

Introduction¹

Everybody has a gender identity. However, because most people's gender identity is consistent with the sex ascribed to them at birth, they never think about it. Nevertheless, gender identity turns out to be very important, largely because of societal expectations and responses based on how one expresses that identity.

GLAD historically focused on issues of discrimination based on sexual orientation and HIV status. Later, the roots of discrimination against gay, lesbian, bisexual and transgender people became increasingly indistinguishable, and we came to see how we all face pervasive discrimination based on gender identity and expression. As a result, GLAD expanded its mission to include the eradication of discrimination based on gender identity and expression.

Since then, we have successfully litigated numerous cases in which a transgender person's rights or liberties are compromised simply because someone does not meet societal expectations of what it means to be a man or to be a woman. We offer this publication to ensure that transgender people are aware of their rights under the law.

Transgender people face serious discrimination in our society, in areas ranging from appropriate medical care to parental rights; from personal identification documents to the freedom to marry. And perhaps most common, transgender people face harassment and discrimination in the areas of employment, housing, and public accommodations – mistreatment that threatens their freedom to work and live safely in their own communities.

¹ This publication is an overview intended to outline the general parameters of the rights of transgender people and is not for the purpose of providing guidance or legal advice relating to any specific situation. Moreover, this area is rapidly developing at the local, state, and federal levels. For specific guidance on your situation, you must consult a lawyer. You may also call GLAD at (800) 455-GLAD in the New England area for referrals and general information.

Like gay men, lesbians and bisexuals, transgender people often find that the legal system is poorly equipped to deal with their needs and concerns. Throughout the 1970s and 1980s, courts frequently held that transgender people were not protected under existing non-discrimination statutes. Despite this history of exclusion under non-discrimination law, courts have recently begun to interpret federal and state anti-discrimination laws as providing protection for transgender people. In addition, many statewide laws and local municipal ordinances have been amended to add explicit coverage for transgender people. In fact, 5 of the 6 New England states (Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont) in which GLAD does its work have explicit legislation, case law, or regulatory guidance providing that transgender people are protected from discrimination. In addition, several federal court decisions explain that transgender people have protection from discrimination throughout New England.

Despite this progress, serious legal concerns remain for transgender people, in part because of the very long-term educational work that is just beginning both within the courts and in society at large. Nonetheless, GLAD's work in the courts is slowly, but surely, securing protections for transgender people against discrimination. GLAD's victories help set precedents that allow other attorneys to successfully argue similar cases on behalf of transgender people. If you know an attorney working on a transgender matter, encourage them to call GLAD. We may be able to assist by providing legal materials.

In addition to impact litigation, GLAD's mission is to inform the community about our legal rights, so we can move forward together in our work to expand the scope of legal protections in the courts. GLAD operates a legal information hotline every weekday from 1:30 to 4:30 pm. Anyone with questions about their rights under the law, in need of referrals to trans-friendly attorneys, or wishing to discuss the details of a legal situation, can call toll free at (800) 455-GLAD (4523).

Legal Principles for Inclusion of Transgender People Under Existing Anti-Discrimination Laws

No one deserves to be harassed or discriminated against based on someone else's idea of "appropriate" male or female gender identity. Yet, transgender people have historically had little or no protection under federal and state anti-discrimination statutes. Occasionally, this exclusion is made explicit, as under the federal Americans with Disabilities Act, which specifically states that its anti-discrimination protections do not apply to transgender people. More often, there is no explicit exclusion, but the courts interpret the statutes so as to exclude transgender people from protection.

These decisions holding that transgender people are excluded from protection were based on bias rather than any principled reason. They relied on narrow definitions of sex and gender, leaving transgender people trying to fit into a legal system that recognized only biological males and females, without recognizing a spectrum of gender expression beyond the categories of "women" and "men," which the law and society conceptualize as separate, distinct and oppositional.²

As the more recent case law indicates, transgender people should be protected from discrimination based on existing principles of anti-discrimination law.

The following describes 3 different approaches that may be used in pursuing recourse for a transgender person subjected to discrimination.

² In order to understand some of the distinctions made in cases and laws related to transgender people, it is important to understand the different ways terms such as sex, gender and sexual orientation have been used. Although there is disagreement about these terms and courts use them imprecisely, it may be helpful in some instances to distinguish them. Sex is typically understood to refer to one's biological sex. Gender typically refers to sexual difference as it is expressed in culture (e.g. behavior or dress), and sexual orientation typically refers to an individual's sexual attractions and partnerships.

Discrimination Based on Sex

Most cases in which transgender people have sought protection under federal law have based arguments on Title VII, a federal law that prohibits an employer from discriminating against any employee on the basis of sex, among other categories. Most instances of discrimination against transgender people can be fairly characterized as sex-based; action is taken against an individual because of stereotypical beliefs about the nature of men and women (about their appearance and behavior, including a belief that men and women cannot or should not change their sex).

Unfortunately, the argument for a straightforward application of sex-based anti-discrimination law has been rejected in many cases. Some courts have ruled that Title VII was intended to only prevent people from discriminating against men because they are men and women because they are women (i.e., not to broadly prevent discrimination based on normative notions of sex), thereby eliminating the possibility of transgender people seeking such protection. Other courts have denied transgender litigants' Title VII claims on the grounds that the discrimination was not based on the person's sex per se, but rather on the individual's change of sex. This logic fails to acknowledge that the transgender person has been singled out for adverse treatment based on a belief about his or her sex – namely, that he or she cannot or should not change his or her sex or express it in a different manner than cultural norms allow.

A number of key cases call these types of faulty reasoning into question and have changed the way that Title VII should be interpreted. First, in *Price Waterhouse v. Hopkins*,³ the Supreme Court ruled that a person who failed to conform to gender stereotypes (specifically, a female employee at an accounting firm who acted aggressively and refused to wear makeup to 'soften' her appearance), was permitted to pursue a claim under Title VII.

³ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Later, *Schwenk v. Hartford*⁴ repudiated a previous 9th Circuit ruling that had denied the application of Title VII to a transgender woman. The ruling in *Schwenk* stated that the definition of “sex” under federal non-discrimination laws encompasses both biological differences between men and women, and failure to “conform to socially-prescribed gender expectations,” basing its reasoning on the previous Supreme Court ruling in *Price Waterhouse*. While not every circuit has followed the example of the 9th Circuit by clearly overturning precedent that created a transgender exclusion, it is arguable that the Supreme Court’s broad interpretation of Title VII in *Price Waterhouse* effectively reverses those that have not done so explicitly.

A recent 1st Circuit decision reinforces the idea that transgender people can seek protection against discrimination under federal laws prohibiting discrimination on the basis of sex.⁵ In *Rosa v. Park West Bank & Trust Co.*,⁶ a claim was brought under the Equal Credit Opportunity Act, which has been construed consistently with Title VII. The plaintiff, a biological male who presents and lives as a woman, was refused a loan application unless she⁷ returned in traditional male attire. The court found that, based on the allegations, Rosa may be able to make out a case of sex discrimination.

In addition to the growing recognition of existing federal protection for transgender people, there are now several cases in New England establishing protection under state non-discrimination statutes.

⁴ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁵ The 1st Circuit includes Massachusetts, Maine, Rhode Island, New Hampshire, and Puerto Rico. The ruling in *Rosa* sets precedent for others to successfully pursue similar claims of discrimination under federal law in this region. Other regions have looked to this case in interpreting similar laws.

⁶ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

⁷ Although the court refers to Rosa as “he,” this document uses “she” to reflect and respect Rosa’s gender identity.

In *In Re Declaratory Ruling of John/Jane Doe*,⁸ the Connecticut Commission on Human Rights and Opportunities (CHRO) ruled that transgender people are protected under Connecticut state laws prohibiting sex discrimination. The CHRO’s rulings recognize that discrimination against transgender people is often grounded in the same type of discrimination seen in *Price Waterhouse* – discrimination based on a perception that the person does not conform to sex stereotypes.

In *Millett v. Lutco*,⁹ the Massachusetts Commission Against Discrimination (MCAD) ruled similarly, holding that Massachusetts state law prohibiting discrimination on the basis of sex also encompasses discrimination against transgender individuals.

Lastly, in 2001, Rhode Island amended its anti-discrimination law to include explicit statutory protection for transgender people, by adding the phrase “gender identity or expression” to the list of prohibited bases of discrimination.¹⁰

Discrimination Based on Disability

State laws that prohibit discrimination on the basis of disability offer a significant source of legal protection for transgender people. Because of misperceptions and misunderstandings about disability laws, some people have expressed discomfort in pursuing legal protections for transgender people based on disability. The term ‘disability’ in anti-discrimination laws, however, is not used in the popular or colloquial sense, and is not limited to individuals who are significantly debilitated or who appear outwardly ill. Rather, under anti-discrimination laws, the

⁸ *Declaratory Ruling on Behalf of John/Jane Doe*, Conn. Comm’n on Human Rights and Opportunities (Nov. 9, 2000), available at <http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm>.

⁹ *Millett v. Lutco*, 2001 WL 1602800 (Mass. Comm’n Against Discrimination).

¹⁰ 2001 R.I. Pub. Laws ch. 340, § 5. The only other state to include such explicit protections is Minnesota. Minn. Stat. Ann. §363.01 (West 2001). Many municipalities throughout New England and across the country also include protections against transgender discrimination. See www.transgenderlaw.org for a complete and up-to-date list.

term 'disability' refers to individuals who have a wide range of *serious health conditions*. Misunderstandings about the term 'disability,' and the stigma associated with disability, should not prevent people's access to the courts and other protections.¹¹

The two federal disability laws – the Federal Rehabilitation Act (FRA) and the Americans with Disabilities Act (ADA) – explicitly exclude from coverage “gender identity disorders not resulting from physical impairments.”¹² As a consequence, most transgender people may not bring claims of disability discrimination under federal anti-discrimination law. Fortunately, however, some state disability laws do not contain this exemption.

In most states, a person is protected from discrimination if he or she:

- has a physical or mental impairment that substantially limits a major life activity;
- has a record of such an impairment; or
- is regarded as having such an impairment.¹³

Therefore, if a transgender person is in a state that does not have an explicit exclusion for gender identity disorders and the person falls within one of the three prongs listed above, the person should be protected under the state disability discrimination provisions.

In Massachusetts and New Hampshire, the state human rights agencies charged with interpreting and enforcing the non-discrimination laws have explicitly found transgender people covered by disability protections. In *Jette v. Honey Farms*,¹⁴ the

Massachusetts Commission Against Discrimination ruled that, unlike the federal disability laws after which it was fashioned, Massachusetts' disability law does not explicitly *exclude* transgender people from protection and therefore the legislature must have intended for transgender people to be *included*. This same conclusion was reached in the case of *Pat Doe v. Yunits* by a trial court judge.¹⁵ In New Hampshire, the Human Rights Commission reached the same result, relying on a case originating in Rockingham Superior Court.¹⁶

As long as a transgender person can demonstrate that he or she has a physical or mental impairment that substantially limits a major life activity, or has a record of such in the past, or is regarded as having such, he or she should be covered, depending on the scope of the state law. Of course, to prevail in a nondiscrimination case, the person must also demonstrate that he or she was qualified for the job (or eligible for the housing, etc.) and was discriminated against on the basis of disability, not for some other reason.

