

THE RIGHTS OF
TRANSGENDER
PEOPLE
IN
WASHINGTON STATE



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This guide is designed to help transgender individuals understand their legal rights in Washington State.

It is not meant to provide legal advice.

The current legal system assumes individuals identify as one gender, either male or female. While this guide provides an understanding of the current legal system, the ACLU recognizes that many people do not identify as male or female. A person may identify or express as a specific gender, both genders, or neither gender.

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DISCRIMINATION & HARASSMENT

Are there laws that clearly prohibit discrimination against transgender people?

Yes. Our state antidiscrimination law, known as the Washington Law Against Discrimination (WLAD), clearly prohibits discrimination because of “gender expression or identity.”

The WLAD protects people from discrimination based on gender expression or actual or perceived gender identity in the following areas:

- Public accommodations (i.e., places that serve the public), including restaurants, hotels, and public schools;
- Housing, including the renting, buying, and selling of homes;
- Employment in public workplaces and private workplaces with eight or more employees;
- Credit transactions, including loans and credit cards; and
- Insurance transactions, including health insurance.

State law also protects transgender people from:

- Violence and threats motivated by gender expression or actual or perceived gender identity, and
- Student-on-student harassment, intimidation, and bullying motivated by gender expression or actual or perceived gender identity in public schools.

Further, at least five cities and one county in Washington have passed their own laws prohibiting discrimination based on gender expression or identity, including:

- Burien (barring discrimination in places of public accommodation, housing, and employment);
- Olympia (barring discrimination in housing);
- Seattle (barring discrimination in places of public accommodation, housing, and employment);

- Tacoma (barring discrimination in places of public accommodation, housing, employment, and education); and
- King County (barring discrimination in places of public accommodation, housing, employment, and education).

In 2009, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into federal law. This law allows the federal government to assist state and local authorities in the investigation and prosecution of hate crimes motivated by bias against a person's gender identity or expression.

What does “gender expression or identity” mean under the law?

As defined in the WLAD, “gender expression or identity” means “having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.”¹ Under this definition, transgender individuals are protected by the WLAD from discrimination based on their transgender status.

Charged with enforcing the WLAD, the Washington State Human Rights Commission (HRC) works to prevent and eliminate discrimination by investigating civil rights complaints and providing education and training opportunities throughout Washington. For information on how to file a formal complaint with the HRC, call 1-800-233-3247 or visit www.hum.wa.gov/ComplaintProcess/Index.html.

Do laws prohibiting discrimination based on “sex” protect transgender people?

Yes. The U.S. Ninth Circuit Court of Appeals – whose jurisdiction includes Washington – has made clear that transgender people are protected from sexual harassment and discrimination based on their gender expression or identity under the federal Title VII law, which prohibits discrimination in employment.

Several federal agencies have expanded protections for transgender people across the nation. In 2012, the Equal Employment Opportunity

Commission (EEOC) – the agency responsible for enforcing anti-discrimination provisions under Title VII – held that federal law prohibits discrimination against transgender employees. In 2014, the U.S. Department of Justice (DOJ) also announced that Title VII protects people from discrimination based on gender identity, including transgender status. The U.S. Department of Housing and Urban Development (HUD) declared in 2012 that housing discrimination based on gender nonconformity violates the federal Fair Housing Act, and adopted regulations prohibiting discrimination on the basis of gender expression or identity in federally funded housing programs. Under the federal Title IX education law, the U.S. Department of Education (ED) affirmed in 2012 that public and private schools receiving federal funding may not discriminate against transgender students.

Does the U.S. Constitution protect transgender people from discrimination?

Although the ACLU thinks the answer should be yes, the U.S. Supreme Court has never considered this question. In 2011, the U.S. Court of Appeals for the Eleventh Circuit became the first federal court to recognize that discrimination on the basis of transgender identity violates the Equal Protection Clause of the Fourteenth Amendment. This ruling reflected the court's belief that sex discrimination encompasses discrimination on the basis of gender identity or expression. Despite this case, the current reality is that equality protections for transgender people under the federal Constitution are not yet nearly as strong as those for people of color and women. It is important to remember that the Constitution only covers discrimination or mistreatment by the government, not by private entities – unlike the WLAD, which contains broader protections.

The ACLU believes the U.S. Constitution's guarantee of equality should protect individuals from being treated differently (i.e., discriminated against or mistreated) because of their gender expression or identity. Further, we believe the First Amendment, which bars the government from censoring speech or expression, should protect people's right to dress (an important form of personal expression) in a way that is consistent with

their gender identity. Finally, we believe the Due Process Clause should recognize and protect individuals' interests in determining and expressing their gender through personal appearance and mannerisms. However, the U.S. Supreme Court has not yet ruled on these issues.

Does the law protect a transgender person's right to use the restroom consistent with their gender identity?

It remains somewhat unclear. Under the WLAD, we now have state law that specifically protects against discrimination in employment and places of public accommodation, including public schools, based on one's gender expression or identity. The Washington State Human Rights Commission (HRC) – the agency responsible for enforcing the WLAD – publicly supports the right of transgender individuals to use restrooms consistent with their gender identity.

