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UNDER ATTACK:
TRANSGENDER HEALTH IN 2020

PAULA M. NEIRA* & AN NA LEE**

INTRODUCTION

Anxiety. Fear. Frustration. These words described 2020 for most people. However, for transgender and gender-diverse people (“TGD”),1 who have endured health disparities and inequity prior to the onset of the COVID-19 global pandemic, these feelings were amplified.2 The 21st century’s second decade promised hopeful progress in advancing TGD people’s rights and improvements in their healthcare. Rather than the historically negative tropes portraying TGD

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1. For the purposes of this commentary the acronym “TGD” will be used to encompass transgender and gender diverse terms. This use comports with usage of the same acronym in AM. PSYCHOL. ASS’N OF GRADUATE STUDENTS COMM. ON SEXUAL ORIENTATION AND GENDER DIVERSITY, AM. PSYCHOL. ASS’N, A GUIDE FOR SUPPORTING TRANS AND GENDER DIVERSE STUDENTS (2019).
people as deviants\textsuperscript{3} or as a joke’s punchline,\textsuperscript{4} TGD people were portrayed positively with their issues discussed seriously in mainstream media. With passage of The Patient Protection and Affordable Care Act ("ACA")\textsuperscript{5} in 2010, an increased number of individuals obtained access to health insurance coverage.\textsuperscript{6} Transgender military personnel gained the ability to serve authentically and access medically necessary care when the ban on their service ended in 2016.\textsuperscript{7} With the election of Donald Trump, those gains were threatened by concerted actions driven by partisan politics that ignored medical science and best practices.\textsuperscript{8}

This commentary provides a foundational understanding of TGD people and the health inequities they face, an explanation of the motivation driving Trump administration policies impacting the TGD population, and exemplars of federal and state actions negatively impacting TGD health.\textsuperscript{9} In conclusion, the authors recommend three action items for legal professionals, which are designed to enhance our collective ability to reduce health inequities impacting TGD people and enhance the holistic health and wellbeing of this marginalized community.\textsuperscript{10}

I. AN OVERVIEW OF TRANSGENDER & GENDER-DIVERSE PEOPLES

While many Americans know people who are gay, lesbian, or bisexual, fewer know someone who is a part of the TGD community or the issues impacting their health.\textsuperscript{11} Due to this level of ignorance about the community, an

\textsuperscript{3} See Understanding the Transgender Community, HUM. RTS. CAMPAIGN (2020), https://www.hrc.org/resources/understanding-the-transgender-community ("The LGBT community still faces considerable stigma based on over a century of being characterized as mentally ill, socially deviant, and sexually predatory.").

\textsuperscript{4} See, e.g., Married with Children: Calendar Girl (Fox television broadcast Feb. 4, 1996) (showing that a cover girl of a girls calendar turns out to be a transgender woman); Family Guy: Quagmire’s Dad (Fox television broadcast May 9, 2010) (showing that Quagmire’s dad undergoes gender affirming treatment, and Brian, who was out of town for a semester, ends up sleeping with her).


\textsuperscript{7} See Memorandum from Ash Carter, Secretary of Defense (Directive-type Memorandum (DTM) 16-005, “Military Service of Transgender Service Members” (June 30, 2016) (announcing the open service transgender military personnel) [hereinafter 2016 Secretary of Defense Memorandum].


\textsuperscript{9} See infra Sections I–II.

\textsuperscript{10} See infra Section III.

\textsuperscript{11} See Where the Public Stands on Religious Liberty vs. Non-Discrimination, PEW RESEARCH CTR. (Sept. 28, 2016), https://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-
overview is helpful as a foundation before discussing harmful policies, including the likely drivers, that negatively impact TGD healthcare. This section will describe the TGD population, including relevant definitions, outline the health disparities and health challenges that the community faces, and discuss the importance of the ACA to transgender health.

A. Demographics

In the United States, there are approximately 1.4 million TGD people, including 150,000 youth between the ages of thirteen and seventeen. These estimates are derived from statistical analysis and are, therefore, undercounts. Governmental disinterest in obtaining accurate data, as well as well-founded fear of discrimination in all sectors, including healthcare, within the TGD community results in decreased self-reporting. The under inclusion or non-inclusion of the population in surveys hinders systemic health inequity analysis.

B. Terminology

The ever-evolving terminology describing TGD people is of relatively recent origin. However, TGD people have always existed. The culture, society, and the time period in which they lived influenced their acceptance. Various cultures and societies have recognized more than the exclusive male or female binary gender concept characteristic of Western European culture.

liberty-vs-nondiscrimination/ (explaining that a vast majority of Americans know someone who is gay, while fewer know someone who is transgender).


13. Id.

14. Id. at 6.


16. See E.L. Meerwijk & J. M. Seveliu, Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples, 107 AM. J. PUB. HEALTH e1, e1-e8 (2017) (finding that “under- or nonrepresentation of transgender individuals in population surveys is a barrier to understanding social determinants and health disparities” and therefore, the authors recommend “using standardized questions to identify respondents with transgender and nonbinary gender identities, which will allow a more accurate population size estimate.”).

17. See 16 Remarkable Historical Figures Who Were Transgender, HIST. COLLECTION, https://historycollection.com/16-remarkable-historical-figures-who-were-transgender/ (last visited Aug 6, 2020). Dr. John Oliven, a psychiatrist at Columbia University, coined the term “Transgender” in 1965 to encompass a broader population than those included in the term “transsexual” and reflective of the variability and fluidity of how individuals may identity in terms of gender. Id.

Many North American indigenous cultures recognized gender-diverse peoples, including the Zuni (Lhamana), Navajo (Nádleehi), Blackfoot Confederacy (Ninauposkitzipxpe), and Lakota (Winkte).19 Hawaiian culture recognized the mahu and Australian aboriginal people accepted transgender people (“sistergirls” or “brotherboys”).20 Other examples include the travesti in South America, the hijra in India, and the bakla in the Philippines.21 Often, Western European colonization replaced acceptance with increased stigmatization and discrimination.22

Knowledge of basic terminology is essential to understanding the TGD community and its healthcare needs. Common terms include:

**Transgender:** “An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms - including *transgender.*”23 The word “transgender” is an adjective, not a noun.24

**Cisgender:** “A term used by some to describe people who are not transgender. . . A more widely understood way to describe people who are not transgender is simply to say *non-transgender people.*”25

**Non-binary / genderqueer:** “Terms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may

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19. *Id.* (The Zuni, located in New Mexico, have a two-spirit tradition known as the lhamana, “in which a person lives as both genders simultaneously.” “The Navajo term nadleehi refers to that culture’s traditional third gender, in which a biologically male-born person embodies both the masculine and feminine spirit” and the “dilbaa refers to a female-born person with a more masculine spirit.” The Blackfoot Confederacy, located in Alberta, Canada, honored a third-gender, ninauposkitzipxpe, which, roughly translated, “it means ‘manly-hearted woman’ and defined a biological female who did not necessarily dress in a masculine mode, but was unrestricted by the social constraints placed on other women in the Blackfoot society.” The Lakota, located in South Dakota, had a word, winkte, for a two-spirit people where they “are born male but assume many traditional women’s roles, such as cooking and caring for children, as well as assuming key roles in rituals and serving as the keeper of the tribe’s oral traditions.”).

