding that the Hawaii Civil Rights Commission has jurisdiction to investigate all claims of sex discrimination filed by transgendered individuals and transsexuals); *Millett v. Lutco, Inc.*, 2001 Mass. Comm. Discrim. LEXIS 52 (Oct. 10, 2001) (holding that transsexual people are protected by state law prohibitions against sex discrimination); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

<sup>29</sup> *Oncale v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998).

## [b] State Sexual Orientation Protection

Thirteen states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation.<sup>30</sup> Of these, only Rhode Island, Minnesota, New Mexico, and California also explicitly protect transgender and transsexual people.<sup>31</sup> Where transgender people are not expressly included in state laws, courts have rejected attempts by transgender plaintiffs to seek protection under the rubric of sexual orientation.<sup>32</sup>

In practice, however, transsexual or transgender people are often mistakenly perceived to be lesbian, gay, or bisexual. If a transsexual or transgender person is discriminated against based on this mistaken belief, then that person may have a viable claim of sexual orientation discrimination in states that have protection against such conduct.<sup>33</sup>

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<sup>30</sup> California, Connecticut, Hawaii, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New York, Vermont, and Wisconsin.

<sup>31</sup> See Minn. Stat. Ann. § 363.01(45) (1996); R.I. Gen. Laws § 11-24-2 (2001).

<sup>32</sup> *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (Sup. Ct. 1995) (holding that the definition of sexual orientation in New York City ordinance does not include transsexualism); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. at 98 (holding that "a conclusory statement that [transsexual plaintiff] was discharged on the basis of transsexuality ... does not constitute a claim for relief on the basis of... sexual orientation")(1994).

<sup>33</sup> See, e.g., *Conway v. City of Hartford*, 1997 Conn. Super. LEXIS 282 ("[h]ad the plaintiff failed to allege specifically discrimination based on sexual orientation, but rather merely referenced his transsexualism as a basis for discrimination based on sexual orientation, the ... claim would have been legally insufficient").

### **III. LAWS THAT AFFIRMATIVELY PROTECT TRANSGENDER PEOPLE**

#### **[1] Federal Transgender Discrimination Laws**

No federal laws prohibit discrimination on the basis of gender identity. Given that homosexuals have no protection from discrimination under federal law, it would seem that the transgender rights movement has a long battle ahead.

#### **[2] State Transgender Discrimination Laws**

Four states expressly prohibit discrimination against transgender people. Minnesota passed the first such law in 1993. The Minnesota statute establishes protections for transgender people under the rubric of sexual orientation, which is defined to include "having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness."<sup>34</sup>

The plaintiff in *Goins v. West Group* was a transsexual woman who had undergone extensive medical treatments to alter her biological sex. Nonetheless, she did not argue that she should be considered biologically female. Rather, she argued that the statute should be interpreted to prohibit employers from inquiring into an employee's biological sex and to require employers to accept the employee's self-image as female or male.<sup>35</sup> The Minnesota Supreme Court rejected this broad construction of the statute, holding that the statutory language does not prohibit an employer from requiring employees to use the restroom facilities corresponding to their biological sex.<sup>36</sup> Accordingly, to state a viable claim, future transsexual plaintiffs who are denied access to appropriate restrooms should argue (and be prepared to present evidence) that they have altered their biological sex by undergoing sex-reassignment.

In 2001, Rhode Island's non-discrimination statute was amended to explicitly include "gender identity or expression" as a protected category.<sup>37</sup> New Mexico and California followed suit in 2003, protecting transgender people from discrimination in housing and employment.

#### **[1] California Laws Prohibiting Discrimination Against Transgender or Gender Non-Conforming People**

California is one of the more progressive states in this regard, leading the way by amending its anti-discrimination laws to include discrimination on the basis of gender

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<sup>34</sup> Minn. Stat. Ann. § 363.01(45) (1996).

<sup>35</sup> *Id.* at 723 (Goins argues "that the [statute] prohibits West's policy of designating restroom use according to biological gender, and requires instead that such designation be based on self-image of gender").

<sup>36</sup> *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

<sup>37</sup> R.I. Gen. Laws § 11-24-2 (2001).

identity. Like a few other states, California law offers protection from discrimination in employment and housing. In addition, California has enacted several anti-discrimination laws whose sole purpose is to prohibit discrimination against transgender people in other areas, including school safety, foster care (*see* FAMILY section IV (2)[b]), and hate crimes).