Additional support for the rights of transgender students in public schools to use restrooms consistent with their gender identity may be found in the Office of Superintendent of Public Instruction (OSPI) guidelines to school districts. These guidelines, which relate to the elimination of discrimination in public schools, state that school districts should allow students to use the restrooms consistent with their gender identity consistently asserted at school. The guidelines also state that any student who has a need or desire for increased privacy should be provided access to an alternative restroom, such as a staff or health office restroom, but that no student should be required to use an alternative restroom just because they are transgender or gender nonconforming.

Are there laws that specifically protect transgender students from discrimination?

Yes. Washington law protects transgender students in public schools from discrimination, intimidation, bullying, and harassment. Since provisions of the WLAD took effect in 2006, the nondiscrimination policies of Washington public schools have included gender expression and identity. In 2010, the Washington Legislature passed a law requiring that public

school policies protect transgender students from bullying and harassment.

Additionally, the WLAD and the Office of Superintendent of Public Instruction (OSPI) require public school officials to allow transgender students to wear clothing that matches their gender identity (including at prom), call transgender students by the appropriate name and pronoun, provide transgender students with access to a safe and appropriate

restrooms and locker rooms (or appropriate alternative places in which to change for gym class), and accommodate transgender athletes. For transgender students participating in interscholastic athletics in public schools, OSPI regulations direct school districts to follow policies set forth by the Washington Interscholastic Activities Association (WIAA), which state that students should be allowed to participate in physical education and athletic activities in a manner that is consistent with their gender identity.²

If you are being harassed, intimidated, or bullied in school, keep a record of each incident and report them to your principal or counselor. To talk to someone outside of your school or to get more information on strategies to stop harassment, call the Safe Schools Coalition at 1-877-723-3723 or visit www.safeschoolscoalition.org/help_harassed.html.

Further, the U.S. Department of Education clarified in 2012 that under Title IX of the Education Amendments of 1972, public schools and private schools that receive federal funding may not discriminate against transgender students on the basis of their gender expression or identity. The ACLU also believes that discrimination or harassment directed at transgender students in public schools may violate the Equal Protection Clause of the federal Constitution, under which we think schools should be held responsible for protecting transgender students from harassment on an equal basis with all other students; the First Amendment, which we think should protect the right of students to dress in accordance with their gender expression or identity; and the Due Process Clause, which we think should protect students' liberty interest in their personal appearance.

IDENTITY DOCUMENTS

Can a person change their name to reflect their gender identity?

Yes. In Washington, any person over the age of 18 can choose and use any name they wish, as long as the purpose of the name change is not to commit fraud. Through what is called a “common law name change,” a person may simply change their name by using a new name consistently and exclusively for all purposes. This method is free and easy, but because many government institutions require documentation proving that a valid name change has been made, it may not create the kind of solid paper trail needed to change important identifying documents.

The other way a person can change their name is by court order, which requires the filing of a Petition for Name Change by the requesting individual and the signing of an Order for Name Change by a judge. This process is uniform among Washington counties, the only difference being the filing fee. To obtain the needed forms, an individual must contact the District Court in the county where they reside. After filing, the court clerk will schedule a date when the person seeking the name change can appear before a judge or a court commissioner. Most judges will allow a name change as long as they are convinced that the purpose of the change is not to evade debts or the authorities. After the judge signs the Order, the individual must pay a recording fee to record the name change with the county auditor. Note that recording fees increased across the state in June 2014. As a result, in most counties, the total cost for completing a name change ranges from \$145 to \$165.³

Can a person get their name and gender marker changed on their birth certificate?

Yes. Washington State Department of Health (DOH) Center for Health Statistics has adopted new procedures for amending birth certificates, effective January 2015. To change the name on a birth certificate, a

person must submit a certified copy of a court-ordered name change and a completed Court Order Legal Name Change Request Form to the DOH. To change the gender marker on a birth certificate, a person must submit the following documents to the Washington DOH:

- A letter from the requestor stating the following information, as listed on the current birth certificate: name, date of birth, place of birth, names of parents, and contact information, and
- Either one of the following:
 - A certified copy of a court order that states the person's name, date of birth, gender currently listed on birth record, and new gender, or
 - A letter from the person's physician stating that the person has received the appropriate clinical treatment and the person's new gender.

Name and gender marker changes may be requested together (note that a certified copy of a court-ordered name change is required in these cases). To obtain certified copies of the amended birth certificate, a person must also submit a personal check or money order of \$20 for each certified copy, and either a completed Birth Certificate Mail Order Form or a certified copy of the birth certificate for replacement.

For people younger than 18, name and gender marker changes on birth certificates require parental authorization. Under new DOH regulations, minors must submit an Affidavit of Correction signed by both parents, along with supporting documents.⁴

If the DOH denies the request to change gender designation, its decision can be appealed to a court.

Can a person get their name and gender marker changed on their driver license or state issued identification card?

Yes. To change the name on a Washington driver license or identification card, a person must submit a written request to the Department of Licensing (DOL) accompanied by an original or certified copy of a court-ordered name change and payment. With the exception of enhanced driver

licenses and enhanced ID cards, an individual may also apply for name changes in person at a driver licensing office with proof of a court-ordered name change. The fee for changing one's name on a driver license is \$10.