20. *Id.*

21. *Id.*

22. *Id.*


24. *Id.* (emphasis in original).

25. *Id.*
define it as wholly different from these terms. The term is not a synonym for *transgender*..."26

*Gender Non-conforming*: “A term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity... Simply being transgender does not make someone gender non-conforming.”27

*Gender diverse*: “An umbrella term to describe and ever-evolving array of labels people may apply when their gender identity, expression or even perception does not conform to the norms and stereotypes others expect.”28

*Gender identity*: “A person’s internal, deeply held sense of their gender.”29

*Sex assigned at birth*: “The classification of a baby as male, female or intersex based on visible genitalia at birth.”30

*Transition*: The process of going from living aligned with one’s sex assigned at birth to living aligned with one’s gender identity. This process may include legal (e.g. changing legal name and gender marker), social (e.g. telling others about one’s gender identity, changing one’s gender expression), or medical (e.g. mental health counselling, hormone therapy, gender-affirming surgery) dimensions. Every person’s transition is unique.31

*Gender Dysphoria*: The conflict between one’s gender identity and one’s assigned or physical gender as well as the conflict with the societal interactions based on that assigned or physical gender.32

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26. Id. (emphasis in original)
27. Id.
29. See GLAAD, supra note 23.
31. See GLAAD, supra note 23.
32. See generally id.; see also What is Gender Dysphoria, AM. PSYCHIATRIC ASS’N (Feb. 2016), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria. While Gender Dysphoria is a chapter in the Diagnostic and Statistics Manual (DSM), its continued inclusion in the
Gender Incongruence: Pronounced and continual incongruence between the gendered lived experience of a person and their assigned sex at birth.\textsuperscript{33}

C. Transgender Health

In America, “health” is often defined by the absence of illness or injury and measured by morbidity and mortality statistics.\textsuperscript{34} Since 1948, the World Health Organization has defined health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”\textsuperscript{35} This view of health encompasses the social determinants which affect people’s ability to live healthy lives. The U.S. Department of Health and Human Services (“HHS”) Office of Disease Prevention and Health Promotion (“ODPHP”) described the social determinants of health as “conditions in the environments in which people are born, live, learn, work, play, worship, and age that affect . . . health, functioning, and quality-of-life outcomes and risks.”\textsuperscript{36} Examples of social determinants that have great influence on the transgender community’s health include the following: safe housing; access to educational, economic, and employment opportunities; access to healthcare services; public safety; social support; social attitudes such as discrimination or racism; exposure to crime, violence and social disorder; poverty; and culture.\textsuperscript{37} The federal government recognizes that policies advancing social and economic conditions enhances the improvement and sustainability of individual and population health.\textsuperscript{38}

The World Professional Association of Transgender Health (“WPATH”) recognizes that:

mental health diagnostics is troublesome as being transgender is not a mental disease or disorder. \textit{Id.} The continued presence of the diagnosis within mental health is often seen as a concession to the needs for insurance coverage in the American healthcare system. \textit{See GLAAD, supra note 23.} With the ICD-11, the terminology will change to “Gender Incongruence” and it will move to the chapter on sexual health. \textit{See Brigitte Khoury et al., The ICD-11 Classification of Gender Incongruence of Adolescence and Adulthood, 23 CULT. HEALTH SEX. 1, 3 (2020) (citing the WHO Int’l Classification of Diseases 11 Revision (2018)).}

\textsuperscript{33} Brigitte Khoury et al., \textit{The ICD-11 Classification of Gender Incongruence of Adolescence and Adulthood, 23 CULT. HEALTH SEX. 1, 3 (2020) (citing the WHO Int’l Classification of Diseases 11 Revision (2018)).}

\textsuperscript{34} \textit{See Health-Related Quality of Life (HRQOL), CTRS. DISEASE CONTROL & PREVENTION,} https://www.cdc.gov/hrqol/concept.htm (last reviewed Oct. 31, 2018).


\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{See id.}
Health is dependent upon not only good clinical care but also social and political climates that provide and ensure social tolerance, equality, and the full rights of citizenship. Health is promoted through public policies and legal reforms that promote tolerance and equity for gender and sexual diversity and that eliminate prejudice, discrimination, and stigma.\textsuperscript{39}

Therefore, reducing TGD health inequities encompasses gender-affirming care specifically, access to medical care generally, and living a healthy life within society in its broadest sense. Gender affirmation is the process by which an individual’s gender identity is acknowledged, supported, and respected in interpersonal or systemic interactions.\textsuperscript{40} An expansive definition of health recognizes the detrimental effects that seemingly-unrelated-to-health policies, legislation, and judicial decisions have on TGD people’s ability to be holistically healthy.

Gender-affirming care is the provision of culturally and clinically-competent care across all health disciplines to enhance TGD wellbeing. Specifically, gender-affirming care such as hormone therapy or surgery is considered medically necessary by the medical establishment including organizations such as the American Medical Association (“AMA”), the American Psychological Association (“APA”), and WPATH.\textsuperscript{41} The WPATH Standards of Care provide flexible, patient-centered, clinical guidance for healthcare professionals to assist TGD people to “maximize their overall health, psychological well-being, and self-fulfillment.”\textsuperscript{42} These standards of care, encompassing TGD healthcare’s multi-discipline nature, address behavioral health, primary care, endocrinology, urology, obstetrics/gynecology, surgery, voice therapy, and reproductive care.\textsuperscript{44} However, the routine provision of gender-affirming care within the American healthcare system remains aspirational.