Why 'Disability' Includes Transgender People – Background Legal Analysis

Many transgender people will be able to prove that they meet the statutory definition of disability in their state in two ways. Applying the first part of the definition, a transgender person must first prove that he or she has a physical or mental 'impairment.' Certainly, many transgender people have a condition, whether characterized as a physiological or a psychological one.¹⁷ Next, he or she must show that the impairment 'substantially limits a

¹¹ Rather than restrict the valid legal options of transgender people, work must be done to eliminate the stigma associated with disability.

¹² 29 U.S.C.A. § 705 (1)(F)(i)(1973); 42 U.S.C.A. § 12211(b)(1)(1990).

¹³ This language may vary slightly from state to state. It is important to check each state's definition of disability as well as any state administrative regulations interpreting that definition. Some states, such as Connecticut, have a broader definition of disability.

¹⁴ *Jette v. Honey Farms*, 2001 WL 1602799.

¹⁵ *Doe ex rel. Doe v. Yunits*, 2001 WL 664947 (Mass. Super. Feb. 26, 2001).

¹⁶ N.H. Code Admin. R. Ann. [Hum.] 401.03 (2002) (citing *Jane Doe v. Electro-Craft Corp.*, No. 87-E-132 (Rockingham Super. Ct. Apr. 8, 1988)).

¹⁷ As a legal matter, because gender identity disorder ("GID") is listed in the *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed), people who have been diagnosed with GID arguably qualify as having "a physical or mental impairment." However, whether an individual's gender identity is characterized as psychological, neurological, or endocrinological, it is certainly a health condition for some transgender people.

major life activity.’ The issue of what constitutes a major life activity is still evolving in courts and state agencies.

Some people may be able to demonstrate that the need for ongoing medical care – including hormone therapy, sex reassignment surgery, or other treatment – qualifies as a substantial limitation to the major life activity of caring for oneself. Other people may at times experience depression or other psychological effects that are sufficiently debilitating to meet the definition, perhaps even to the point of suicidal feelings and behavior. In addition, even with treatment, many individuals can prove a substantial limitation to the major life activities of intimate sexual relations and procreation. It is important to keep in mind that the term ‘substantial limitation’ does not mean that a person is unable to engage in the activity, but only that the condition creates complexities and obstacles that would not otherwise exist.¹⁸

Even if an individual does not meet the first part of the definition, he or she may be ‘regarded as’ disabled, because the ADA definition of disability also extends to prohibit any discrimination arising from stereotypes and ignorance about physical and mental impairments. This part of the definition is clearly intended to cover stigmatized impairments that elicit discriminatory reactions based on fear and ignorance.

According to regulations issued by federal agencies that have interpreted the ADA, the “regarded as” part of the definition of disability is aimed at limitations that occur only as a result of the negative attitudes of others, whether a person: (a) has an impairment that does not substantially limit major life activities but is treated as such; (b) has an impairment that substantially limits major life activities only as a result of other people’s attitudes about it; or (c) has no substantially limiting impairment, but is treated as having such an impairment. While the courts do not

¹⁸ According to the second part of the definition, one may prove discrimination based on a record of a physical or mental impairment. Therefore, transgender people who have no current limitation of a major life activity may, nonetheless, be covered because they had such a limitation at an earlier time in their life.

give these regulations the same weight as the text of the statute itself, the regulations provide a strong framework for an expansive interpretation of disability laws on both the federal and state level.

Transgender people have a quintessentially stigmatizing condition – a condition that sometimes produces discomfort or fear in others. As a result, transgender people may be substantially limited as a result of the negative attitudes of others toward their impairment, whether or not their gender identity condition itself substantially limits major life activities. The irrational fears attached to transgender people are analogous to the type of stigma and stereotypes associated with HIV. When a transgender person is denied employment or services based on a negative reaction to their transgender identity (including their gender non-conforming personal appearance and presentation), that person may be protected because he or she has been “regarded as” having an impairment.

State disability anti-discrimination laws present an important tool to eradicate irrational discrimination against transgender people in employment, housing, public accommodations and other areas of law. An accurate understanding of the term ‘disability’ as specifically used in anti-discrimination laws brings transgender people squarely within the scope of these protections.

Discrimination Based on Sexual Orientation

Many transgender people are harassed or treated adversely because they are identified as, or perceived to be gay. Assumptions about a person’s sexual orientation may often arise either because of clothing the person wears or because of their gender presentation, which may be subtler than a person’s attire. In such cases, although the transgender individual may or may not be gay or lesbian, he or she may still have a claim based on existing laws that prohibit discrimination based on actual or perceived sexual orientation, such as those in Connecticut, Massachusetts, New Hampshire, Vermont, or Rhode Island.

Other Legal Issues

Marriage

The legality of a transgender person's marriage has become a thorny issue. Since civil marriage is seen to be available only to so-called "opposite" sex couples, courts sometimes require a determination of a transgender person's sex, and the court's determination may or may not be consistent with the individual's identity, or even with the gender status reflected on government documents such as a driver's license.

People Who Transition After Entering Into a Marriage

There are no reported decisions invalidating a marriage of a transgender person who transitioned after entering into a lawful marriage. Invalidating such a marriage where both spouses wish to remain married is against public policy and seriously disadvantageous not just to the couple involved, but to the expectations of the community and society that surrounds them. Anyone having specific legal questions or concerns relating to this situation is advised to contact an attorney.

People Who Transition Prior to Entering Into a Marriage

We know that many post-transition transgender people have married and continue to marry throughout New England, whether or not the state knowingly sanctions their marriages. Practically speaking, unless the marriage of a post-operative transgender person to a person of the opposite sex is challenged (by a party seeking annulment, for example, or by a third party challenging a spouse's right to the deceased's estate through laws of automatic inheritance) it is unlikely that the validity of the marriage will ever be an issue. No applicable case has been reported in New England, and until that time this area of law remains unclear.

