

March 18, 2014

Veterans Health Administration (20M33)
Department of Veterans Affairs
Attn: Crystal Rennie
VA Clearance Officer
810 Vermont Ave NW
Washington, D.C., DC 20420

Dear Ms. Rennie,

**RE: Proposed Information Collection (Civil Rights Discrimination Complaint) Activity:
Comment Request**

On behalf of Family Equality Council, please accept these comments on the Veterans Health Administration's (VHA) Proposed Information Collection (Civil Rights Discrimination Complaint) Activity: Comment Request. Family Equality Council is a national organization working to ensure full social and legal equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) parents and their children by providing direct support, educating the American public, and securing inclusion in legislation, policies, and practices impacting families. On behalf of the more than three million LGBTQ parents and their six million children across the United States,¹ Family Equality Council would like to thank the Secretary and the Department for their work to provide inclusive and comprehensive services to LGBTQ veterans and their families across the United States.

Bases for Civil Rights Discrimination Complaints

VA Form 10-0381 is used by veterans to report civil rights discrimination in the delivery of services or employment through the Veterans Health Administration.² Question 8 of this form requires a veteran complainant to identify the type of discrimination upon which her complaint is based.³ The form requests information about experiences of discrimination on the following bases: race, ethnicity, national origin, age, sex, disability, and reprisal.⁴

The intent of this form is to permit a veteran complainant to report any and all civil rights discrimination experienced in the provision of medical services or employment through the VHA. This information is used by the Department to assist the complainant in seeking a remedy for said discriminatory treatment. However, the list of bases for a claim of discrimination in Question 8 omits options for discrimination based on a veteran's sexual orientation or gender

¹ Movement Advancement Project, Family Equality Council and Center for American Progress, "All Children Matter: How Legal and Social Inequalities Hurt LGBTQ Families," October 2011, *Issue Brief: Obstacles and Opportunities: Ensuring Health and Wellness for LGBTQ Families*.

² VA Form 10-0381, upd. Nov. 2005 (available at: <http://www4.va.gov/vaforms/medical/pdf/VHA-10-0381-fill.pdf>)

³ *Id.* at Question 8.

⁴ *Id.*



identity. Discrimination based on sexual orientation or gender identity is explicitly prohibited by a number of policy directives issued by both the Veterans Health Administration⁵⁶ and the Veterans Administration generally.⁷ The form's failure to include these bases as options in Question 8 disregards administration policy as issued in these directives.

Furthermore, by failing to include sexual orientation and gender identity as bases for a complaint, veterans who are LGBTQ or who are perceived as LGBTQ may be prevented or delayed from receiving a remedy for discriminatory treatment. This omission may erroneously suggest to veteran patients that the Department provides no protections against this kind of discrimination, prompting LGBTQ veterans in need of medical services or employment to seek alternative and more expensive care, delay seeking necessary care, or not seek care altogether. Expanding the bases listed in Question 8 to include "Sexual Orientation" and "Gender Identity" would allow the form to provide assistance to veterans facing LGBTQ discrimination while gathering essential data on discrimination against LGBTQ veterans without compromising any of the data gathered by this form.

History of Discrimination against LGBTQ Individuals Accessing Healthcare

Discrimination in the healthcare setting based on sexual orientation and gender identity is a far too prevalent occurrence that is the cause of significant harm to LGBTQ individuals and veterans. A 2009 survey conducted by Lambda Legal provides data illustrating the gravity of this discrimination. Among lesbian, gay, and bisexual respondents, 56 percent reported experiencing discrimination ranging from health care workers being physically or verbally abusive to outright refusals of treatment.⁸ Eight percent of LGB respondents were denied healthcare as a result of their sexual orientation.⁹ Transgender respondents to the Lambda Legal survey experienced even higher rates of discrimination in health care settings. Overall, 70 percent of transgender or gender non-conforming respondents reported experiencing discrimination while receiving care.¹⁰ One-third of these respondents were refused care altogether because of their gender identity.¹¹

A second national survey of transgender people conducted by the National Gay and Lesbian Task Force and National Center for Transgender Equality details the experiences of discrimination among transgender Americans to an even greater degree. Transgender and gender nonconforming people seeking health care were denied equal treatment in doctor's offices and

⁵ VHA Directive 2012-003 (outlining VA policy to provide appropriate and medically necessary care to transgender veteran patients, as well as outlining appropriate treatment of transgender patients).

⁶ VHA Directive 1019 (prohibiting discrimination based on sexual orientation and gender identity in federally conducted and federally assisted programs and activities administered by the Veterans Health Administration).

⁷ *Hospital Visitation*, Deputy Under Secretary for Health for Operations and Management (10N), Department of Veterans Affairs, June 2 2010 (available at: <http://www.diversity.va.gov/programs/files/lgbt/hospital-visit-memo.pdf>) (explicitly including domestic partners within definition of "family" for hospital and other visitation purposes).

⁸ Lambda Legal, "When Healthcare Isn't Caring" (2010) available at http://data.lamdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf at 9-10.

⁹ Lambda Legal, "When Healthcare Isn't Caring."