To change the gender marker on a Washington driver license or identification card, a person must mail a written request to the Washington DOL. To make this request, a person must:

- Complete a “Change of Gender Designation Request” form (available for download on the Washington State Department of Licensing website) by:
 - Filling out the “Applicant” section of the form, and
 - Having a treating physician⁵ fill out the “physician” section of the form
- Mail all of the following to the address on the form:
 - The completed request form, and
 - A copy of any one of the following: the person's valid Washington State driver license/ID card, enhanced driver license or enhanced ID card, or instruction permit

Upon receipt of these documents, the DOL will send the individual a letter authorizing that person to get a new license or identification card online or in person at a driver licensing office.⁶ The fee for changing one's gender designation on a driver license is \$10 in person, or \$20 online.

Does changing the gender marker on one's birth certificate legally change one's gender?

It is unclear because Washington courts have not expressly addressed this issue. Although changing the gender marker on one's birth certificate should put to rest once and for all the question of one's legal gender, courts outside of Washington have, in certain circumstances, ignored the corrected birth certificate. To deal with this potential problem, some individuals obtain a court order declaring a legal change of gender. (To save time and money, some advocates recommend doing this when petitioning for a court-ordered name change.) The advantage of a court order is that

unlike a birth certificate or other identity document, courts and agencies in other states are supposed to follow it.

Can a person change their name and gender marker with the Social Security Administration (SSA)?

Yes. To change one's name, a person needs to provide proof of a court-ordered name change, U.S. citizenship, and identity.

As of June 2013, the SSA no longer requires certification from a physician in order to update social security records to reflect a gender change. To change the gender marker on a social security card, a person may now submit to the SSA acceptable government-issued documentation reflecting a gender change, which includes a U.S. passport showing the correct gender, a birth certificate showing the correct gender, or a court order recognizing the correct gender. Alternatively, a person may also submit a signed letter from a licensed physician confirming that the person has had appropriate clinical treatment for gender transition, which does not have to mean surgery.⁷

Is it advisable to change one's name and gender with the SSA?

Yes. Ensuring that the SSA's record of one's gender is consistent with the gender marker on other identity documents will help avoid problems.

The risk of problems caused by not changing SSA records is particularly high in the work context. The SSA sometimes contacts an employer when it notices that the personal information it has about a social security number (usually name, but sometimes gender) does not match the information being reported by the employer. These so-called "No-Match" letters often end up "outing" transgender employees at work.⁸

Additionally, the possibility that a federal identification card system will be developed increases the likelihood that, in the near future, a person's SSA gender marker will be considered the last word on the person's gender.

Can a person change their name and gender on their U.S. passport?

Yes. To change their name, a person must apply for a new passport by submitting to the U.S. Department of State a completed Form DS-5504, “Application for a US Passport Name (Change, Data Correction, and Limited Passport Book Replacement),” along with a copy of a court-ordered name change. Procedures and costs vary depending on how long it has been since the person’s last passport was issued. If more than one year has passed since one’s passport was issued and one is eligible to renew by mail, one must submit a completed Form DS-82, a copy of a court-ordered name change, and appropriate fees.

To change the gender marker on one’s passport, a person must apply for a new passport in person at a passport acceptance facility with a completed Form DS-11, appropriate fees, and documents showing that the person has undergone the clinical treatment appropriate to facilitate gender transition, as certified by a licensed physician who is familiar with the person’s transition-related treatment. Certification from the treating physician must include both the physician’s license or certificate number and Drug Enforcement Agency Registration number. No specific treatment is required, and the details of an individual’s treatment (e.g., details about surgery, hormone treatment) need not be included in the letter. Note that the State Department will only issue a limited, two-year passport with an updated gender marker if the physician’s letter states that the individual is in the process of transitioning.⁹

Can a veteran change their name on military records, including the DD Form 214?

Depending on the military branch, transgender veterans who have legally changed their name after discharge may be able to correct the name on their DD Form 214. Known as the Certificate of Release or Discharge from Active Duty, the DD 214 contains a record of a veteran’s military service, discharge status, awards and medals, and other pertinent information. The DD 214 is a critical document used to determine

eligibility for veteran benefits and legal protections tied to military service. Veterans need this document to engage in many spheres of public life, including healthcare, employment, and credit transactions.

Federal law authorizes Boards for Corrections of Military Records (BCMR) to review applications for changes and amend records when necessary to correct an error or remove an injustice. Each branch of the military has its own BCMR and its own procedures for changing records. Applicants may request changes to their DD Form 214 by submitting DD Form 149, Application for Correction of Military Records, to their department's BCMR. Although Boards have historically refused to grant name changes for transgender veterans, several individuals have successfully amended their DD Form 214 in recent years through the Army, Air Force, and Navy BCMRs.¹⁰

FAMILY MATTERS

If a married spouse transitions to their affirmed gender expression or identity during the marriage, is the couple still legally married?