All six New England states acknowledge the existence of sex reassignment surgeries and, either by statute or administrative policy, permit an individual to amend his or her birth certificate to reflect this change of sex. This is an important first step toward the recognition of the right of post-operative transgender people to marry. Presumably, if a state permits an individual to legally change his or her sex, the person's new legal sex should be recognized for all purposes, including marriage. This is how a New Jersey court ruled, stating clearly that there is no legal or public policy reason to prevent post-operative transgender people from marrying.¹⁹

Unfortunately, however, two recent court decisions have been hostile towards marriages involving transgender people, calling into question whether marriages of post-operative transgender people whose legal sex matches their gender identity will be considered valid.

Recent Harmful Rulings

In Littleton v. Prange,²⁰ a Texas appeals court invalidated the six year marriage of a post-operative transgender woman, holding that no surgery or treatment can change a person's sex in Texas and that only the marriage of a chromosomal (XY) man and a chromosomal (XX) woman is valid.

In Kansas, In re Estate of Gardiner,²¹ that state's Supreme Court invalidated the marriage of a post-operative transgender widow, ruling similarly that under no circumstances may a transgender person in Kansas marry a person of the same birth sex.

In the past, if transgender people changed the sex designation on their birth certificate or lived in a jurisdiction where they could, it appeared that they would be able to lawfully marry. Both Littleton

¹⁹ *M.T. v J.T.* 355 A.2d 204 (NJ Super. Ct. App. Div. 1976).

²⁰ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

²¹ *In re Estate of Gardiner*, 2002 WL 397677 (Kan. 2002).

and Gardiner cast doubt on that thinking. In both cases, the transgender litigants either had or could have had a birth certificate designating that they were of the opposite sex of their partner. Despite that, the courts looked only to their sex assigned at birth.

Even Less Restrictive Interpretations Can Pose Problems

Putting aside the restrictive rulings in Littleton and Gardiner that insist categorically that a transgender individual is not legally the transitioned-to sex and therefore could never marry a person of the opposite sex, many transgender people still face considerable obstacles to their right to marry. Even in a more favorable jurisdiction, criteria for transgender people's marriage eligibility might include completion of sex reassignment surgery and amending one's birth certificate. These criteria can pose considerable difficulties.

1. Some states—such as Florida and Ohio—do not allow individuals born there to change their birth certificates, regardless of any hormone therapy or surgery they undergo.
2. Although all six New England states theoretically allow people to change their sex designations on their birth certificates, the requirements to achieve such a change are formidable. For example, the Massachusetts birth certificate statute requires documentation that the person “completed sex reassignment surgery, so called.”²²

Although there is no statutory definition for “completed sex reassignment surgery,” some individuals have found that without documentation of having had genital reconstruction, they cannot obtain a new birth certificate. This is true despite the fact that experts in the field of caring for and treating transgender people agree that an individualized assessment is necessary to determine what procedures a

²² M.G.L. c. 43 § 13.

person should undergo as part of “sex reassignment.” Moreover, medical professionals concur that genital surgery is not required in many circumstances for some to transition from one sex to another. Unfortunately, until the law catches up to the expert medical knowledge, many transgender people are left in limbo with regard to who they may lawfully marry.

While there are no reported decisions on point, it is possible that a court would require an FTM transgender man to have undergone both chest and genital reconstructive surgery to meet the terms of the statute despite the fact that such a requirement is unreasonable and may be medically unsound for that particular individual.

3. Even under a scenario in which a birth certificate amendment is granted administratively but without a court order, a court might still seek to determine whether the criteria for sex reassignment have been met by requiring detailed medical examination and a case-by-case determination of the litigant's sex.

Rights Of Transgender Parents

Like gay men and lesbians, transgender people often find themselves fighting for the custody of their children. Although custody decisions ideally should be based on the best interests of the child, independent of the parent's gender identity, the case law on this issue is inconsistent.

In 1989, in a most alarming decision, a Nevada Court not only denied a transgender parent the right to primary custody, but actually terminated parental rights solely on the basis of transgender status. The court held that the child should not be required to undergo the psychological adjustments necessary for coming to terms with a parent's transgender identity. Instead of evaluating what was in the best interests of the child, the court's

decision seemed to turn on whether a transgender person, by definition, is unfit and inadequate as a parent.

The contrary result was reached in a case in Orange County, California, in which a FTM transgender father was granted continuing visitation and custody of his child.

GLAD is presently unaware of any cases in New England in which a court has terminated the parental rights of a transgender person on the basis of gender identity alone. In any of the six New England states, in order to remove a child permanently from a biological parent (transgender or not), a judge must find, by clear and convincing evidence, that the parent is currently unfit to further the welfare and best interests of the child. GLAD would be interested in hearing from any parent whose parental rights are being threatened based on gender identity.

Use Of Public Restroom Facilities By Transgender People

Transgender people often risk physical harm and public humiliation when they choose a restroom facility. They are frequently unwelcome or uncomfortable in either the restroom of the sex ascribed to them at birth or the restroom appropriate to their gender identity.

GLAD is presently unaware of any cases in New England addressing the issue of what legal recourse a transgender person may have if denied access to a safe and appropriate public restroom. This may be a very difficult area in which to litigate. In fact, even in Minnesota, a state with explicit protections for transgender people in employment and public accommodations, the high court recently found an exception to the law for bathroom use.²³ It is uncertain how a court would rule in a case in which a transgender person is denied the right to use a gender-appropriate restroom. Even where the law is clear, as in

²³ *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

Massachusetts and Rhode Island, courts may be disinclined to protect the transgender person's right to appropriate restroom access. However, if a transgender person is threatened, assaulted, or harassed in a public restroom or any other public place, they may be able to bring criminal charges and/or pursue civil rights violations.

The issue of what bathroom a transgender person may use on the job is also of huge significance. GLAD takes the position that a transgender employee should be permitted to use the restroom that is consistent with his or her gender identity. Although some employers have not complied with this approach initially, many have been willing to change restrictive policies once they have received adequate education relating to the safety and health concerns of transgender people. Regardless, it is clear under federal and state law that a transgender employee must have access to some safe, clean restroom facilities.