\textsuperscript{40} Jae Sevelius, Gender Affirmation: A Framework for Conceptualizing Risk Behavior Among Transgender Women of Color, 68 SEX ROLES 675, 676 (2013).
\textsuperscript{42} See COLEMAN ET AL., supra note 39, at 1.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
Historically, TGD healthcare concerns have not been prioritized. Only in 2010 when HHS launched Healthy People 2020 did “Lesbian, Gay, Bisexual and Transgender Health” became a topic of interest for the federal government.\textsuperscript{45} This government initiative identified multiple health disparities facing the TGD population that were “linked to societal stigma, discrimination, and denial of their civil and human rights.”\textsuperscript{46} These disparities included:

- Increased risk for mental health co-morbidities
- Increased risk for substance abuse
- Increased risk for suicide
- Increased risk to be the victim of violence
- Increased use of tobacco, alcohol or drugs
- Reduced access to health services\textsuperscript{47}

Further, the government identified social determinants of health related to “oppression and discrimination”\textsuperscript{48} that were negatively impacting TGD health such as:

- Shortage of clinically and culturally competent healthcare providers
- Lack of laws protecting children and adolescents from anti-transgender bullying
- Lack of social programs for transgender people across the lifespan
- Legal discrimination in access to healthcare, housing, employment, public accommodations, and familial-relational benefits\textsuperscript{49}

Between 2010, when Healthy People 2020 was released and the ACA enacted, and January 2017, when the Trump administration officially began, the story of TGD healthcare was characterized by both progress and stagnation.\textsuperscript{50} Progress included more TGD people receiving insurance coverage for general healthcare,\textsuperscript{51} an increasing number of insurers providing coverage for gender-
affirming care, and greater access to gender-affirming care, despite the number of culturally and clinically competent providers remaining low.

Another noteworthy sign of transgender health progress in the United States was the end of the Department of Defense ban on transgender military service in June 2016. The Department of Defense is the largest employer of transgender individuals in the United States. The new regulation’s immediate impact provided employment protection to the estimated 15,000 transgender military personnel and ensured their access to medically necessary care. Prior to the change in regulations, transgender personnel were stigmatized within the military and had to forego seeking medically necessary healthcare lest their careers be jeopardized. More broadly, the advances for diversity and inclusion within the military historically lead to progress in the civilian world. The military in reducing stigma and exemplifying a large employer providing medical care directly addressed known healthcare disparities.

**D. Impact of the ACA on TGD Health**

The ACA’s enactment, arguably, has been the most significant event advancing transgender healthcare and care accessibility. The ACA expanded access to insurance coverage by prohibiting exclusions based on pre-existing conditions. Prior to the ACA’s implementation, insurance carriers routinely denied coverage to TGD individuals, citing gender identity disorder (“GID”), an older term in the Diagnostics and Statistics Manual (“DSM-IV”) or gender

52. See MAP, supra note 50, at 13–14.
55. See 2016 Secretary of Defense Memorandum, supra note 7.
57. See 2016 Secretary of Defense Memorandum, supra note 7.
59. Paula M. Neira, Clinical Program Director, Johns Hopkins Ctr. for Transgender Health, Plenary Address at the Ass’n of Nurses in AIDS Care (ANAC) Annual Conference: Service Beyond the Uniform: Military Service and the Path to a More Perfect Union (Nov. 10, 2018) (presentation slides available from author).
dysphoria as a preexisting condition.\textsuperscript{61} If insurers did offer coverage, there were often broad “transgender exclusions” for gender-affirming care.\textsuperscript{62} Additionally, insurers often justified denial of coverage by claiming the care lacked medical necessity.\textsuperscript{63} While §1201 of the ACA amended the Public Health Service Act to prohibit denial of insurance coverage based on pre-existing conditions, this section did not require affirmative coverage of gender-affirming treatments.\textsuperscript{64}

The section of the ACA that will likely have the greatest impact on TGD healthcare access is §1557, the nondiscrimination section which prohibits discrimination on the basis of sex.\textsuperscript{65} During the Obama administration, HHS issued a final rule stating that sex-based discrimination included discrimination based on gender identity and sex stereotyping.\textsuperscript{66} HHS also provided that healthcare providers and facilities must treat and identify patients according to their gender identity.\textsuperscript{67} However, the rule’s implementation was enjoined by a federal district judge the day before it was to come into effect in \textit{Franciscan Alliance, Inc. v. Burwell}.\textsuperscript{68} The plaintiffs included a religiously-affiliated health system, Christian medical and dental associations, and several Republican-governed states.\textsuperscript{69} The health-provider plaintiffs alleged that the rule prohibiting discriminating against transgender individuals and requiring the provision of transgender-related medical care infringed on their religious liberty.\textsuperscript{70} The state plaintiffs alleged that the final rule infringed on states’ rights to “regulate healthcare, ensure appropriate standards of medical judgment, and protect its citizens constitutional and civil rights.”\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{65} 45 C.F.R. § 92 (2016).
\item \textsuperscript{66} Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375 (May 18, 2016) (repealed by the 2020 Section 1557 Final Rule).
\item \textsuperscript{67} \textit{Id.} at 31427.
\item \textsuperscript{68} 227 F. Supp.3d 660 (N.D. Tex. 2016).
\item \textsuperscript{70} Plaintiff’s Amended Complaint at 3, Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 600 (N.D. Tex. 2016) (No: 7:16-cv-00108-O).
\item \textsuperscript{71} \textit{Id.}
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E. TGD Health Inequities by the Numbers

Beyond the stalled ability of the federal government to enforce nondiscrimination in healthcare for TGD people as a result of the December 2016 injunction, the overall picture of TGD healthcare otherwise reflected some progress and the persistence of health disparities and health inequities. In its Healthy People 2020 Mid-course Review, HHS found no increase in the collection of health data on the transgender community. This lack of progress persisted through 2017, the latest year for which results are posted. Despite problems being identified by HHS in 2010, five years later, the largest survey ever conducted on the transgender population in the United States reported many persistently troublesome findings overall, with worse conditions for black and Latinx TGD people. Among the most salient findings pertinent to the health-related deficiencies were:

- 25% were denied coverage for hormone therapy and 55% were denied coverage for gender-affirming surgery
- 33% had at least one negative healthcare experience due to their gender identity in the preceding twelve months
- 24% interacted with healthcare providers lacking cultural- or clinical-competency in transgender healthcare
- 77% of respondents who were perceived as transgender in school (between K-12 grades) experienced some form of mistreatment including verbal harassment, physical assault, and sexual assault. Mistreatment led 17% to leave school.
- 48% of Latinx and 53% of Black respondents had been sexually assaulted at some point in their life
- 30% had a negative job experience in the preceding twelve months (e.g., fired, denied promotion, workplace harassment)
- 29% lived in poverty, increasing to 38% for Blacks and 43% for Latinx
- 15% were unemployed, increasing to 20% for Black and 21% for Latinx (all well above the national averages)
- 33% did not seek medical care because they could not afford to pay for it

72. See infra notes 73 and 74.
• 40% had attempted suicide at one point in their lives; 39% suffered psychological distress in the preceding twelve months – due to the impact of stigma and discrimination
• 23% suffered from discrimination in housing
• 30% had been homeless at one point in their life; 26% avoided homeless shelters for fear of violence. Of those who did stay in a shelter in the preceding year, 70% reported being mistreated because of their gender identity.