### **[a] Fair Employment and Housing Act (FEHA)**

On August 2, 2003, California became the fourth state to ban discrimination against transgender employees and tenants.<sup>38</sup> AB 196 amends FEHA to prohibit discrimination in housing and employment based on an individual's gender identity. It does, however, allow employers to require employees to comply with reasonable workplace appearance, grooming and dressing standards, provided that employees are allowed to appear or dress consistently with their gender identities.

### **[b] School Safety and Inclusion**

The California Student Safety and Violence Prevention Act of 2000, signed into law by Governor Gray Davis, changed California's Education Code to include actual or perceived sexual orientation and gender identity in existing nondiscrimination policy. This bill, AB 537, acknowledges that hate crimes represent the fastest growing violent crime in California and that students in public school systems across the state are not immune to victimization. The California Constitution affords all students of public schools the inalienable right to attend campuses that are safe, secure, and peaceful. The passage of this legislation represents a victory in a five-year fight for students, teachers, parents, community groups, and political activists in creating this protection.

Under the new law, students and teachers in schools receiving state money, with the exception of religious schools, are protected from harassment based on sexual orientation or gender identity. The law states, "No person shall be excluded from participation in or denied the benefits of any local agency's program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an 'educational institution' or any other 'local agency' . . . that receives or benefits from any state financial assistance."<sup>39</sup>

The Student Safety and Violence Protection Act incorporates the transgender inclusive definition of gender from the California Hate Crimes Law.<sup>40</sup> (This definition of gender is also used in the California Code of Regulations.)<sup>41</sup> The state defines gender as "[t]he victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with

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<sup>38</sup> Cal. Gov. Code §§ 12926, 12949 (West 2004).

<sup>39</sup> 5 Cal. Code Reg. § 4900(a) (West 2004).

<sup>40</sup> Cal. Ed. Code, § 200, *et seq.* (West 2004).

<sup>41</sup> 5 Cal. Code Reg. § 4910(k) (West 2004).

the victim's sex at birth.”<sup>42</sup> Harassment is defined as “...a conduct based on protected status that is severe or pervasive, which unreasonably disrupts an individual’s educational or work environment or that creates a hostile educational or work environment.” The protection applies to any program or activity in a school, including extracurricular activities and student clubs.

Those who experience an act of discrimination should follow the complaint and appeals procedure outlined in detail in RESOURCES Section VII. This process appears effective and reflects an overall positive implementation of AB 537. Several cases have reached the court system and each has successfully settled in the plaintiffs’ favor. A sampling of these cases can be found at <http://www.nclrights.org/publications/15reasons.htm>.

### **[c] Hate Crimes**

Transgender people are also protected by California’s hate crimes law. In 1998, California became the second state (following Minnesota in 1993) to amend its state hate crimes law to include transgender people. The legislation added "gender" to the list of protected categories in the Crimes and Punishment section of the California Penal Code and defined the term to mean: “the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim's sex at birth.”<sup>43</sup> Since then, Vermont, Missouri, and Pennsylvania have also amended their state hate crimes statutes to include transgender people.<sup>44</sup>

### **[d] Unruh Civil Rights Act**

The Unruh Civil Rights Act is a California law that protects against discrimination on the basis of “sex” (among other protected classes).<sup>45</sup> Practitioners are interpreting the Act to apply to transgender people in accordance with recent case law.<sup>46</sup>

## **[3] Local Ordinances**

### **[a] San Francisco**

In December 1994, San Francisco’s anti-discrimination ordinances were amended to include “gender identity” as a protected class. The amending ordinance, No. 433-94, defined gender identity as “a person’s various individual attributes as they are understood to be masculine and/or feminine” and added the term to Chapters 12A, 12B, and 12C of the San Francisco Administrative Code and Article 33 of the San Francisco

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<sup>42</sup> Cal. Penal Code § 422.76 (West 2004).

<sup>43</sup> *Id.*

<sup>44</sup> See Missouri Revised Statutes § 557.035 (2000); 13 V.S.A. §§ 1455 and 1458 (2000); Pa. ALS 143; 2002 Pa. Laws 143; 2001 Pa. HB 1493 (2002).

<sup>45</sup> Cal. Civ. Code § 51 et seq. (West 2004).

<sup>46</sup> See *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*").

Municipal/Police Code. Under this umbrella, transgender and gender variant people gained protection from discrimination in employment, public accommodations and housing within San Francisco. Furthermore, any entity that receives money from the city of San Francisco must abide by its anti-discrimination ordinance. This includes many private companies that conduct business with the city of San Francisco.