Rights Of Transgender People In Prisons

Prison officials have not generally been receptive to transgender people's need to live their lives consistently with their gender identity. In some cases, prisons have denied transgender people access to hormones and other medical treatment, and have also denied them the ability to express their gender through clothing, make-up, accessories, and the like. While courts have held that transgender people should receive some treatment or care, including continuation of pre-established hormone therapy regimens, they have also found that transgender people are not entitled to any specific treatment, gendered clothing, sex reassignment surgery, or transfer to a gender-appropriate prison.

Classification of Prisoners

A primary issue of concern to a transgender person being placed into a correctional facility is how he or she will be classified for housing—whether the individual is going to be placed according to his or her ascribed birth sex or gender identity. Generally,

when prisoners have had sex reassignment surgery, prison authorities have confined them according to their post-surgical sex designation; prisoners who have not had surgery have been imprisoned with inmates of the sex ascribed to them at birth. In addition, this determination is typically based on whether or not the transgender inmate has had genital surgery, placing, for example, an FTM transgender person who has not had genital surgery (even if he has had chest surgery) in a women's prison, regardless of his otherwise masculine appearance.²⁴

In addition to sex, classification of inmates is based on the following criteria: age; tendency for violent, disruptive behavior; sentence; type of crime; prior criminal history; educational level; need for protective custody; and employment history and skills. In the case of the classification of a transgender inmate, gender identity and the need for protective custody at least deserve special consideration. Unfortunately, this consideration often results in inappropriate segregation of the transgender inmate that leads to ineligibility for services and programs available to inmates in the general population. Further advocacy is needed to ensure a safe placement for all inmates that comes with access to the full range of prison services and programs.

Protection for Transgender Prisoners Against Violence

Once a transgender person has been placed in a facility, whether that placement is with inmates of their sex ascribed at birth or gender identity, they often face threats of harm from inmates and prison authorities alike.²⁵ Due to their gender identities, and

²⁴ While these have typically been the classifications imposed by prison officials, there are exceptions. See *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (rejecting privacy claim of woman whom jail officials had housed with Cheyenne Lamson, a pre-operative MTF transsexual woman, based on the Jail's physician's recommendations that Ms. Lamson was psychologically female and thus her integration into the female inmate population was in her best psychological and physical interest).

²⁵ Recognizing that transsexualism "is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others," one federal appeals court has held that transsexual people in general, and transsexual prisoners in particular, have a constitutional right to maintain medical confidentiality as to their transsexual status. *Powell v. Schriver*, 175 F.3d 107, 111-13 (2nd Cir. 1999).

prejudice against them, transgender people often have greater need for special protection.

Under federal law, prison officials have a duty to exercise reasonable care to provide reasonable protection against an unreasonable risk of harm. (State laws may include more specific language about appropriate treatment of prisoners). Specifically, prison officials have a duty under the Eighth and Fourteenth amendments to protect prisoners from violence at the hands of other prisoners. A prisoner need not wait to be assaulted to obtain relief for the infringement of this right. An unreasonable risk of harm is established where a prisoner shows that there is a "strong likelihood" that violence would occur. Prison officials who actually know of a substantial risk to a prisoner's health or safety have a duty to respond reasonably to the risk, but the standard for proving such circumstances is very high.²⁶

In a case involving a pre-operative male-to-female transgender person who was beaten and raped in prison, the U.S. Supreme Court ruled that prison conditions constitute cruel and unusual punishment only if officials know of, and disregard, an excessive risk to an inmate's health or safety.²⁷ The individual had been incarcerated with males in the federal prison system, sometimes in the general prison population, but more often in segregation. The complaint alleged that by placing her in the prison's general population despite knowledge that she would be particularly vulnerable to sexual attack, officials violated the Eighth Amendment prohibition against cruel and unusual punishment through a deliberately indifferent failure to protect her safety.

The Supreme Court's decision in that case turned on the definition of "deliberate indifference." The Court held that a prisoner may prove that officials knew of a substantial risk from the very fact that the risk that the transgender inmate would be physically assaulted by male inmates was obvious. More specifically, the risk may be shown by evidence that the problem

²⁶ *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991); *Farmer v. Brennan*, 128 L.Ed.2d 811, 114 S. Ct. 1970 (1994).

²⁷ *Farmer v. Brennan*, 128 L.Ed.2d 811, 114 S. Ct. 1970 (1994).

of inmate attacks was long-standing, pervasive, well documented, or expressly noted by the officials in the past. This decision may be helpful to other transgender individuals seeking protection from substantial harm in correctional facilities.

Medical Treatment in Prison

The U.S. Constitution requires that prisoners be provided with a certain minimal level of medical treatment. However, at least one Massachusetts case has held that the Constitution does not guarantee a prisoner the treatment of his or her choice.²⁸ Another Massachusetts case held that the care of prisoners could depart from good medical practice, so long as the care did not rise to the level of “deliberate indifference,” amounting to cruel and unusual punishment.²⁹ Absent a claim of cruel and unusual punishment, there is no constitutional right to medical treatment in prison.

Despite this high standard, some transgender prisoners are able to maintain their hormone treatment in prison, based on federal cases holding that it is cruel and unusual punishment to stop providing hormones to an individual who had been receiving hormone therapy upon entrance to the prison.³⁰ The policy of the U.S. Bureau of Prisons is to provide hormones at the level that

²⁸ *Dias v. Vose*, 865 F. Supp. 53 (D. Mass. 1994).

²⁹ *Navedo v. Maloney*, 172 F. Supp. 2d 276 (D. Mass. 2001).