As of 2012, Washington State recognizes marriage for same-sex couples, including marriages between same-sex couples performed in other states. Therefore, under state law, a marriage continues to be valid regardless of whether either one or both of the spouses transitions during the marriage—even if either one or both of the spouses transitioned at a time and place when marriages between same-sex couples were not recognized. Currently, however, there is no case law directly addressing this issue in Washington. Moreover, courts in different states have reached varying conclusions in these situations, and not all states recognize marriage between same-sex couples or honor marriage between same-sex couples performed in other states. This means that same-sex couples, although their marriage is legally recognized in Washington, may not receive legal recognition when they cross state lines.

In 2013, the U.S. Supreme Court invalidated the Defense of Marriage Act, a federal law that restricted the meaning of “marriage” and “spouse” to heterosexual couples. As a result of this ruling, same-sex couples married in states that recognize marriage between same-sex couples now receive the same federal benefits as different-sex couples, including tax, military, employment (for employees of the federal government), immigration, family medical leave, social security, and veterans benefits. Same-sex couples also now receive recognition in federal legal matters, such as survivor benefits and spousal evidentiary privileges in criminal prosecutions. Married same-sex couples are entitled to these federal benefits even if they reside in states that do not recognize same-sex marriage.

Can a person who has transitioned to their affirmed gender identity legally marry a person of a different gender identity?

Yes. As discussed above, Washington State now recognizes marriage without regard to the gender identities of the spouses. This means that two people can legally marry in Washington State regardless of whether either one or both of the spouses has transitioned prior to the marriage, and regardless of whether the legal gender identities of the spouses are different or the same.

Does undergoing gender confirmation surgery during marriage affect parental rights?

Not necessarily. Many transgender parents retain custody of their children, and Washington courts have indicated that a trial court cannot restrict a parent’s rights based on the fact that the person is transgender. However, transgender parents sometimes may fare poorly in custody and visitation disputes, where judges base their decisions on what they believe to be in the children’s best interest. At least one Washington court has upheld a trial court’s consideration of the impact of a parent’s impending gender transition in determining primary residency.¹¹

HEALTH CARE COVERAGE

Are there laws that protect transgender people from discrimination in health care and health insurance?

The WLAD prohibits discrimination against transgender people in places of public accommodation, which includes hospitals. Thus, under Washington law, hospitals may not refuse to treat or otherwise treat transgender patients differently from other patients because of their gender expression or identity. The WLAD also prohibits discrimination against transgender people in insurance transactions. It follows that, under Washington law, health care insurers may not refuse to issue health insurance coverage, decline to renew health insurance coverage, cancel health insurance coverage, or specify different benefits, terms, rates, conditions, or types of health insurance coverage on the basis of a person's gender expression or identity. The Office of Insurance Commissioner's directive, discussed below, affirms that such discrimination by insurance providers is illegal under Washington law. It is important to note that the WLAD's prohibitions against health care discrimination relate to the provision of routine medical services generally, but do not necessarily guarantee coverage for transgender-specific care.

Transgender discrimination in health care is also illegal under the federal Patient Protection and Affordable Care Act (ACA). Section 1557 of the ACA prohibits discrimination on the basis of sex by any health program receiving federal assistance, as well as within any state Health Insurance Marketplace established under the ACA. HHS has explicitly stated that "sex discrimination" for purposes of Section 1557 includes discrimination on the basis of gender expression or identity. Thus, under federal law, it is illegal for any federally-funded health program in Washington or any health insurance plan sold on Washington's Health Insurance Marketplace – known as Washington Health Plan Finder – to discriminate against transgender people. Although case law under Section 1557 is developing, HHS' current position is that Section 1557 does not require health insurers to cover transition-related surgical care.

Do any government health care programs cover surgical or nonsurgical transition-related medical treatment?

Coverage for transition-related care varies among government health care programs. Under Medicare, a federal program for individuals over 65 and individuals who are disabled, insurance coverage for surgical and nonsurgical transition-related procedures is available. In May 2014, the U.S. Department of Health and Human Services (HHS) ended its outdated policy of categorically excluding Medicare coverage for transition-related surgery. As a result, decisions about coverage for transition-related care will now be made on an individual basis like all other services under Medicare. This does not necessarily mean that Medicare will cover gender confirmation surgery for all patients, but it does mean that Medicare will no longer automatically deny claims for transition-related medical procedures.

Coverage under Medicaid, a joint federal and state program for individuals and families with limited resources, is determined by individual states. The HHS ruling on Medicare does not apply to Medicaid. Washington State's Medicaid program is known as Washington Apple Health. The Office of Insurance Commissioner (OIC) now prohibits most private health care plans sold in Washington from denying coverage for transition-related benefits if those same benefits are covered for other purposes; however, this rule does not apply to Washington Medicaid because Medicaid is regulated by a different state agency, the Health Care Authority (HCA). Currently, Washington State Medicaid covers hormone treatment and other nonsurgical transition-related treatments for gender dysphoria; coverage may also be available for gender confirmation surgery through individual exceptions to the rules.¹²

For public employees of Washington State, the Public Employee Benefits Board (PEBB) offers coverage for surgical and nonsurgical transition-related care, including hormones and gender confirmation surgery.