#### **[4] Local Ordinances Nationwide**

Over fifty other localities have adopted ordinances prohibiting discrimination against transgender people. Jurisdictions that have passed such laws include, among others: New York City, Boston, Chicago, Dallas, Philadelphia, Atlanta, and Seattle. Smaller cities include Tucson, AZ; Santa Cruz, CA; Iowa City, IA; Louisville, KY; Ann Arbor, MI; Toledo, OH; and Tacoma, WA.

## IV. FAMILY

### [1] The Right to Marry

#### [a] Transsexual Transition within an Existing Marriage

What happens to the validity of an existing marriage when one of the spouses undergoes sex-reassignment? There are no published decisions on this issue. So long as both spouses want to stay in the marriage and continue to live as a married couple, many couples in this situation have avoided legal problems, in large part because there are relatively few situations in which anyone other than one of the spouses has legal standing to challenge the validity of a marriage.

Legal problems become more likely to arise when one spouse dies and the other attempts to collect survivorship benefits or to claim inheritance or other tax benefits that are restricted to married couples. An employer or health insurance company may challenge the validity of the marriage when trying to exclude the spouse from an employer-provided health plan. Under long-standing legal principles, the validity of a marriage is determined at the time the marriage is created; moreover, once a valid marriage exists, nothing other than death or divorce can dissolve it. These principles support the view that a marriage in which one of the spouses undergoes sex-reassignment continues to be valid.

#### [b] Case Law

Only a handful of courts have ruled on the validity of a marriage entered into *after* a transsexual person has undergone sex-reassignment. At least two courts have recognized the individual's reassigned sex for the purpose of marriage.<sup>47</sup> In February 2003, a Florida Circuit Court judge issued a landmark decision affirming the validity of a marriage between Michael Kantaras, a female-to-male transsexual, and Linda Kantaras, his wife.<sup>48</sup> In contrast, a few courts have ruled that for purposes of marriage, a person's legal sex is irrevocably determined at birth.<sup>49</sup>

#### [c] Birth Certificate Statutes

California and seventeen other states have laws or administrative policies allowing a transsexual person to change the sex designation on his or her birth certificate. This is important, because by allowing birth certificate changes, a state is acknowledging that changing one's sex is legally possible.<sup>50</sup> Courts in Texas and Kansas have rejected the argument that obtaining a new birth certificate is sufficient to establish one's legal sex for

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<sup>47</sup> See *M.T. v. J.T.*, 355 A.2d 204 (N.J. App. Div. 1976) (upholding validity of a marriage involving a "post-operative" transsexual woman). See also Stuart Pfeifer, "Transsexual Can Sue for Custody," Orange Co. Reg., Nov. 26, 1997, at B1 (discussing the unreported California case of *Vecchione v. Vecchione*, which upheld the validity of a marriage between a female-to-male transsexual and his female spouse).

<sup>48</sup> *Kantaras v. Kantaras*, Case No: 98-5375CA (Circuit Court of the Sixth Judicial Circuit, Pasco County, Florida, February 19, 2003). The full text of the decision is available at <http://www.transgenderlaw.org>.

<sup>49</sup> *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

<sup>50</sup> See also *In re Heilig*, 68 Md., 816 A.2d (2003) (holding that Maryland courts have jurisdiction to enter an order declaring the legal sex of a transsexual person who was born in another state but resides in Maryland).

the purpose of marriage.<sup>51</sup> In other states, however, it is likely that courts will hold that providing a transsexual person with a new birth certificate establishes the person's legal sex for all purposes, including marriage.

## **[2] Parental Rights**

A transgender person who marries and has children (through donor insemination, adoption, surrogacy, or some other route) is in a potentially vulnerable legal situation as a parent. If the other parent successfully argues that the marriage was never valid, then the transsexual person's parental status and parental rights may be jeopardized. At least in some states, however, a transsexual parent may be able to argue that the other parent should be estopped from challenging his or her parental status, even if the underlying marriage is held to be invalid.<sup>52</sup>

### **[a] Adoption Laws**

California has no law that specifically bars transgender people from adopting children, but there is no law that protects them from discriminatory practices in adoption. Are adoption agencies and judges welcoming of transgender applicants? Not always, and California case law has not yet included any discussion of gender identity in the context of adoption. There are, however, explicit protections against discrimination on the basis of gender identity for foster care institutions.<sup>53</sup>

### **[b] Foster Care**

California's Foster Care Non-Discrimination Act, AB 458, went into effect on January 1, 2004 and represents the first of its kind in the United States. Through adding anti-discrimination and equal protection clauses to existing California foster care laws, this legislation prohibits discrimination in the foster care system on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status. The protection extends to foster youth, foster parents, other foster household members, and foster agency staff. In addition, the bill requires administrators, licensing personnel, licensed foster parents, and relative caretakers to undergo training to further understand the legislation and the overall importance of having a safe and nondiscriminatory foster care system.