These statistics reflect the persistent and pernicious reality for most TGD people in the United States. The survey’s next iteration was anticipated to be conducted in 2020; however, it has been delayed. It has been a decade since the government recognized the need for policies, regulations, and legislation that address the social determinants of health and promote holistic health. Yet, in the past three years, federal and state executive, legislative, and judicial branches have often proposed or enacted policies, or have rendered decisions resulting in exacerbations of known health disparities and perpetuating the stigma, discrimination, and oppression harmful to the TGD population’s health.

II. RELIGIOSITY & POLITICS: AN UNHOLY ALLIANCE

The alliance between faith-based organizations and the Republican Party (“GOP”) long predated the Trump administration. The GOP’s demonizing of sexual and gender minority communities to further partisan politics is not new. Yet, the toxic combination of religiosity and partisan politics embraced by the Trump administration, emboldened those who have harbored long-standing anti-TGD animus to seek actions designed to roll back or deny civil rights and services, including access to healthcare, to the TGD community.

77. Id.
79. See supra note 45 and accompanying text.
80. See infra Section II.
Kansas GOP state committee, voted to “oppose all efforts to validate transgender identity.”

In effect, the Kansas GOP sought to eliminate the existence of TGD people from society. In opposing the provision of medically necessary care to TGD people, the committee resolution affirmed that “God’s design for gender as determined by biological sex and not by self-perception.” The Family Research Council, the Alliance Defending Freedom (ADF), and Liberty Counsel, all self-proclaimed to be faith-based organizations, have championed actions that have direct and indirect negative health implications for TGD Americans. These organizations are designated as anti-LGBTQ hate groups by the Southern Poverty Law Center for their continued defamation, intentional misinformation, and willful intellectual dishonesty about TGD people. While some of their efforts predate the 2016 elections, Trump’s victory was a catalyst for furthering their agenda.

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85. Id.


87. See Gender Identity, FAM. RSCH. COUNCIL, https://www.frc.org/gender-identity (last visited Dec. 1, 2020) (stating that FRC “does not believe that ‘gender identity’ should be included as a protected category in non-discrimination laws or policies” and stating “providing gender transition medical procedures such as hormones or surgery to minors should be prohibited”); see Alliance Defending Freedom, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom (last visited on Dec. 1, 2020) (stating “ADF also works to develop ‘religious liberty’ legislation and case law that will allow the denial of services and goods to LGBTQ people on the basis of religion”); see also Charlie Butts, Staver: LGBT ‘Rights’ Sneakily Added to Anti-Lynching Bill, ONE NEWS NOW (Jan. 8, 2019), https://onenewsnow.com/politics-govt/2019/01/08/staver-lgbt-rights-sneakily-added-to-anti-lynching-bill (reporting that Liberty Counsel leader objects to inclusion of “homosexuals and transgenders” in anti-lynching bill and further reporting that “Liberty Counsel is talking to lawmakers in House in effort to convince them to strip the bill of the amendment before taking a vote.”).

88. Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning.


An agenda designed to harm TGD individuals by removing civil protections, denying medical care, and fostering societal stigmatization and discrimination, was first laid out in 2016 with the launch of “Project Blitz” during a teleconference between, the Congressional Prayer Caucus Foundation, the National Legal Foundation, and WallBuilders, all self-identified Christian organizations, and state legislators.\textsuperscript{91} Attacking TGD people is only part of a broader objective of imposing a sectarian-based government at all levels in the United States.\textsuperscript{92} Initially, these groups distributed a guide with twenty model bills to over 750 state legislators in 2018.\textsuperscript{93} In 2019, Project Blitz, since renamed “Freedom for All,” produced an expanded guide with twenty-one model bills along with strategic guidance and talking points.\textsuperscript{94} In 2020, Freedom for All was behind the majority of the 226 anti-LGBTQ bills proposed across the country in various state legislatures.\textsuperscript{95} Approximately ninety of the bills can be considered anti-transgender.\textsuperscript{96}

\section*{III. EXEMPLARS OF HARMFUL POLICY}

This section will discuss selected federal and state proposed or enacted policies which are harmful to the health of the TGD community. At the federal level, many Departments during the Trump administration attempted to impose rules or policy which are not grounded in medical science or are in direct conflict with evidence-based best practices. Specific discussion focuses on the Department of Health and Human Services, the Department of Education, and the Department of Housing and Urban Development. At the state level, representative actions across the states are discussed with attention to those actions negatively impacting social determinants of health, or harming TGD youth.

\subsection*{A. Federal Issues}

Multiple executive-branch departments have proposed or enacted policies which negatively impact the health of the TGD community. The Department of

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item See generally CONGRESSIONAL PRAYER CAUCUS FOUNDATION, REPORT AND ANALYSIS ON RELIGIOUS FREEDOM MEASURES IMPACTING PRAYER AND FAITH IN AMERICA (2018-19 Version) (containing model bills with accompanying guidance and talking points).
\item Molly Sprayregen, 226 Bills Target LGBTQ Americans This Year. One Organization is Behind a Lot of Them, LGBTQ NATION (Feb., 18, 2020), https://www.lgbtqnation.com/2020/02/226-bills-target-lgbtq-americans-year-one-organization-behind-lot/.
\end{enumerate}
\end{footnotesize}
Justice ("DoJ") has argued that Title VII and Title IX allow discrimination on the basis of sexual orientation and gender identity, rescinding previous guidance to the contrary. The Department of Labor ("DoL") regressed on employment non-discrimination rules governing federal contractors and proposed to allow healthcare discrimination in military-dependent and retiree health coverage. The State Department refused to issue passports recognizing non-binary individuals. Further, the State Department’s Commission on Unalienable Rights has attempted to exclude TGD rights from the definition of human rights, while either ignoring LGBTQ rights or framing issues as fundamental as "social and political controversies."

The Department of Veterans Affairs continues to refuse to provide medically necessary, gender-affirmation surgery to eligible veterans. The Department of Defense ("DoD") re-implemented a de facto ban on transgender military service despite the lack of medical science or military evidence to support such a policy. Multiple lawsuits are challenging the constitutionality of this misguided DoD policy.

On January 25, 2021, President Biden issued an Executive Order which effectively reversed the Trump administration’s policy and ordered the Secretaries of Defense and Homeland Security to report the status of implementing new regulations allowing for transgender military service within

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98. See id. (reporting that the Department of Labor issued a directive on Aug. 10, 2018, granting broad religious liberty exemptions to federal contractors to allow for LGBTQ discrimination).

99. See id. (reporting that the Department of Labor proposed to allow TRICARE to be exempt from regulations prohibiting discrimination on the basis of sexual orientation and gender identity).

100. Id.


104. See generally DOD’S RATIONALE FOR REINSTATING THE TRANSGENDER BAN IS CONTRADICTED BY EVIDENCE, PALM CTR. 1 (May 4, 2018) (assessing the plausibility of DoD’s justification for reinstating the ban on transgender military service and finding its rationale unpersuasive and contradicted by ample evidence).