For active duty and retired armed forces members under the federal TRICARE program (formerly known as the Civilian Health and Medical

Program of the Uniformed Services), only coverage for nonsurgical transition-related care is available. Thus, coverage includes hormones and mental health services, but not gender confirmation surgery.

Does private health insurance cover transition-related surgery or other transition-related medical treatment?

In June 2014, Washington’s Office of Insurance Commissioner stated that transgender discrimination in private health insurance plans is illegal under the WLAD and the federal Affordable Care Act. As a result, most private health insurance plans sold in Washington State must provide health care coverage to transgender policyholders on terms equal to coverage provided to non-transgender policyholders.

For example, if an insurer covers breast reduction surgery to lessen back pain, that insurer could not deny breast reduction surgery for transition purposes if the provider deemed the treatment to be medically necessary.

Private health plans that are “self-funded” are not subject to the OIC’s directive requiring equality in health insurance coverage for transgender individuals. Self-funded plans are private health insurance plans for employees that are fully insured by the employer rather than by an outside insurance company, meaning the employer plays the insurance claims. Because self-funded plans often rely on outside insurance companies for administrative support, it is often difficult for employees to know whether or not their plan is self-funded. Self-funded plans are primarily offered by very large employers with more than 500 employees. Unfortunately, these plans may continue to exclude coverage for transgender-specific care under Washington law because they are governed exclusively by the federal Employee Retirement Income Security Act (ERISA).

The Washington State Office of Insurance Commissioner (OIC) encourages transgender individuals who have experienced discriminatory exclusions or denials of service in private health insurance plans to file a complaint for investigation. For information on filing a complaint with the OIC, visit www.insurance.wa.gov/complaints-and-fraud/file-a-complaint or call 1-800-562-6900.

RIGHTS IN JAILS & PRISONS

Are there laws that protect transgender individuals from discrimination and violence in jails and prisons?

Yes. The Eighth Amendment of the U.S. Constitution, which guarantees an individual's right to be free from cruel and unusual punishment, requires prison and jail officials to protect all prisoners from violence by other inmates and staff. Prison officials violate the Eighth Amendment if they know of a substantial risk of harm to a prisoner and fail to take reasonable steps to reduce the risk. For instance, the U.S. Supreme Court held that prison officials violated the Eighth Amendment where officials showed "deliberate indifference" to ongoing physical and sexual violence against a transgender prisoner by other prisoners. The U.S. Court of Appeals for the Ninth Circuit held that prison officials also violate the Eighth Amendment when officials commit acts of violence against transgender prisoners. In practice, this means that transgender prisoners should report to prison officials, in writing, about any risks or concerns they have that could lead to violence or harm.

The ACLU also believes that prisons and jails may also violate the constitutional rights of transgender prisoners under the Equal Protection Clause of the Fourteenth Amendment if prison officials deny transgender individuals services or benefits because of their transgender status, when those services and benefits are provided to other prisoners for non-transition purposes.

Furthermore, the Prison Rape Elimination Act (PREA), a federal law that aims to combat sexual assault and harassment in prisons, jails, police lockups, community confinement, and juvenile facilities provides additional support for the protection of transgender inmates. In 2012, the U.S. Department of Justice (DOJ) issued final regulations for implementing PREA across the country. These DOJ regulations, known as the "PREA Standards," contain specific protections for transgender prisoners in federal, state, and local correctional facilities.¹³

Following guidance from the DOJ, the Washington State Department of Corrections (DOC) adopted revised regulations to enforce the PREA Standards in Washington.

As a result, state DOC rules now require prisons and jails in Washington to conduct an initial screening of all prisoners within 72 hours of intake to assess their risk for sexual victimization and abuse, as well as a follow-up assessment within 30 days of arrival. These assessments must take into account whether the prisoner is or is perceived to be LGBT or gender non-conforming. Furthermore, facilities must consider initial screening results when making housing and program assignments to protect vulnerable prisoners from abuse. Facilities must also provide accommodations for

transgender individuals who wish to shower separately from other inmates. Finally, jails and prisons are required to provide training to correctional staff that specifically addresses safety concerns for transgender and gender nonconforming prisoners.

A growing number of local correctional systems are developing more respectful policies for transgender individuals. For example, the King County Correctional Facility—the largest correctional facility in Washington State—adopted specific guidelines in 2006 to protect the rights of transgender inmates. King County’s jail policies establish additional protections for transgender individuals beyond those adopted by the state. Under King County’s explicit anti-harassment and discrimination policy, correctional staff are prohibited from making derogatory or hurtful comments about transgender or gender non-

Under the Prison Rape Elimination Act (PREA), the Washington State Department of Corrections (DOC) must investigate all reports of sexual harassment, assault, and abuse against prisoners. To report sexual misconduct against an individual in DOC custody or supervision, call the PREA Hotline at 1-800-586-9431 (0-800-586-9431 from a prison facility) or send a written report to the PREA Unit at P.O. Box 41131, Olympia, WA 98504. Prisoners may also report PREA violations by submitting a kite or grievance, telling a trusted staff member, or asking a family member or friend to call the hotline. For more information about PREA reports, visit <http://www.doc.wa.gov/prea.asp>

conforming individuals, talking about or ridiculing transgender or gender non-conforming individuals to the larger inmate population, and asking inmates personal questions about their gender identity or expression. Further, staff must allow transgender inmates to access gender-congruent commissary items, such as bras for transgender women and shirts large enough to fit loosely over the chest area for transgender men. King County's policies also require housing arrangements for transgender inmates to be based on the individual's safety and security needs and be the least restrictive option. The county also provides for separate shower accommodations upon request and PREA training for staff.