### **[c] Child Custody**

Some courts have held that a parent's transgender status is irrelevant to child custody unless there is specific evidence of harm to the child. In 1973, the Colorado Court of Appeals refused to remove custody from a female-to-male transsexual parent. The court

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<sup>51</sup> *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

<sup>52</sup> *See, e.g., Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. 1985) (holding that a female-to-male transsexual was estopped from denying his parental responsibilities, regardless of whether his marriage to the child's mother was valid).

<sup>53</sup> Cal. Health & Safety Code §§ 1522.41; 1529.2; 1563 (West 2004); Cal. Welf. & Inst. Code §§ 16001.9, 16003, 16013 (West 2004).

held that the mother's transition from female to male and subsequent marriage to a woman did not justify a change of custody to the father in the absence of evidence that the children had been adversely affected.<sup>54</sup> In 1993, the Montana Supreme Court reversed a trial court decision awarding sole custody to the mother and restricting the father's visitation rights, solely because the father had cross-dressed in private.<sup>55</sup>

Second-parent adoption is available in California, and state courts require evidence of adverse impact before a parent's sexual orientation or involvement in a non-marital relationship can be used to restrict custody or visitation.<sup>56</sup> The "adverse impact" test, also called the "nexus" test, requires a *clear* connection between a parent's actions and harm to the child before a parent's sexual orientation (or any other factor relating to parental behavior) assumes any relevance in the custody determination.<sup>57</sup>

More commonly, however, transgender parents face tremendous discrimination in child custody and visitation decisions.

### **[i] Restrictions on Custody or Visitation**

Several courts have granted custody or visitation to transgender parents only when the parent agreed to hide his or her transgender status.<sup>58</sup> Other courts have restricted or denied visitation to transsexual parents.<sup>59</sup>

### **[ii] Termination of Parental Rights**

At least one court has terminated a transsexual parent's parental rights. The Nevada Supreme Court characterized a male-to-female transsexual parent as "selfish" and terminated her parental rights, stating: "It was strictly [the father's] choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."<sup>60</sup>

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<sup>54</sup> *Christian v. Randall*, 516 P.2d 132 (Co. Ct. App. 1973). See also *In re the Custody of T.J.*, 1988 Minn. App. LEXIS 144 (Minn. App. Feb. 2, 1988) (unpublished decision) (affirming award of custody to transsexual father and concluding that "there is no evidence...that providing primary parenting responsibilities to a gender dysphoric father would cause future problems for [the child]").

<sup>55</sup> *Marriage of D.F.D.*, 862 P.2d 368, 376 (Mont. 1993).

<sup>56</sup> A second-parent adoption (also called co-parent adoption) is a legal procedure that allows a same-sex parent to adopt her or his partner's biological or adoptive child without terminating the first parent's legal status as a parent.

<sup>57</sup> See *In re: Marriage of Birdsall*, 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (Cal. App. 4 Dist., 1988).

<sup>58</sup> See *In re D.F.D. and D.G.D.*, 261 Mont. 186 (1993) (awarding custody to cross-dressing father after expert testimony that father no longer cross-dressed and would not do so in the future); *In re T.J.*, Minn. App. LEXIS 144 (1988) (awarding custody to "gender dysphoric" father where father agreed to undergo therapy and "to maintain his male identity" and where there was no evidence that the child manifested any gender "atypical" behaviors or gender identity problems); *In re V.H.*, 412 N.W. 2d 389 (Minn. Ct. App. 1987) (granting custody to cross-dressing father on condition that father never cross-dress in front of daughter or have any literature relating to transvestism in his home).

<sup>59</sup> See *J.L.S. v. D.K.S.*, 1997 Mo. App. LEXIS 377 (March 11, 1997) (reversing a trial court order that had awarded joint legal, but not physical, custody to a male-to-female parent and imposing an indefinite moratorium on visitation, based on finding that it would be emotionally confusing for the children to see their father as a woman); *B. v. B.*, 184 A.2d 609 (N.Y. App. Div. 1992) (refusing to grant overnight visitation to father who cross-dressed).