60 days. Pending the new regulations, it is likely that the Executive Order and new regulations will make the litigation moot. Three other federal departments merit specific mention due to their role in guiding health policy (HHS) or because their policies impact the health and wellbeing of the most vulnerable of an already marginalized population, notably, youth (Department of Education ("DoE")) and the homeless (Department of Housing and Urban Development ("HUD")).

1. Department of Health and Human Services (HHS)

HHS is the chief federal department charged with protecting the health rights of, and to provide human services to, all Americans. The Department administers programs dealing with health, health research, welfare, and health information. A major role of HHS is to provide rules for the implementation of laws such as the ACA that directly impact the health of the TGD community. Within its scope of authority, HHS addresses health insurance matters aimed at providing affordable health insurance, protecting individuals from insurance abuse, and strengthening Medicare. “The HHS Office for Civil Rights (“OCR”) enforces federal civil rights laws, conscience and religious laws, [as well as laws such as] the Health Insurance Portability and Accountability Act (HIPAA) . . . and the Patient Safety Act.” However, under the Trump administration, HHS, with OCR as the main champion: (1) tried to define gender in its policies in a way that denies TGD existence; (2) sought to allow healthcare practitioners, citing “religious liberty” or “freedom of conscious” to refuse care; (3) sought to exclude TGD health concerns from data collection; and (4) worked to remove non-discrimination protections for TGD people from the ACA. HHS targeted TGD people and their health, and

108. Id.
109. Id.
110. Id.
113. See NCTE, supra note 97.
114. See id.
115. See id.
perpetuating stigmatization of the community and reinforcing existing barriers to healthcare access.\textsuperscript{116}

Starting in 2017, HHS sought to define “sex” under Title IX in a way that removed TGD people from official legal recognition.\textsuperscript{117} A leaked departmental memorandum stated, “[s]ex means a person’s status as male or female based on immutable biological traits identifiable by or before birth, . . . The sex listed on a person’s birth certificate, as originally issued, shall constitute definitive proof of a person’s sex unless rebutted by reliable genetic evidence.”\textsuperscript{118} Further, HHS sought concurrence for this definition from the Departments of Justice, Labor, and Education.\textsuperscript{119} Health professionals condemned the proposed definition for its lack of grounding in medical science and for the negative impact on TGD public health.\textsuperscript{120} Another HHS attempt to prevent TGD healthcare was the issuance of its final Denial of Care rule in May 2019.\textsuperscript{121} HHS provided a basis for healthcare practitioners to deny care to TGD patients by citing religious or moral objections.\textsuperscript{122} This rule was condemned by healthcare professional organizations and was the subject of several court challenges grounded in constitutional and administrative matters.\textsuperscript{123} Three different federal district courts struck down the proposed rule, recognizing the rule’s discriminatory effect.\textsuperscript{124}

While the Trump administration took broad steps to remove TGD people from data collection such as declining to include sexual and gender minority demographics from the 2020 census, HHS has consistently attempted to remove the TGD community from health data collection.\textsuperscript{125} An early Trump administration action erased health data collection on transgender seniors\textsuperscript{126} by

\textsuperscript{116} See Lucas Acosta, The Real List of Trump’s “Unprecedented Steps” for the LGBTQ Community, HUMAN RTS. CAMPAIGN: BLOG (June 11, 2020), https://www.hrc.org/blog/the-list-of-trumps-unprecedented-steps-for-the-lgbtq-community.

\textsuperscript{117} See Green et al., supra note 112.

\textsuperscript{118} Id.

\textsuperscript{119} Id.


\textsuperscript{121} See NCTE, supra note 97.

\textsuperscript{122} See id.


\textsuperscript{125} See NCTE, supra note 97.

changing its annual consumer assessment survey for participants in programs funded under the Older Americans Act. This survey gathers information on older adults who receive federally-funded aging services and assesses program benefits to the population. Policymakers and advocates rely on this data to ensure programs meet their goals without excluding any particular population.

In Healthy People 2030, HHS removed the emphasis on health inequities and disparities for minority populations. Policy makers and healthcare leaders use the data derived from this decennary healthcare strategic plan to evaluate and direct national efforts to improve health and well-being of all people. However, the Trump administration removed TGD people from consideration in areas such as youth data addressing suicidality or harassment and assault in school. HHS aimed to erase the experiences of TGD seniors and ignore data collection on TGD youth, thus impairing efforts to identify and end disparities and discrimination in government programs.

However, the most troubling action to perpetuate discrimination against TGD in healthcare was HHS’s issuance of a final rule reinterpreting §1557 of the ACA. Under the Obama administration’s guidance, discrimination on the basis of sexual stereotyping and gender identity was prohibited as forms of sex discrimination. The definition of discrimination “on the basis of sex” encompassed discrimination on the basis of gender identity, “an individual’s internal sense of gender, which may be male, female, neither or a combination of male and female.” In another attempt to redefine sex in a manner to remove non-discrimination protections, on June 12, 2020, HHS published a final rule removing all references to gender identity, sexual orientation, and TGD people. In effect, by removing the guidance that discrimination based on sexual orientation and gender identity are forms of impermissible sex

127. Id.
128. Id.
129. Id.
133. See Neira, supra note 130.
134. Nondiscrimination in Health Programs and Activities, supra note 66, at 31375.
135. Id.
discrimination, the final rule allows healthcare providers and insurers to deny routine care to TGD patients; impacting all insured patients under any HHS funded health program including Medicaid and Medicare.137

Three days later, the Supreme Court announced its decision in Bostock v. Clayton County, which undercut these efforts by clearly defining that discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination.138 While the decision pertained to Title VII, it will undoubtedly influence any definition of sex discrimination proposed under Title IX.139 Further, the Trump administration’s final rule on §1557 is being litigated.140 On behalf of several organizational and individual plaintiffs a lawsuit was filed in the United States District Court for the District of Columbia on June 22, 2020.141 The complaint includes claims for equitable relief and injunctive relief due to violations of the Administrative Procedures Act as well as the First and Fifth Amendments of the Constitution.142 Further, the complaint seeks declaratory judgment that the Revised Rule is unconstitutional, and for enforcement be preliminary and permanent enjoined.143

2. Department of Education (DoE)

TGD youth represent one of the most vulnerable groups in society. Up to 2% of high school age adolescents identify as TGD.144 The Centers for Disease Control and Prevention (“CDC”) reported that TGD high school students “face serious risk for violence victimization, substance use, and suicide. . . .”145 Seventy seven percent of TGD people have been mistreated during their school years.146 Sexual and gender minority youths comprise 40% of homeless

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137. See generally id. ("In Donald Trump’s United States, transgender people apparently do not have the same right as their cisgender counterparts to receive medically appropriate, patient-centered care — or, indeed, any health care at all.").
138. Id.
141. Id.
143. Id.
145. Id.
146. See James et al., supra note 15.
The American Academy of Pediatrics calls for actions to provide safe and supportive environments for TGD youth to improve their health. Yet, the Trump Department of Education, working in conjunction with DoJ, intending to reverse Obama-era guidance designed to protect TGD youth, took actions to remove protections for TGD youth despite warning from experts about the harm such policy threatens to the youths’ psychological and physical health.