Are jail and prison officials required to place a transgender individual in the facility that matches the inmate's gender expression or identity?

As discussed above, Washington's Department of Corrections (DOC) has adopted regulations pursuant to federal law to protect transgender individuals from sexual assault and violence in prison. The state's DOC's regulations establish specific protocols for housing incarcerated transgender, intersex, and gender nonconforming inmates. According to these regulations, housing assignments for transgender and intersex individuals must take into account the individual's initial risk assessment, potential and identified risks of each housing option, the individual's own view of personal safety within each housing option, and the extent to which the individual physically resembles the gender with which they identify. Housing determinations for transgender, intersex, and gender nonconforming individuals will be reviewed every six months to assess any threats to the individual's safety. DOC policies also prohibit facilities from segregating transgender inmates from the general population, except when requested by the individual or in limited circumstances when necessary to protect the individual from harm. When placed in protective custody, facilities must ensure that transgender individuals retain access to the same programs afforded to general population inmates of the same security level.

King County requires housing assignments for transgender and gender non-conforming inmates consider on a case-by-case basis which placement option would best ensure the individual's health and safety. The county's housing policy explicitly states that an inmate's own views with respect to personal safety must be given serious consideration in this process. Housing assignments must be reviewed at least every six months, and must be reviewed earlier if an inmate expresses fear about threats to their safety. Like the DOC policy, King County's policy prohibits housing transgender and gender non-conforming inmates in isolation or segregation solely because of their gender identity or expression. Decisions to place an inmate in administrative segregation must be based on objective criteria without regard to gender identity, such as an inmate's propensity for violence, history of victimizing others, or severe mental or physical illness; furthermore, the county's policy specifically states that the status of being transgender cannot be considered a mental or physical illness for these purposes. Transgender and gender non-conforming individuals placed in protective custody must have access to the same programs afforded to general population inmates of the same security level.

Are transgender individuals protected from invasive physical examinations by jail and prison officials?

Yes. Washington's DOC regulations explicitly state that jail staff may not search or physically examine a transgender or intersex inmates for the sole purpose of determining the individual's genital status. To further protect transgender individuals from invasive and discriminatory searches, the regulations provide that determinations about an individual's genital status may be made by a health care provider based on conversations with the individual or through a review of medical records. Prison and jails may only determine genital status through physical examination when the examination is part of a broader medical examination necessary for some other purpose and is conducted in private by a health care practitioner.

Similarly, King County's policies prohibit correctional staff from searching or physically examining transgender or intersex individuals for the sole purpose of determining genital status. These policies further require that strip searches of transgender and gender non-conforming inmates be authorized by the duty Sergeant or higher authority before proceeding. The authorizing staff must consider the inmate's preference to be searched by an officer of a particular gender. Staff must document both the reason for the strip search and the basis for the decision about which officer(s) will conduct the search.

Do transgender prisoners have a right to receive transition-related health care services such as hormones and gender confirmation surgery?

Although the ACLU thinks the answer should be yes, there is no definitive answer yet. Under the Eighth Amendment of the U.S. Constitution, prisons and jails must provide adequate health care for prisoners' serious medical needs. Prison officials violate a prisoner's constitutional right to care when they cause significant injury, inflict unnecessary and excessive pain, or create a substantial risk of future harm through the denial of medical treatment, or through the provision of treatment so inadequate that it amounts to no care at all. This means that decisions about treatment for transgender prisoners must be based on individualized medical considerations, not financial, political, or other reasons, and should be consistent with generally accepted medical standards of care. A growing number of courts across the country have concluded that gender dysphoria constitutes a serious medical need under the Eighth Amendment. However, the Constitution does not guarantee a prisoner's choice of medical treatment for any condition, and judgment is often in the hands of prison medical staff. As a result, transition-related care remains inaccessible to many transgender people in prison who struggle to obtain a diagnosis or authorization for specific treatment from facility providers.

The U.S. Court of Appeals for the Ninth Circuit has indicated that blanket denials of hormone treatment for transition-related purposes constitute deliberate indifference to the serious medical needs of prisoners. In other words, correctional officials may not automatically deny a transgender person's requests for hormones on the grounds that gender dysphoria cannot qualify as a medical need. Such blanket rules against transition-related care are unconstitutional because they are not based on individualized medical evaluations.

The Ninth Circuit has also indicated that if an individual was already receiving transition-related hormone treatment prior to entering the facility, abrupt termination of hormones may be unconstitutional. This suggests that once a course of hormone treatment has begun, prisons and jails must provide some short-term continuing care. At the very least, hormone therapy should only be terminated gradually in accordance with medical judgment, not peremptorily cut off. In 2011, the U.S. Bureau of Prisons (BOP) ended its discriminatory "freeze-frame" policy, which "froze" treatment for any person diagnosed with gender dysphoria at the level of treatment that was provided to them at the time they entered prison. Individuals incarcerated in federal prisons may now receive hormone therapy based on medical need.