<sup>60</sup> See *Daly v. Daly*, 715 P.2d 56 (Nev. 1986). See also *In re Darnell*, 49 Or. App. 561, 619 P.2d 1349 (Ct. App. 1980) (terminating mother's parental rights on the ground that the mother's continued relationship with her former husband, a

## V. HEALTH CARE

### [1] Medicare and CHAMPUS

Medicare does not pay for sex reassignment surgery. The Civilian Health and Medical Program of the Uniformed Services also excludes such procedures.

### [2] Medicaid

In contrast, the federal Medicaid statute does not exclude sex reassignment. As a result, almost every court that has ever considered the issue has concluded that states cannot categorically exclude sex reassignment surgeries from Medicaid coverage.<sup>61</sup> Despite these holdings, many state Medicaid statutes contain a blanket exclusion for procedures related to sex-reassignment.<sup>62</sup>

As a practical matter, obtaining Medicaid reimbursement for medical procedures related to sex reassignment (especially surgery) proves extremely difficult, even in states with positive case law on this issue. This is true for a number of reasons, including, among others: (1) the front line Medicaid staff who process Medicaid claims often automatically deny claims from transsexual persons based on the mistaken belief that the procedures are cosmetic or experimental, or based on the mistaken belief that the procedures are categorically excluded; (2) transsexual persons and their health care providers often fail to submit adequate documentation supporting the medical necessity of particular procedures, based on a lack of familiarity with the legal requirements for showing medical necessity; (3) advocates and attorneys often fail to provide adequate representation for transsexual persons, based on prejudice, ignorance, or an inability to find information and models of good advocacy; and (4) health care providers who specialize in transgender issues often do not accept Medicaid patients.

Transsexual people who have completed sex reassignment also experience frequent denial of routine medical treatments appropriate to their new sex. In the first published decision to address this form of discrimination, the Superior Court of Massachusetts held that a transsexual woman who had undergone sex reassignment over 25 years earlier

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female-to-male transsexual, was detrimental to the best interests of the child; an earlier proceeding had terminated the parental rights of the father).

<sup>61</sup> See *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) ("We find that a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the 'diagnosis, type of illness, or condition' ."); *J.D. v. Lackner*, 80 Cal. App. 3d 90 (Cal. Ct. App. 1978); *Doe v. State*, 257 N.W.2d 816 (Minn. 1977) (noting that SRS was "the only surgical treatment which, if recommended by a physician and related to a patient's health, is not covered by the [Minnesota Medicaid] program."). But see *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001) (reversing district court's ruling and holding that Iowa's rule denying coverage for SRS was not arbitrary or inconsistent with the Medicaid Act); *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980) (reversing district court's ruling that Georgia's Medicaid program could not categorically deny coverage for SRS).

<sup>62</sup> See e.g., Ill. Admin. Code tit. 89, 140.6(1) (1983); Pa. Code tit. 55, § 1163.59(a)(1) (1995); Alaska Admin. Code tit. 7, 43.385(a)(1) (1975).

could not be denied medically necessary breast reconstruction surgery simply because she is transsexual.<sup>63</sup>

### [3] MediCal

In 2001, a Writ of Mandate from the California Superior Court held that MediCal (state health insurance for low-income people) cannot categorically deny treatment to transgender people, must treat each individual claim on a case-by-case basis, and cannot deny medically necessary procedures, which include sex reassignment surgery (SRS) and hormone treatment.<sup>64</sup> Thus, MediCal is now covering SRS. Further, the California Court of Appeals has held that an SRS can be medically necessary.<sup>65</sup>

### [4] Private Insurance

Contract law largely governs private insurance. In the absence of an explicit contractual provision specifying that the insurance company will not pay for sex-reassignment treatment, transsexual people have won claims requiring the company to pay for surgeries.<sup>66</sup> In addition, while most insurance plans expressly exclude services related to sex-reassignment, anecdotal evidence shows that growing numbers of transsexual individuals successfully challenge these exclusions through internal appeals procedures.<sup>67</sup>

Thus far, there have been few attempts to litigate employers' refusal to provide equal health benefits to transsexual employees under non-discrimination statutes. The Second Circuit Court of Appeals confronted one such suit in 2002.<sup>68</sup> A female-to-male transsexual sued his employer for wrongfully denying insurance coverage for sex-reassignment surgeries under a plan governed by the Employee Retirement Income and Security Act of 1974 (ERISA). The Second Circuit held that the employee failed to prove that the procedures were medically necessary. The court also rejected the plaintiff's alternative claim that the denial of reimbursement violated Title VII of the 1964 Civil Rights Act.