The rollback of protections for TGD youth began within one month of Donald Trump’s inauguration with the reversal of the guidance from 2016 requiring schools to protect transgender youth under Title IX. In 2018, DoE announced that it would no longer pursue civil rights complaints from transgender students who were denied access to facilities aligned with their gender identity. In 2019, the Department enacted a final rule granting private religious schools an exemption from nondiscrimination standards which otherwise would protect TGD students. The attacks on TGD children continued in 2020. In May, the Department published a final rule that would undermine protections for students who report being the victims of sexual violence and harassment.

The most recent DoE action targeted transgender student athletes. In March 2020, the DoJ and DoE, intentionally misgendering transgender youth, publicly stated that biological males who identify as women should not be


149. See generally NCTE, supra note 97.

150. See id.


152. See NCTE, supra note 97.

153. Id.

154. Id.

classified as girls when it comes to athletics.\footnote{156} In a thirteen-page brief, the DoJ averred that Title IX does not prohibit discrimination on the basis of gender identity.\footnote{157} DoJ further claimed that including TGD females in sex-segregated athletic competitions would be inconsistent with Title XI requirements because it would impair a cisgender female athlete’s chance to compete.\footnote{158} In May, DoE sent a letter to various Connecticut school districts and an interscholastic athletic association that threatened to withhold federal financial support from various Connecticut jurisdictions unless they prohibited transgender student athletes from competition aligned with their gender identity.\footnote{159} This letter also alleged violations of cisgender civil rights and threatened to refer matters for civil action by DoJ.\footnote{160} The organization instigating the legal challenges and filing complaints with the DoE Office of Civil Rights seeking to bar the participation of transgender student athletes, and which the DoE is explicitly supporting, is the aforementioned anti-TGD hate group, the ADF.\footnote{161}

3. The Department of Housing and Urban Development (HUD)

Given previous HUD Secretary, Ben Carson’s history of anti-transgender commentary,\footnote{162} it is not surprising that HUD ignored the negative impact on health caused by permitting homeless shelter providers to discriminate against homeless TGD people. On July 1, 2020, HUD announced a proposed rule modification to the Equal Access rule which mandated that HUD-funded housing services cannot discriminate on the basis of gender identity.\footnote{163} The original 2012 final rule, entitled “Equal Access to Housing in HUD Programs Regardless of

\footnote{156} See id. (claiming that Title XI defines sex as one’s physiological reproductive function, not their gender identity).

\footnote{157} Id. at 3.

\footnote{158} Id at 2–3.

\footnote{159} Letter from Timothy C. J. Blanchard, N.Y. Office Dir., U.S. Dept. of Educ., to Lori Mizerak, Assistant Corp. Counsel, City of Hartford, et al. (May, 15, 2020) (on file with the American Civil Liberties Union); see also Scott Skinner-Thompson, Trump Administration Tells Schools: Discriminate Against Trans Athletes or We’ll Defund You, SLATE (June 4, 2020, 4:33 PM), https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html.

\footnote{160} Blanchard, supra note 159.


\footnote{162} See, e.g., Zack Ford, Ben Carson: Transgender People are “the Height of Absurdity,” THINK PROGRESS (July, 20, 2016, 1:43 PM), https://archive.thinkprogress.org/ben-carson-transgender-people-are-the-height-of-absurdity-62a6054e0534/ (quoting Ben Carson, “You know, we look at this whole transgender thing. I got to tell you: For thousands of years, mankind has known what a man is and what a woman is. And now, all of a sudden[,] we don’t know anymore. Now, is that the height of absurdity? Because today you feel like a woman, even though everything about you genetically says that you’re a man or vice versa?”).

Sexual Orientation or Gender Identity,” generally restricted homeless shelter providers from making inquiries into a person’s gender identity when determining eligibility and placement for services. In 2016, the original rule was clarified by a final rule entitled, “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” which made it impermissible to inquire about an individual’s sex and directed placement be based on an individual’s gender identity without being subjected to “intrusive questioning or [being] asked to provide anatomical information or documentary, physical, or medical evidence of their gender identity.”

HUD now proposes to allow homeless shelter providers to elect criteria to effectively refuse to provide appropriate shelter to TGD persons based on their sex “without regard to their gender identity.” HUD’s major rationale to support this change is that the current rule, which was meant to protect vulnerable individuals, places an undue burden on the religious liberty of faith-based providers of homeless services. HUD alleges that the Free Exercise Clause is violated because providers would have to provide services to transgender women even when the provider contends its interpretation of scripture holds that these are not women but instead are males. Disingenuously, HUD asserts that the proposed revision keeps in place the prohibition against discrimination on the basis of gender identity while, arguably, allowing discrimination against transgender individuals based on their anatomy or their genetics. Further, HUD would allow shelter providers to use such attributes as an individual’s height, facial hair growth, prominence of their thyroid cartilage (Adam’s apple), or other physical characteristics to determine an applicant’s sex and thus deny services in a gender-segregated facility. Such an assertion ignores medical science and uses stereotypes that will likely also result in discrimination against cisgender women who look “too masculine” for a shelter staff member.

166. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811, 44812 (July. 24, 2020) (to be codified at 24 C.F.R. pt. 5) (“The proposed rule would maintain requirements from HUD’s 2012 final rule entitled ‘Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity’ and would require shelters to uniformly and consistently apply any such policy the shelter develops.”).
167. Id.
168. Id. at 44814.
169. Id. at 44812.
170. Id. at 44816.
4. Federal Summary

Rather than enacting policy designed to improve the health and wellbeing of the TGD population, the Trump administration ignored medical expertise, science, and public outcry. In pandering to partisan politics, it attempted, at every turn, to increase barriers to healthcare and exacerbate negative social determinants of health for the TGD community. A host of lawsuits challenging these actions are in progress across the federal judiciary – a judiciary which the Trump administration sought to pack with unqualified jurists, many of whom harbor anti-TGD animus at the behest of its partisan base. While the Bostock decision offers some hope for progress, there will be much litigation to ensue. As a result of the November 2020 Presidential election, there is great hope that the Biden administration will halt the federal attacks on TGD people, including the homeless, children, military service members, and veterans.