Washington State's current health policy for inmates, which went into effect in December 2014, states that transition-related treatment qualifies as medically necessary care in certain circumstances. Once a medical diagnosis is made, transgender individuals may access transition-related services, such as hormones, pursuant to DOC health care protocol. Transition-related surgical procedures, however, are explicitly excluded from coverage.

King County's policy requires that transgender individuals be provided medical and mental health care like all other inmates. Furthermore, after a review of their medical records, transgender individuals may also access necessary continuing care items, such as stents and other post-operative supplies.

IMMIGRATION

May a transgender immigrant be granted asylum in the United States because of anti-transgender harassment in the individual's country of origin?

Yes. More and more transgender immigrants are being granted asylum after making the case that they have been persecuted at home because of their failure to conform to cultural gender roles and/or sexual orientation.

Although many of the courts addressing the issue confuse sexual orientation with gender identity or expression, it is clear that transgender people are a “particular social group” entitled to the protection of asylum laws.

To qualify for asylum in the U.S. on these grounds, a person must show that they are transgender, that they faced persecution at home because they are transgender, and that their government either persecuted them or refused to do anything to protect them from persecution by others.

NOTES ON WORDS & PHRASES USED

Terminology used to discuss gender expression and identity varies within transgender communities and has changed over time. To respect every individual's right to self-identify as they choose, the term(s) preferred by an individual should always be used. To avoid confusion, here is a general list of common words and phrases:

Transgender: A broad term for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some people prefer the term “trans,” an abbreviation for “transgender.” Note: “Transgender” is correctly used as an adjective, not a noun—thus, “transgender people” is appropriate, but “transgenders” is often viewed as disrespectful. Use of the term as a past-tense verb—for instance, “transgendered”—is also often viewed as disrespectful. “Transsexual” is an older term for people whose gender identity is different from their assigned sex at birth and who seek to transition from male to female or female to male. Many people do not use or prefer the term “transsexual” because of its overly clinical association.

Gender Expression: The way a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyle, and/or voice or body characteristics.

Gender Identity: A person's internal sense of being male, female, or something else. Note: Because gender identity is internal, a person's gender identity is not necessarily visible to others.

Sex: The classification of people as male or female based on a combination of bodily characteristics, including chromosomes, hormones, internal and external reproductive organs, and features that appear during puberty.

Gender Non-Conforming: A term for individuals whose gender expression is different from social expectations of masculinity and femininity. Note: Not all gender non-conforming people identify as transgender, and not all transgender people are gender non-conforming. This term is not a synonym for “transgender.”

Gender Transition: The time when a person begins living as the gender with which they identify rather than the gender they were assigned at birth, which often includes changing one's first name, using new pronouns, and dressing and grooming differently. Transitioning may or may not also include medical and legal aspects, such as changing official documents (e.g., driver's license) to reflect one's gender identity, taking hormones, or having surgery. The exact steps involved in transition vary from person to person.

Sex or Gender Confirmation Surgery: Surgical procedures that may be part of gender transition. Gender confirmation surgery may involve a wide variety of different procedures, including those sometimes referred to as "top surgery" (breast augmentation or removal) and "bottom surgery" (genital alteration). These surgeries are medically necessary for some people, but not all people want, need, or can have surgery as part of their transition. Note: This term is preferable to the commonly used phrase "sex reassignment surgery," which incorrectly suggests that all transgender people need surgery to "reassign" their sex before their gender identity can be respected. Many people consider "sex change surgery" and "sex change operation" to be derogatory terms.

Gender Dysphoria: The formal medical diagnosis given to transgender individuals as a prerequisite for certain types of transition-related medical care. Note: Formerly known as "Gender Identity Disorder," this diagnostic term was revised to better characterize the experiences of transgender individuals and remove the negative connotations of "disorder."

Transgender Woman: A transgender person who currently identifies as a woman (see also "MTF").

MTF: A person who transitions from "male-to-female," meaning a person who was assigned male at birth, but identifies and lives as a female (see also "Transgender Woman").

Transgender Man: A transgender person who currently identifies as a man (see also "FTM").

FTM: A person who transitions from "female-to-male," meaning a person who was assigned female at birth, but identifies and lives as a male (see also "Transgender Man").

Queer: A term used to refer to lesbian, gay, bisexual, and often also transgender people. Some use queer as an alternative to “gay” in an effort to be more inclusive. Depending on the user, the term has either a derogatory or an affirming connotation, as many have sought to reclaim the term that was once widely used in a negative way.

Genderqueer: A term used by some people who identify as neither entirely male nor entirely female. Note: This term is not a synonym for “transgender.”

Two-Spirit: A term that refers to historical and current First Nations people whose bodies simultaneously manifest both masculine and feminine spirits. This term is used by some people in Native American LGBT communities to honor their heritage and provide an alternative to Western labels of gay, lesbian, bisexual, or transgender.