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<sup>63</sup> *Beger v. Acting Com'r, Div. of Medical Assistance*, 11 Mass.L.Rptr. 745 (2000).

<sup>64</sup> *Jane Doe v. Diana M. Bonta*, Writ of Mandate in Superior Court of California (2001), Recommendations for *Transgender Health Care*, Transgender Law Center, available at <<http://www.transgenderlawcenter.org/resources/hchealth.htm>>.

<sup>65</sup> *J.D. v. Lackner*, 80 Cal. App. 3d 64 (Cal. Ct. App. 1978).

<sup>66</sup> *See, e.g., Davidson v. Aetna Life & Casualty Ins. Co.*, 420 N.Y.S. 2d 450 (Sup. Ct. 1979).

<sup>67</sup> *See Kari Hong, Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination against Transsexuals*, 11 Colum. J. Gender & L. 88 (2002).

<sup>68</sup> *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758 (2d Cir. 2002).

## VI. PRISON ISSUES

### [1] Sexual Violence

Transgender people who have not had genital surgery are generally classified according to their birth sex for purposes of jail and prison housing—a situation that puts male-to-female transsexuals at great risk of sexual violence. It is well established that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. However, the United States Supreme Court adopted a very narrow interpretation of that duty in 1994.<sup>69</sup> After a male-to-female prisoner was raped and beaten, the Court considered the petitioner's argument that prison officials should be held to an *objective* standard of liability, i.e., prison officials should be liable for risks to prisoner safety when those risks are obvious enough that officials "should have known" the prisoner was in danger.<sup>70</sup>

The Court rejected that argument and concluded that a prison official is not liable "unless the official knows of and disregards an excessive risk to inmate health or safety." The official must display a "deliberate indifference" and have an actual, subjective knowledge of the danger and then fail to act.<sup>71</sup>

To protect transgender women housed in male prisons from the risk of violence, prison officials sometimes separate them from other prisoners. This is referred to as "administrative segregation." While placing a transgender woman in administrative segregation may provide greater protection, it also results in exclusion from recreation, educational and occupational opportunities, and associational rights.<sup>72</sup>

### [2] Access to Hormone Therapy and Sex-Reassignment Surgeries

In the past, courts almost always ruled in favor of prison officials when they denied transgender prisoners access to hormone therapy or re-assignment surgery.<sup>73</sup> Recently,

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<sup>69</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994).

<sup>70</sup> *Id.* at 837.

<sup>71</sup> See also *Lucrecia v. Samples*, 1995 U.S. Dist. LEXIS 15607 (Oct. 16, 1995) (finding no Eighth Amendment violation where prison officials transferred male-to-female transsexual prisoner, who had developed breasts and had her testicles surgically removed, from female prison to male prison, where she was subjected to constant verbal, physical, and sexual harassment and assault by other prisoners and by prison guards). *But see Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999) (holding that qualified immunity did not protect prison official from claim that the disclosure of the inmate's transsexual status constituted deliberate indifference to a substantial risk of serious harm, in violation of the Eighth Amendment).

<sup>72</sup> See Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 530 (2000).

<sup>73</sup> See *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) (recognizing that sex reassignment is the only effective treatment for transsexual prisoners, but holding that it is permissible to withhold treatment from transsexual prisoners in light of fact that neither public nor private health insurance programs will pay for sex reassignment); *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to cross-dress or to estrogen therapy); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (rejecting equal protection claim brought by pre-operative male-to-female transsexual based on evidence that Colorado provided hormone therapy to non-transsexual prisoners with low hormone levels and to post-operative male-to-female transsexuals); *White v. Farrier*, 849 F.2d 322

however, prisoners have had more success in challenging denials of hormone therapy. At the core of the issue lies the claim that gender identity disorder constitutes a serious medical need.