B. State Issues

1. Actions Negatively Impacting Social Determinants of Health

While some states improved the landscape for the TGD community, more have proposed or enacted legislation that targeted TGD individuals and increased barriers to their overall health. The first wave of state-level legislation targeting TGD people were a host of “bathroom bills” introduced in at least sixteen states in 2017 and 2018. Many of these attempts were patterned upon North Carolina’s HB2[1], which limited access to multi-occupancy bathrooms based on sex as assigned at birth, effectively denying transgender individuals,

171. See supra Section II A.1–3.
172. See NCTE, supra note 97 (citing nominations of Mark Norris, Jeff Mateer, Matthew Kacsmaryk, and Gregory Katsas for appointment to the federal judiciary).
173. See Timothy J. Stanton & Hillary M. Sizer, Post-Bostock Ruling Does Little to Resolve Health Plan Uncertainty, NAT’L L. REV., https://www.natlawreview.com/article/post-bostock-ruling-does-little-to-resolve-health-plan-uncertainty (Aug. 28, 2020) (stating “[i]t is safe to say that there will be more to come for employers on the application of sex discrimination law to health plans as a handful of other lawsuits challenging the new rule make their way through the federal court system”).
177. Id.
including those whose legal sex had been updated, from using bathrooms aligned with their gender identity. Proponents of these bills admitted that the argument that such legislation was needed for public safety was a sham meant to disguise anti-LGBTQ animus.

Numerous bills that continue the stigmatization of, and discrimination directed towards, TGD people are at some stage of consideration in twenty six states. A sampling of these actions include: (a) proposing to remove civil rights protections, (b) allowing for discrimination based on “religious liberty” or “freedom of conscience,” (c) denying insurance coverage for gender-affirming care under state-funded programs, (d) denying access to medically necessary care to state prisoners, and (e) denying the ability to amend legal records to reflect their legal sex or non-binary gender identity. All of these actions negatively affect the social determinants of health known to be vital to comprehensive health. Those aimed to deny access to medically-necessary, gender-affirming care exacerbate existing barriers to care.

2. Actions Specifically Targeting TGD Youth

The most odious state-level actions being taken are those that specifically target TGD children and adolescents. Studies show that as many as 60% of TGD youth have suicidal ideation because of stigmatization, discrimination, and lack

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178. See 2016 N.C Sess. Laws 2016-3 (stating that bathroom use be based on an individual’s ‘biological sex’ as stated on their birth certificate while also ignoring that not all jurisdictions allow sex to be updated on birth certificates).

179. See Massachusetts Voters Overwhelmingly Say “Yes” to Transgender “Bathroom” Law: What Happened?, MASS RESISTANCE (Nov. 9, 2018), https://www.massresistance.org/docs/gen3/18d/NoTo3/election-analysis.html (“Our side concocted the ‘bathroom safety’ male predator argument as a way to avoid an uncomfortable battle over LGBT ideology, and still fire up people’s emotions. It worked in Houston a few years ago.”).


181. See id. (identifying various legislation such as Iowa HF2164 which proposes to remove gender identity as a protected class under the Iowa Civil Rights Act).

182. See id. (citing legislative actions in Iowa (HF2273), Arizona (HB2082), and Colorado (HB1033)).

183. See id. (citing Alaska (HB5)).

184. See id. (identifying an Idaho resolution, (SCR135) supporting the Governor and Department of Corrections of Idaho in denying a prisoner gender-affirming surgery).

185. See id. (citing legislation enacted in Idaho (H0509) and proposed in Arizona (HB 2080 and HB2081) as examples).


187. See supra Section III.
of familial and societal support of their gender identity. Up to 77% of TGD individuals report mistreatment in school. Studies show that being supportive of a child’s gender identity with actions such as social transition, using correct pronouns, access to facilities and activities aligned with their gender identity, and age-appropriate medical intervention (which is only considered when a child is peri-pubertal) reduce levels of anxiety, depression, and suicidality. In willful ignorance of medical science and best practices, many legislatures are considering, and in some cases have enacted, legislation that will only make it worse for TGD youth.

Under the Obama administration, the DoE and DoJ provided guidance in support of TGD youth having access facilities aligned with their gender identity. However, some states expressed concern that various school districts and the DoE in trying to protect transgender students under Title IX have overreached their authority. Consequently, Texas and ten other states filed suit seeking relief and alleging federal overreach in interpreting the law regarding transgender students. A federal district court in Texas issued a preliminary injunction in August 2016 effectively barring consideration of gender identity within the purview of sex discrimination under Title IX. Under the Trump administration, as discussed earlier, DoE and DoJ reversed positions and did not protect children in state-level public and private schools from discrimination or harassment on the basis of gender identity.

The most direct threat to TGD youths’ health are attempts in various states by Republican legislators, emboldened by the Trump administration, to bar the

188. Brian C. Thoma et al., *Suicidality Disparities Between Transgender and Cisgender Adolescents*, 144 Pediatrics 1, 6 (Nov. 2019).
192. See Bradley Domangue, *Transgender Issues in Public Schools*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Articles&Template=CM/HTMLDisplay.cfm&ContentID=34301 (last visited Aug. 9, 2020) (stating that various school districts and the Department of Education have overreached in their Title IX protections for transgender students).
193. *Id.; see also* Plaintiff’s Complaint, at 30–32, Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (No: 7:16-cv-00054-O) (alleging defendant’s interpretation of Title VII and Title IX is incompatible with Congressional text). The case was voluntarily dismissed and closed Mar. 3, 2017 after the Trump administration took office. *Id*.
195. *See supra* notes 150–51 and accompanying text.
provision of medically necessary, gender-affirming care in an age appropriate manner. Some states have proposed to add to the law that provision of this care, recognized by medical science as a best practice and medically necessary, is a form of child abuse. Others have proposed criminalizing or otherwise penalizing practitioners who seek to provide care to TGD youth. For example, a proposed Georgia bill, HB1060, would make the provision of gender-affirming care to a minor under the age of 18 a felony punishable by a prison term of up to 10 years, a civil violation allowing for a private cause of action, and allows for licensure revocation by the governing professional boards. The Republican legislator who sponsored the legislation is supported by the leader of another anti-LGBTQ hate group, the American College of Pediatricians, an organization with a long history of willful intellectual dishonesty concerning the medical care of TGD youth. These legislative attempts to create further barriers to care for TGD youth have been widely condemned by reputable medical professional organizations. State legislators also target TGD youth by seeking to ban them, particularly transgender girls, from competing in interscholastic athletics aligned with their gender-identity. Idaho has enacted a law that bars transgender girls from competing against cisgender girls, arguing that the competition is unfair.