³⁰ See *South v. Gomez*, 211 F.3d 1275, 2000 WL 222611 (9th Cir. 2000) (unpublished opinion) (finding 8th Amendment violation when a prisoner’s course of hormone treatment was abruptly cut off after transfer to a new prison); *Phillips v. Michigan Department of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990) (granting preliminary injunction directing prison to provide estrogen therapy to a pre-operative transsexual woman who had taken 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”), *aff’d*, 932 F.2d 969 (6th Cir. 1991). Cf. *Wolfe v. Horn*, 130 F. Supp. 2d 648 (D. Pa. 2001) (abrupt termination of prescribed hormonal treatment by a prison official with no understanding of Wolfe’s condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute “deliberate indifference”). One federal appeals court refused to follow *Phillips* because the inmate at issue had not received hormone treatment prior to incarceration. *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995).

was maintained prior to incarceration. Specifically, the policy provides:

It is the policy of the Bureau of Prisons to maintain the transsexual inmate at the level of change existing upon admission to the Bureau. Should responsible medical staff determine that either progressive or regressive treatment changes are indicated, these changes must be approved by the [Bureau of Prisons] Medical Director prior to implementation. The use of hormones to maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration, but such use must be approved by the Medical Director.³¹

No cases in any of the New England states directly address the issue of a transgender person’s right to commence or continue hormone treatment. Perhaps, with the help of the medical community, an argument can be made that the failure to permit a transgender inmate to commence or continue hormone treatment amounts to cruel and unusual punishment. A case addressing this question is pending in federal court, so a more definitive legal answer may be forthcoming.

³¹ *Bureau of Prisons Health Services Manual*, Program Statement 6000.3, § 6803.

Personal Identification & Documentation

Name Change

In most states, a name change requires a petition in a local probate court. A name change granted by a probate court does not typically appear as an amendment to the individual's birth certificate. (In most states, if it is possible to amend a birth certificate, to do so requires a separate process. See below). Rather, a probate court name change allows the individual to use the new name in a legal capacity, for everything from changing one's driver's license to signing official business paperwork. Most jurisdictions allow anyone, transgender or otherwise, to choose whatever name they wish to have as long as it is not adopted for fraudulent purposes. If you are inappropriately denied a request of name change, please call GLAD.

Social Security Identification

Social Security cards are issued by the federal government, and therefore one must follow the same procedure to change them in every state.

Use Form SS-5 to apply for a Corrected Card. The form is available at any Social Security branch office and also online. To find the nearest office, call 800-772-1213 or visit www.ssa.gov. If you already have a card, you can apply by mail. If you are applying for a card for the first time, you need to go in person.

You will need either (a) one or more documents identifying you by both your *old name* and your *new name* (such as a court decree changing your name), or; (b) two identity documents – one in your old name and one in your new name. Generally, the Social Security Administration prefers to see a document with a photograph. However, they can usually accept a non-photo

identity document if it has enough information to identify you (e.g., your name as well as your age, date of birth, or parents' names).

Some documents the Social Security Administration accepts as proof of identity are:

- Driver's license
- Marriage or divorce record
- Military records
- Employer ID card
- Adoption record
- Life insurance policy
- Passport
- Health Insurance card (not a Medicare card)
- School ID card

All documents must be either originals or copies certified by the issuing agency (i.e., no photocopies or notarized copies). Your documents will be returned to you.

There is no fee for changing the name on your Social Security card. You should receive your new card within two weeks.

Amendment Of Birth Certificates

Although at least four states forbid the amendment of birth certificates based on sex changes (Florida, Idaho, Ohio and Tennessee), many states have statutory provisions permitting birth certificates to be amended upon completion of sex reassignment surgery. (See the *Appendix* for more details on the New England states). The fact that some states prohibit changes to birth certificates can cause further problems for people wishing to change other documentation (such as drivers' licenses), particularly when such changes require a copy of an amended birth certificate as evidence of change of sex designation. GLAD encourages people who foresee such difficulties to attach to their petition a letter explaining that the state that issued their birth

certificate has a categorical exclusion for change of sex designation; nonetheless, they meet the requirements for changing sex designation on a birth certificate in the state where they live.

Driver's License Changes

Procedures for changing one's name and sex designation on a driver's license differ from state to state. (See the *Appendix* for more details on the New England states).

Passports

Because passports are issued by the federal government, one must follow the same procedure to change them in every state.

To change the name and sex designation that appear on a passport, a person must complete form DSP-19, the Passport Amendment/Validation Application. In addition, the individual must enclose a certified copy of the court decree ordering the name change. For a change of sex, the individual must enclose a certified copy of the new birth certificate, reflecting the change. In the blank portion of the form, include descriptive information regarding what exactly should be changed on the passport. Unless requesting expedited service, there is no fee for this process, which can be done by mail by sending the appropriate documents and the current passport. For more information, contact:

National Passport Agency
(202) 647-0518

National Passport Information Center
(900) 225-5674 (\$.35/minute)
<http://travel.state.gov>

Appendix:

A Guide to Changing Personal Identification & Documentation in the New England States

CONNECTICUT

Connecticut *Probate Court Name Change*

According to Connecticut law, probate courts and the Superior Court have concurrent jurisdiction to grant a change of name.³²

Moreover, “an application for a change of name should be granted unless it appears that the use of the new name by the applicant will result in injury to some other person with respect to his legal rights, as, for instance, by facilitating unfair competition or fraud.”³³

Name Change Process

- 1) Submit a certified copy of birth certificate;
- 2) Submit an affidavit (call or go to local probate court in town of residence);
- 3) A hearing will be set within 30 days;
- 4) Fill out form PC-900 (BBS) for adult or PC-901 (BBS) for minor (printable online @ <http://www.jud.state.ct.us/external/super/forms.htm> or pick up at local court);
- 5) Pay a \$150 dollar filing fee.