In 2002, a federal district court held that the plaintiff's gender identity disorder constituted a serious medical need and directed prison officials to provide adequate treatment.<sup>74</sup> Two years prior, the Ninth Circuit held that prison officials violated the Eighth Amendment by abruptly terminating a prisoner's course of hormone therapy when she was transferred to a new facility.<sup>75</sup> Similarly, in *Wolfe v. Horn*, the court held that abrupt termination of prescribed hormonal treatment by a prison official with no understanding of the plaintiff's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute "deliberate indifference."<sup>76</sup>

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(8th Cir. 1988) (holding that male-to-female transsexual prisoner is not entitled to cross-dress or wear cosmetics and does not have a constitutional right to hormone therapy); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987), cert. denied, 484 U.S. 935 (1987) (holding that transsexual prisoner is constitutionally entitled to some type of medical treatment for diagnosed condition of transsexualism, but she "does not have a right to any particular type of treatment, such as estrogen therapy"); *Jones v. Flannigan*, 1991 U.S. App. LEXIS 29606 (7th Cir. 1991) (same); *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986) (same); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986) (holding that transsexual prisoner had no right to hormone therapy). See also *Cuoco v. Mortisugo*, 222 F.3d 99 (2nd Cir. 2000) (holding that officials were entitled to immunity from claim by transsexual pre-trial detainee who was denied hormones).

<sup>74</sup> *Kosilek v. Maloney*, 221 F. Supp.2d 156 (D. Mass. 2002).

<sup>75</sup> *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000).

<sup>76</sup> 130 F. Supp.2d 648 (E.D. Pa. 2001). See also *Phillips v. Michigan Department of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991) (granting preliminary injunction directing prison officials to provide estrogen therapy to a pre-operative transsexual woman who had been taking estrogen for several years prior to her transfer to a new prison and distinguishing failure "to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery" from "[t]aking measures which actually reverse the effects of years of healing medical treatment").

## VII. IMMIGRATION AND ASYLUM

Neither the Immigration & Naturalization Service (INS) nor the Board of Immigration Appeals (both now subsumed under the Office of Homeland Security) has expressly recognized transsexual people as "a particular social group" for the purposes of asylum. Nonetheless, a growing number of individuals who have been persecuted for being transgender or transsexual have received asylum in the past few years under the rubric of persecution on the basis of sexual orientation and/or gender.<sup>77</sup>

In a groundbreaking decision, the Ninth Circuit held that Geovanni Hernandez-Montiel, a transgender youth from Mexico who was kidnapped, repeatedly beaten, and raped by police officers was entitled to asylum on the ground that she was persecuted because of her sexual orientation.<sup>78</sup> The Board of Immigration Appeals had previously denied Geovanni's claim, holding that she was not entitled to protection because she could have avoided persecution by adopting a more masculine style of dress and behavior. The Ninth Circuit rejected that rationale, which the court described as "offensive."

In the past few years, a number of transgender immigration petitioners who have been physically abused, injured, battered, and harassed by persons whom the government is unwilling or unable to control, have received asylum in the United States.<sup>79</sup>

To qualify for asylum, the immigration Asylum Officer must establish certain "Protected Characteristics" (identity factors) of the persecuted applicant.<sup>80</sup>

### [1] Obtaining Asylum

In the case of transgender asylees, the Asylum Officer must:

1. Identify factors to determine whether persecution or feared persecution is on account of membership in a particular social group; and
2. Identify factors in evaluating the motive of the persecutor.<sup>81</sup>

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<sup>77</sup> See, e.g., Law Office of Robert Jobe, Press Release, "Six More Gays Receive Asylum as Window of Opportunity Closes in April 1997," Feb. 25, 1997 (San Francisco, CA) (describing decisions granting asylum to a female-to-male transsexual from Pakistan and a male-to-female transsexual from Peru). Cf. *Miranda v. INS*, 51 F.3d 767 (8th Cir. 1995) (holding that male-to-female transsexual from Honduras was not entitled to suspension of deportation based on hardship due to absence of comprehensive medical care for transsexual people in Honduras, where she had already undergone sex reassignment surgery and there was no evidence that she would be unable to obtain necessary care to maintain her health in Honduras).

<sup>78</sup> See *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

<sup>79</sup> *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).

<sup>80</sup> Immigration Officer Academy, *Asylum Officer Basic Training Course Eligibility Part III: Nexus 1* <<http://www.asylumlaw.org>> (Nov 30, 2001).

<sup>81</sup> *Id.* at 47.

The decision in *Hernandez-Montiel vs. I.N.S.*, discussed above, is the leading case for identifying factors for transgender asylum applicants.<sup>82</sup> The Ninth Circuit found that in Mexico, gay men with female sexual characteristics constitute a particular social group. More importantly, the court ruled that Hernandez-Montiel’s feminine personality was an inherent characteristic of her self-identity. Her personality was considered so fundamental to her identity and the transgender community as to be ascertained “an immutable trait” that she should not be required to change. This is the first case in which a transgender/transsexual was classified as a member of a particular social group, and wherein the persecutors were found motivated to harm the applicant simply because she belonged to this social group. The decision in *Hernandez-Montiel* clearly articulated the identifying factors to be used for transgender/transsexual asylum applicants.