ACLU OF WASHINGTON

The American Civil Liberties Union of Washington is a nonprofit, nonpartisan membership organization devoted to protecting the civil liberties of all people in Washington and extending rights to groups that historically have been denied equal treatment.

As one of the ACLU’s more than 50 local affiliates around the U.S., the ACLU of Washington works for equal rights and legal protections against discrimination and harassment for the LGBT community through litigation and legal advocacy, through lobbying at the state legislature and local governments, and by public education. The ACLU of Washington does not handle matters that arise outside of the state of Washington.

The ACLU of Washington offers information in response to specific inquiries or concerns and advice on how to assert individual rights and engage in advocacy; provides referrals to other organizations better able to offer such information or advice in specific situations; and undertakes impact litigation (i.e., pursues lawsuits that will defend or extend fundamental civil liberties and civil rights that will affect a large number of people).

If you feel you have been the victim of discrimination based on your gender expression or identity, please consider contacting the ACLU of Washington in one of the following ways:

- Online: Submit a request for help online by visiting www.aclu-wa.org/how-get-legal-help-aclu.
- By phone: Call the ACLU of Washington's Intake and Referral Line at 206.624.2180 (open Monday through Thursday, 10:00am – 2:00pm).
- By mail: Write to American Civil Liberties Union of Washington, 901 Fifth Avenue, Suite 630, Seattle, WA 98164 and provide the following information: your name, mailing address, telephone number and e-mail address (if available); a brief description of the problem or issue about which you are contacting the ACLU of Washington, including any relevant dates and the names of any individuals or organizations involved; a description or copy of any relevant documentation; whether you are presently represented by an attorney in the matter you are writing about; whether you have taken any steps to resolve the matter you are writing about and, if so, a description of these steps; and a description of what you would like the ACLU of Washington to do concerning this matter.

ADDITIONAL RESOURCES

For additional resources and information about transgender rights in Washington, see:

- Ingersoll Gender Center (www.ingersollcenter.org)
- Gender Justice League (www.genderjusticeleague.org)
- Washington State Human Rights Commission (www.hum.wa.gov)

ENDNOTES

¹RCW 49.60.040(26).

²For more information about transgender student rights, see Office of Superintendent of Pub. Instruction, *Prohibiting Discrimination in Washington Public Schools: Guidelines for School Districts to Implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC* (Feb. 2012), available for download at www.k12.wa.us/equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf, and 2014-2015 Washington Interscholastic Activities Association Handbook (May 8, 2014), available for download at www.wiaa.com/subcontent.aspx?SecID=350.

³For more information about Petitions and Orders for Name Changes, visit the Washington State Courts website, “Name Changes,” at <https://www.courts.wa.gov/forms/?fa=forms.static&staticID=13>.

⁴For more information about name and gender marker changes to birth certificates, visit the Washington State Department of Health website, “Correcting Birth Certificates” (Jan. 2015), at www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/CertificateCorrection/Birth.

⁵“Physician” includes: medical physician, internist, endocrinologist, gynecologist, urologist, osteopathic physician, psychiatrist, psychologist, Washington State licensed naturopathic physician, Washington State licensed advanced registered nurse practitioner, Washington State licensed physician assistant, and Washington State licensed certified osteopathic physician assistant.

⁶For more information about name and gender marker changes on drivers licenses and state ID cards, visit the Washington State Department of Licensing website, “Update Your Driver License or ID Card” (2015), at www.dol.wa.gov/driverslicense/change.html.

⁷For more information about name and gender marker changes with the Social Security Administration, see National Center for Transgender Equality, *Transgender People and the Social Security Administration* (June 2013), available for download at www.transequality.org/Resources/SSAResource_June2013.pdf.

⁸For more information about “No-Match” letters, see National Center for Transgender Equality, *Social Security Gender No-Match Letters and Transgender Employees* (Feb. 2011), available for download at www.transequality.org/Resources/NCTE_SSA_2011.pdf.

⁹For more information about name and gender marker changes on U.S. passports, including a model certification letter, see National Center for Transgender Equality, *Understanding The New Passport Gender Change Policy* (Jan. 2012), available for download at www.transequality.org/Resources/passports_2012.pdf.

¹⁰For more information or assistance on applications to change military service records, contact the ACLU of Washington.

¹¹For more information about the rights of transgender parents, see American Civil Liberties Union & National Center for Transgender Equality, *Protecting the Rights of Transgender Parents and Their Children: A Guide For Parents and Lawyers* (March 2013), available for download at www.aclu.org/transgender-parent-guide.

¹²For more information about transgender rights and discrimination in health care and health plans, contact the ACLU of Washington.

¹³For more information about national protections for transgender prisoners under the Constitution and PREA Standards, see American Civil Liberties Union & National Center for Lesbian Rights, *Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners* (Dec. 1, 2014), available for download at www.aclu.org/sites/default/files/assets/121414-aclu-prea-kyrs-1_copy.pdf.

The American Civil Liberties Union of Washington Foundation is the legal, research, and educational arm of the American Civil Liberties Union of Washington, a nonprofit, nonpartisan membership organization devoted to protecting the civil liberties of all people in Washington and extending rights to groups that historically have been denied equal treatment.

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