¹⁰ *Id.*

¹¹ *Id.*

hospitals (24%), emergency rooms (13%), mental health clinics (11%), by EMTs (5%) and in drug treatment programs (3%).¹² Discrimination reported among transgender people of color is especially high. Nearly one in five African American respondents reported being refused treatment, and six percent reported being physical attacked in a doctor's office.¹³ Nearly one in three Latino respondents reported unequal treatment by a doctor or hospital.¹⁴ 36 percent of American Indian respondents were refused medical care.¹⁵ These figures are only some of the findings regarding discrimination in health care settings reported in the survey, but paint a very clear picture of the discrimination faced by the transgender community.

Individual stories of health care discrimination lay bare the results of these extraordinarily high rates of discrimination against LGBTQ patients – and transgender patients in particular. The tragic reality is that discrimination against LGBTQ people solely because of their sexual orientation or gender identity results in undue hardships that were likely preventable.

Recommendations

This form can be updated to include “Sexual Orientation” and “Gender Identity” in Question 8 as bases for a civil rights discrimination claim without undermining or compromising the information gained from VA Form 10-0381. The Secretary of Veterans Affairs has the authority to change this form as granted by 5 U.S.C § 301 and 38 U.S.C. § 501.¹⁶

The regulations governing this form explicitly prohibit discrimination in Veterans Health Administration medical services on the bases of race, color, national origin,¹⁷ and disability.¹⁸ However, these enumerated groups do not make up a closed list of the bases of discrimination recognized by the Department, as Question 8 permits complainants to report discrimination based on the additional bases of sex, age, and reprisal, despite these bases not being listed in the governing regulation. Therefore, failing to include “sexual orientation” and “gender identity” as protected groups within the regulations governing this form is not grounds to preclude them from being included as bases for a civil rights discrimination complaint on the form.

In turn, directives and other policy memoranda issued by the Department and the VHA specifically addressing discrimination in healthcare services provide explicit prohibitions against discrimination on the basis of sexual orientation and gender identity.¹⁹ VHA Directive 1019 prohibits discrimination based on sexual orientation and gender identity and expression in federally-conducted and Federally-assisted programs and activities, which covers employment,

¹² Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 73 (2011) (*available at*: http://transequality.org/PDFs/NTDS_Report.pdf).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 5 U.S.C § 301; 38 U.S.C. § 501, Rules and Regulations.

¹⁷ 38 C.F.R. § 18.3 (prohibiting discrimination on the bases of race, color, and national origin).

¹⁸ 38 C.F.R. § 15.130 (prohibiting discrimination on the basis of disability).

¹⁹ VHA Directive 2012-003.

health services, and providers in the vast majority of VHA programs.²⁰ A June 2010 memorandum from the Department provides explicit hospital visitation rights for veterans' same-sex partners and families, using broad definitions of spouse and family that are inclusive same-sex spouses and the families of LGBTQ veterans.²¹ Finally, VHA Directive 2012-003 outlines responsibilities and expectations of VHA medical staffers in their treatment of transgender and intersex veteran patients.²² The document's purpose is stated to be, "establish[ing] policy regarding the respectful delivery of health care to transgender and intersex Veterans who are enrolled in the Department of Veterans Affairs (VA) health care system or are otherwise eligible for VA care."²³ These internal policy documents provide clear and explicit protections for LGBTQ veterans accessing or seeking to access VHA services and programming.

Omitting "Gender Identity" and "Sexual Orientation" as bases for a civil rights discrimination complaint in VA Form 10-0381 results in veterans being unable to report the discriminatory treatment prohibited in VHA Directives 2012-003 and 1019, and the June 2010 VA memorandum on hospital visitation. This omission means that LGBTQ veterans subjected to discriminatory treatment in access to VHA medical services or employment may never have their complaint heard or grievance remedied. It also may result in LGBTQ veterans avoiding, delaying, or being denied medical services, employment, or other essential programming. Updating VA Form 10-0381 to include sexual orientation and gender identity as bases for a complaint will help avoid these negative outcomes while making the form consistent with VHA policy governing nondiscrimination in provision of services and employment.

We respectfully recommend that the Veterans Health Administration update VA Form 10-0381 to include "Sexual Orientation" and "Gender Identity" as bases for a civil rights discrimination complaint. Because the regulations governing this form do not provide a closed list of grounds for complaint and VHA policy explicitly prohibits discrimination on the basis of sexual orientation and gender identity in the provision of VHA medical services, employment, and programming, this form does not require statutory or regulatory changes in order to be modernized. We commend the Veterans Health Administration and Department of Veterans Affairs for its work, and look forward to the final draft of this form.

We are happy to provide your office with any additional information or clarification that you might need. Please contact Michael Porcello (mporcello@familyequality.org, 202-496-1285) in our Washington, D.C. office with any questions.

²⁰ VHA Directive 1019.

²¹ *Hospital Visitation*, Deputy Under Secretary for Health for Operations and Management (10N), Department of Veterans Affairs, June 2 2010 (available at: <http://www.diversity.va.gov/programs/files/lgbt/hospital-visit-memo.pdf>).

²² VHA Directive 2012-003.

²³ In addition, the directive ensures access to specific transgender healthcare services, including, "medically necessary care . . . including hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex reassignment surgery." *Id.* at 2.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gabriel Blau', enclosed within a light gray rectangular border.

Gabriel Blau
Executive Director
Family Equality Council