Immigration Asylum Officers are directed to rely on this established protocol, and *Hernandez-Montiel vs. I.N.S* remains prevailing law.

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<sup>82</sup> 225 F.3d 1084 (9th Cir. 2000).

## **VII. RESOURCES**

### **[1] Human Rights Commission (HRC)**

#### **Transgender Discrimination in San Francisco**

Established in 1964 with the goal of working to provide leadership and advocacy to secure, protect and promote human rights for all people, HRC has been charged with implementing and enforcing San Francisco's anti-discrimination laws.<sup>83</sup> In order to fulfill this responsibility, HRC encourages any member of the San Francisco community facing gender discrimination to contact its office. Upon contact, a discussion will take place to decide whether or not a formal complaint should be filed, pending factors such as jurisdiction and statute of limitations. If deemed appropriate, the parties work with HRC as a mediator to remedy the situation. Members of HRC report that numerous complaints have been filed since this ordinance was established, most of which have been easily resolved through instructive programs and training. Overall, HRC's approach has proven successful in providing protection and education to the San Francisco community.

If you or someone you know has been affected by gender discrimination, please contact the Human Rights Commission at (415) 252-2500.

### **[2] California State School Safety Act**

#### **Complaint Procedure**

As the governing body over public schools, the California Department of Education (CDE) is responsible for enforcing AB 537. People experiencing acts of discrimination in a school environment must first file a complaint with the school, a process that varies from school to school. If the school does not adequately address the complaint, the district superintendent's office should be notified. The responsible officer has 60 days after receiving the complaint to act, following regulations set out in the state's "Uniform Complaint Procedures." If the district officer exceeds the 60-day requirement or if the complainant wishes to appeal the decision, the CDE then becomes responsible for performing further investigations.

## **ADDITIONAL RESOURCES**

(1) *A Legal Guide to Child Custody and Selected Family Law Issues for Transgender Parents* is available from the National Center for Lesbian Rights, 870 Market Street, Suite 570, San Francisco, CA 94102; (415) 392-6257; [www.nclrights.org](http://www.nclrights.org); [info@nclrights.org](mailto:info@nclrights.org).

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<sup>83</sup> S.F. Admin. Code §§ 12A, 12B, 12C (2003); S.F. Police Code Art. 33 (2003).

- (2) Spencer Bergstedt, Esq, *Translegalities: A Legal Guide for FTMs, and Translegalities: A Legal Guide for MTFs*. These publications may be ordered by contacting Spencer Bergstedt, e-mail: [MstrSpence@aol.com](mailto:MstrSpence@aol.com).
- (3) Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (NCLR & NGLTF, 2000) (PDF version available at <http://www.nglhf.org>).
- (4) Other publications on transgender legal issues are available from the Transgender Law & Policy Institute, <http://www.transgenderlaw.org>; [info@transgenderlaw.org](mailto:info@transgenderlaw.org).
- (5) For information on state laws and policies relating to the issuance of new birth certificates for transsexual people, refer to <http://www.drbecky.com/birthcert.html>.
- (6) For information relating to legislation protecting transgender people, contact the Transgender Civil Rights Project of the National Gay & Lesbian Task Force at 202-393-5177, [www.nglhf.org](http://www.nglhf.org).
- (7) For information relating to employer policies prohibiting discrimination against transgender employees, contact the Human Rights Campaign, at 202-628-4160, [www.hrc.org](http://www.hrc.org).
- (8) For additional legal materials relating to transgender people, refer to [www.transgenderlegal.org](http://www.transgenderlegal.org).
- (9) For more information on transgender parenting issues, refer to [www.geocities.com/transparentcy](http://www.geocities.com/transparentcy).
- (10) For more information on medical issues for transsexual people, contact the Harry Benjamin International Gender Dysphoria Association at [www.hbigda.org](http://www.hbigda.org).
- (11) For information on transgender legal issues outside the U.S., contact Press for Change at [www.pfc.org.uk](http://www.pfc.org.uk) or the International Gay & Lesbian Human Rights Commission at [www.iglhrc.org](http://www.iglhrc.org).
- (12) For information and assistance regarding transgender legal issues in California, contact the Transgender Law Center at [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org).