Connecticut *Birth Certificate Amendment*

Birth certificate changes are also allowed by statute in Connecticut.³⁴

A law enacted in October of 2001 allows for birth certificates to now be amended without the asterisks that were previously used to denote the change. Under the new law, the re-issued birth certificate will contain no evidence of the original sex designation

³² Conn Gen. Statute §§ 45a-99 and 52-11.

³³ *Don v. Don*, 142 Conn. 309, 311-312, 114 A.2d 203 (1955).

³⁴ *Conn. Gen. Stat. § 19a-42(a)*, as amended by *Public Act No. 01-163, Sec. 32 (2001)*.

and the original will remain confidential and under seal. A court order is not required.³⁵

Name

The applicant must provide a certified copy of the probate court order for name change to the Vital Records Section of the Dept. of Public Health. The court order does not need to be from Connecticut.

Sex Designation

The Vital Records Section of the Department of Public Health requires:

- (1) An affidavit from the physician who performed the sex reassignment surgery;
- (2) An affidavit from a licensed psychiatrist, psychologist, or social worker, verifying that the individual has undergone an evaluation and is of the indicated sex;
- (3) A nominal fee.

Affidavits can be obtained through one's doctor or at the Department of Public Health in Hartford.

Documentation should be mailed to:

Department of Public Health
Vital Records Section
410 Capital Ave. M.S. #11 VRS
P.O. Box 340308
Hartford, CT 06134

Questions?

For further information, one may contact the customer service line at the Vital Records Section of the Department of Public Health at: (860) 509-7897.

³⁵ The law is available on the State of Connecticut web site: The amendment to P.A. 19a-42 is in section 32 of the bill.

Connecticut **Driver's License**

Name

If a person has changed their name, they must go to the nearest branch office of the Department of Motor Vehicles with their current license and documentation (i.e., marriage license, divorce decree, probate court documents, etc.) that shows the change. *Photocopies will not be accepted.* The new license will be issued at no cost.

Sex Designation

In order to change the sex designation on a CT license, the applicant must:

- (1) Bring a notarized letter from their doctor on letterhead;
- (2) Turn in old license;
- (3) Pay a nominal fee.

Questions?

For further information, one may contact the CT Department of Motor Vehicles customer service line: (860) 263-5700.

MASSACHUSETTS

Massachusetts **Probate Court Name Change**

A change of name shall be freely granted unless such change is inconsistent with public interests.³⁶

It is not open for a court to inquire into the motive that prompts one to change his or her name, provided the change is not for any dishonest, fraudulent, or unlawful purpose.³⁷

Name Change Process

- (1) Submit an application (CJP-27);
- (2) Submit a copy of birth certificate or naturalization papers;
- (3) Pay a \$60 fee.
- (4) Publish a notice of name change in a local newspaper.

If no person files an objection and the court finds no reason to refuse it, the name change will be approved without a hearing.

Massachusetts **Birth Certificate Amendment**

A person who has completed sex reassignment surgery, and has had his or her name legally changed by a court, may have his or her birth record amended to reflect the newly acquired sex and name.³⁸

Name

The applicant must submit to the appropriate clerk a certified copy of the legal name change court order.

³⁶ M.G.L. c. 210 §12.

³⁷ *Sec'y of Comm. v. City Clerk of Lowell*, 366 N.E.2d 717 (Mass. 1977).

³⁸ M.G.L. c.46 § 13.

Sex Designation

The applicant must provide the town clerk (in town/city of birth) with a physician's notarized statement indicating completion of sex reassignment surgery.

Massachusetts Driver's License

Name

The applicant must go in person to local Registry with (1) old license, and; (2) new name on Social Security card. A listing of branch offices can be found online at <http://www.state.ma.us/rmv/>. There is a nominal application fee.

Sex Designation

According to Department of Motor Vehicles policy, an individual must provide:

- (1) A notarized physician's statement indicating completion of sex reassignment surgery;
- (2) Proof of name change*;
- (3) An amended birth certificate.

* An individual is not required to change his or her name in order to change his or her sex designation.

MAINE

Maine Probate Court Name Change

A person who desires to change his or her name may petition the probate judge in the county where he or she resides. If the person is a minor, the person's legal custodian may petition on his or her behalf.³⁹

Name Change Process

- 1) Submit form CN-1 (available at local probate court);
- 2) Pay a filing fee;
- 3) Publish change in newspaper.

Maine Birth Certificate Amendment

Maine law does not have an explicit provision relating to public records for transgender people; the Office of Vital Records provides the guidance below.

Name

The applicant must submit an application to the local probate court.

Sex Designation

The applicant must submit to the local probate court:

- (1) An Application for Correction;
- (2) A letter from the doctor performing the surgery/treatment.

The change cannot be made until surgery/treatment has been 'completed.' This standard has not been defined by a Maine court, but GLAD maintains that the determination of what is

³⁹ *Me. Rev. Stat. Ann. tit. 18-A, § 1-701, amended by 2001, c. 163, § 1.*

'complete' should be evaluated on a case-by-case basis and in the judgment of the treating physician or therapist.

All legal changes require a court order and a nominal fee. The fee is a one-time processing fee for all changes, so if, for example, a name change is completed prior to a change in sex designation, inform the court that the fee has already been paid.

A birth certificate that has been modified will be marked "amended" and will include the date of the change as well as a description of the evidence used in support of the amendment.⁴⁰

Questions?

For more information, one may contact the Maine Office of Vital Records: (207) 287-3181.

Maine *Driver's License*

Sex Designation

Although there is no official policy, the Maine Department of Motor Vehicles advises people to submit:

- (1) A doctor's statement (in process, intention may be sufficient);
- (2) An old license;

A nominal fee may be required.

Questions?