197. See Anti-Transgender Equality Tracker, supra note 180 (citing New Hampshire HB163).


203. See Stubbs, supra note 196 (reporting on a law that disallows transgender girls from competing against cisgender girls).
Litigation challenging the law was filed and the Federal district court granted a preliminary injunction prohibiting enforcement of the law in August 2020. The state of Idaho has appealed the decision to the Ninth Circuit Court of Appeals in November 2020. In Connecticut, which has a law permitting transgender youth to compete aligned with their gender identity, a lawsuit has been filed. The plaintiff’s attorneys are the aforementioned hate-group, ADF. The Trump administration threatened to withhold federal funding from any state that did not prohibit TGD youth from competition.

3. Recommendations for Legal Professionals

Lawyers play an essential role in improving TGD health and reducing systemic health inequities. The connections between the law and the holistic health of TGD people are inseparable. Healthcare is delivered within a societal framework driven by legislation, policy formulation, and judicial decisions impacting social determinants of health and access to care. Our legal profession can pursue several actions aimed at improving TGD healthcare. First, cultural competency regarding the TGD community should be mandated within legal education and licensure. The fair administration of policy and justice requires members of the legal profession to understand the language needed to interact with the community with dignity and respect while having a grasp of the historical and societal conditions that shape the lived experience of the TGD population.

There is no mandate that cultural competency education be included in academic programs leading to licensure. The American Bar Association’s (“ABA”) accrediting standards include cultural competency as a type of “other professional skill,” leaving academic programs to decide whether to include such education in the curricula. Once licensed, continuing education requirements


206. See Taking a Stand to Defend Female Students, supra note 161.

207. See, e.g. Timothy C. J. Blanchard, Letter to Various Connecticut Jurisdictions, http://www.adfmediam.org/files/SouleDOEImpendingEnforcementLetter.pdf, (May 15, 2020) (threatening that the “OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance [to jurisdictions in Connecticut allowing transgender athletes to compete in alignment with their gender identity]”).

are determined by each state. While the ABA has recognized the need for cultural competency training, such training, specifically training addressing TGD communities, is often missing. Some states mandate a minimal level of continuing education each reporting period aimed at the “elimination of bias in the legal profession and in the practice of law.” However, gender identity is not included as a basis of bias to address. In contrast, Washington, D.C. requires health professionals to have LGBTQ-specific competency training each reporting period in order to renew licensure.

Second, a nondiscrimination rule, expressly including protections on the basis of gender identity and gender expression, should be included in the respective state codes of ethical conduct. The fundamental duty owed to the legal system and to individuals is to act ethically; in essence, this is a duty to act with honor and integrity. Other nations’ codes of legal ethics make this clear and include advancing human rights and social justice. In Japan, the first article of basic ethics for attorneys is that “an attorney shall be aware that his or her mission is to protect fundamental human rights, to realize social justice, and to strive to attain this mission.” In the U.K., the Barristers’ Code of Conduct states that a barrister must not discriminate unlawfully against any person and explicitly includes TGD people. A model rule proposed by the ABA which includes a prohibition on discrimination based on gender identity has been rejected by

211. See MINN. R. 9(B)(2) (2016) (stating that all lawyers must complete a minimum of two credit hours in courses pertaining to the elimination of bias in the legal profession).
212. Id. at Rule 2(G).
213. LGBTQ Cultural Competency Continuing Education Amendment Act of 2016, 63 D.C. Reg. 2203 (Apr. 6, 2016).
214. See Code of Conduct for Legal Professionals GN 40610 of GG 38022 (Feb. 10, 2017) (stating that lawyers have a duty to act ethically with honor and integrity).
215. See id. at §3.3.1 et seq; see also Australian Solicitors Conduct Rules 2015 (NSW & VR) (Austl.); Lawyers and Conveyancers Act 2006, s 4 (N.Z.) (stating that the fundamental laws of New Zealand include non-discrimination as part of their Bill of Rights).
217. BAR STANDARDS BOARD, THE BAR STANDARDS BOARD HANDBOOK: VERSION 4.4, at Rule C12, https://www.barstandardsboard.org.uk/uploads/assets/f0d14af-9c5a-4be4-9dbfa980b1e47f614e29-7f00-4e6f-8f6839b68cb63e93/Part-2-Code-of-Conduct18092019092228.pdf, (listing that barristers “must not discriminate against, victimize or harass any person on the grounds of…sex, gender, gender re-assignment, [or] sexual orientation. . .”).
218. MODEL RULES OF PROF’L CONDUCT R. 8.4(g) (AM. BAR ASS’N 2018).
many jurisdictions. Some states include antidiscrimination rules within their respective codes, however, the majority do not explicitly prohibit discrimination based on gender identity. California Rule 8.4.1 is an exception.

Third, codes of ethical conduct should clarify that intentional misrepresentation is professional misconduct. For example, in the U.K., the Bar Standards Board state that barristers “must not knowingly or recklessly mislead or attempt to mislead the court,” including “being complicit in another person misleading the court.” More broadly the standards, in support of honorable practice and integrity, prohibit knowingly or recklessly misleading anyone. In Maryland, misrepresentation may be considered professional misconduct.

Arguably, these sections of the code of conduct are relevant for attorneys who will advocate in judicial proceedings, administrative tribunals, or craft governmental policy which will impact TGD health. Our ethical codes of conduct should deter advocacy and legal argumentation founded upon pseudoscience rejected by peer-reviewed science, willful ignorance of, or intentional intellectual dishonesty about, the medical science and evidence-based practice that ground TGD healthcare.

IV. CONCLUSION

The state of TGD health in 2020 was precarious. The Trump administration’s ascent was a catalyst for advancing a sectarian-based, partisan agenda designed to regress TGD civil rights and to enhance existing barriers to medical care. Despite the government’s own findings, medical experts’ advice, and public opposition, multiple federal departments and state legislatures, then controlled by the Republican party, proposed or enacted policy and law that will impair the health of already-marginalized individuals and populations. There is hope that the Biden administration will reverse these harmful policies and will work with Congress to put in place legislation that will protect TGD people from future assaults on their rights and their health.


220. See, e.g. Code of Conduct for Legal Professionals, supra note 214 (“knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this section”) (omitting gender identity).

221. RULES OF PROF’L CONDUCT r. 8.4.1(c)(1) (STATE BAR OF CAL. 2018).

222. See BAR STANDARDS BOARD, supra note 217, at rC3, gC4 (stating that barristers must not mislead the court in any manner).

223. See Australian Solicitors Conduct Rules 2015 (NSW & VR) § 19 (Austl.) (prohibiting solicitors from engaging in misleading conduct).

224. Mo. R. §19-308.4.
profession collectively, we can take actions to stem these attacks by increasing our cultural competence on TGD issues, and by strengthening our codes of conduct to deter advocacy, argument, and policy development grounded in an unscientific, narrow-minded, willfully ignorant worldview.