For more information, one may contact:

Bureau of Motor Vehicles
Attn: License Services
29 State House Station
Augusta, ME 04333

⁴⁰ Me. Rev. Stat. Ann. tit. 22, § 2705(1).
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NEW HAMPSHIRE

New Hampshire *Probate Court Name Change*

New Hampshire law permits individuals to change their name through Probate court.⁴¹

Name Change Process

- (1) File a name change petition (Form #87) at local probate court;
- (2) Appear before a judge;
- (3) Pay a \$25 fee.

New Hampshire *Birth Certificate Amendment*

New Hampshire law does not have an explicit provision relating to public records for transgender people. The law provides generally for changes to birth certificates to be made by the town clerk according to rules set by the Commissioner of the Department of Health and Human Services.⁴²

Name

See the process for changing a name above. Once the name change is accepted, the birth certificate will be amended to read "also known as [New Name]" and "name changed pursuant to an order of the [Town] probate court." It is the individual's responsibility to inform others of the name change.

Sex Designation

The Bureau of Vital Records and Health Statistics (603-271-4655) provides the following guidance: An applicant should petition the appropriate probate court for a court ordered sex change using

⁴¹ N.H. Rev. Stat. Ann. § 547:3-i.

⁴² N.H. Rev. Stat. Ann. § 126:23-a.

Form #77. This involves a hearing in which evidentiary findings are made and payment of a nominal certificate amendment fee.

New Hampshire *Driver's License*

Name

A name change on a New Hampshire driver's license requires a probate court order.

Sex Designation

New Hampshire Department of Motor Vehicles policy requires an individual to:

- (1) Submit current license;
- (2) Submit a doctor's letter verifying completed surgery.

RHODE ISLAND

Rhode Island *Probate Court Name Change*

Rhode Island law allows individuals to change their names in probate court.⁴³ In every petition for change of name in the probate court, the judge shall grant or deny the petition without consideration of spousal consent.

Name Change Process

- 1) Bring original certified birth certificate to local probate court*;
- 2) Fill out form P.C. 8.1 (available at court or printable online @ <http://www.state.ri.us/probateforms.htm>);
- 3) Authorize and pass criminal background check;
- 4) Advertise in local newspaper by filling out form P.C. 9.1 at least 10 days before hearing;
- 5) Pay a \$57 fee that includes the advertising cost.

*For minors, both parents must be present with identification.

Rhode Island *Birth Certificate Amendment*

Rhode Island law does not have an explicit provision relating to public records for transgender people; the law provides generally for changes to birth certificates.

Name

The applicant must submit to the registrar of vital records a certified copy of the probate court order changing the name, including applicant's name at birth, date and place of birth, and new name. The applicant will receive an affidavit in the mail that must be signed in a notary's presence.

⁴³ *R.I. Gen. Laws § 8-9-9, 33-22-28.*

Sex Designation

The Division of Vital Records requires that an applicant submit a notarized copy of a letter from the hospital or clinic performing the surgery/treatment. The letter must be on hospital letterhead and signed by the physician who performed the surgery or the physician in charge of the hospital.

The certificate will be marked “amended” when changed; the date of modification and a summary of evidence supporting the change will accompany the certificate.⁴⁴

The state registrar of vital records must report the change to the custodian of permanent local records in order for those records to be amended accordingly.⁴⁵

A sex designation change does not require a court order.

Questions?

For more information, one may contact the Rhode Island Division of Vital Records: (401) 222-2812.

Rhode Island *Driver’s License*

Sex Designation

Rhode Island Department of Motor Vehicles policy requires an applicant to:

- 1) Bring a letter from doctor verifying completed surgery;
- 2) Turn in old license;
- 3) Pay a nominal fee.

⁴⁴ R.I. Gen Laws § 23-3-21(b).

⁴⁵ R.I. Gen Laws § 23-3-21(e).

VERMONT

Vermont *Probate Court Name Change*

According to Vermont law, a person of age and sound mind may change his or her name by making, signing, sealing and acknowledging before the judge of the probate court of the district in which the person resides, a standard form available from the probate court.⁴⁶

Vermont *Birth Certificate Amendment*

Vermont law does not have an explicit provision relating to public records for transgender people; the law provides generally for changes to birth certificates to be made by petition.⁴⁷

Name

- 1) Make appointment at local probate court;
- 2) Bring certified copy of birth certificate;
- 3) Submit petition;
- 4) Pay \$35 filing fee plus advertising fee (different for each county but may be as much as \$100).

No appearance before a judge is necessary; a clerk fills out paperwork and seeks the judge’s signature. A court order is granted within 10 days of filing the petition. Then the Register of probate shall transmit the certificate and a certified copy of the change of name order to the supervisor of vital records, who forwards the order to the appropriate town clerk. The clerk amends the certificate and indicates that it has been “Court Amended” on the top of the certificate.⁴⁸

⁴⁶ Vt. Stat. Ann. tit. 15, § 811.

⁴⁷ Vt. Stat. Ann. tit. 18, § 5075(a).

⁴⁸ Vt. Stat. Ann. tit. 15, § 816.

Sex Designation

The applicant must submit a formal request to the local probate court, accompanied by an affidavit from the doctor or facility performing the medical treatment or sex reassignment surgery.

The court sets a hearing to consider the evidence in support of the petition. If the amendment is allowed, the supervisor of vital records instructs the clerk to amend the original record.

The amended birth certificate will show a line through the incorrect information with the change indicated in writing. The words "Court Amended" will appear on the top of the amended certificate and all copies.⁴⁹

Vermont *Driver's License*

Sex Designation

The Vermont Department of Motor Vehicles issued an official policy in June, 2001, stating that people who wish to change their sex designation must:

- (1) Submit a letter requesting the change;
- (2) Submit a letter from a licensed physician (include address) stating that change has been completed and on what date it was completed;
- (3) Turn in old license;
- (4) Pay a nominal fee.

⁴⁹ Vt. Stat. Ann. tit. 18, § 5076(b).