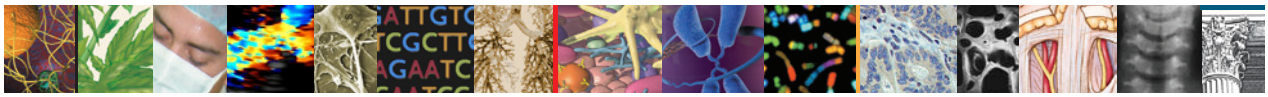

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Perspective

The Future of Transgender Coverage

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In tandem with the growing visibility and acceptance of transgender people in the United States, we have seen a rapid increase in insurance coverage for health care services related to gender transition. Despite ongoing court battles over federal nondiscrimination protections for transgender people and uncertainty over the future of the Affordable Care Act (ACA), this trend is likely to continue: Medicare, many state-regulated private plans, some state Medicaid programs, and an increasing number of employer-sponsored plans now cover transition-related care for transgender people. These changes are driven by a growing expert consensus on the medical necessity of gender transition, new legal interpretations prohibiting insurance discrimination against transgender people, and mounting evidence that transgender-inclusive coverage is cost-effective.

Transgender people are those whose gender identity — their innate, deep-seated knowledge of their own gender — differs from that typically associated with the sex they were assigned at birth. In the United States today, there are approximately 1.4 million transgender adults (0.6% of the population) and 150,000 transgender teens 13 to 17 years of age.[1]

As a small, poorly understood population, transgender people frequently encounter discrimination that includes mistreatment by health care providers, rejection by employers, and harassment in restrooms and other places of public accommodation.[2] These experiences exacerbate health disparities such as high rates of depression, anxiety, exposure to violence, and HIV infection. Discrimination and disparities are particularly acute for low-income transgender people, transgender people of color, and others at the intersections of multiple marginalized communities.

The *Diagnostic and Statistical Manual of Mental Disorders* uses the term gender dysphoria to describe the clinically significant distress that, for many transgender people, accompanies a profound misalignment between gender identity and assigned sex at birth. The current standard of care for treating gender dysphoria is gender transition, which may include mental health counseling, hormone therapy, and reconstructive surgeries affecting primary and secondary sex characteristics.[3]

Every major expert medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people and has called for health insurance coverage for treatment of gender dysphoria (a compilation of these statements is available from Lamb-

da Legal at http://www.lambdalegal.org/sites/default/files/publications/downloads/ll_trans_professional_statements.rtf_.pdf). Until recently, however, most payers categorically excluded coverage of any service or procedure related to gender transition. Indeed, before the ACA, many carriers refused to insure transgender people at all, arguing that being transgender constituted a preexisting condition.

This landscape began to shift in 2012, when the California Department of Insurance promulgated a regulation clarifying the intent of a 2005 state law prohibiting health insurance discrimination based on gender identity. The regulation prohibits categorical exclusions of coverage for health care services related to gender transition if these services are covered for other conditions. This definition underscores that gender-related bodily function and appearance are of equal concern to transgender and cisgender (nontransgender) people: services that may be part of gender transition for transgender people — such as hormone therapy, breast reconstruction, hysterectomy, vaginoplasty, or phalloplasty — are regularly covered for cisgender people for indications including endocrine disorders, cancer treatment or prevention, intersex conditions, and treatment after traumatic injury.

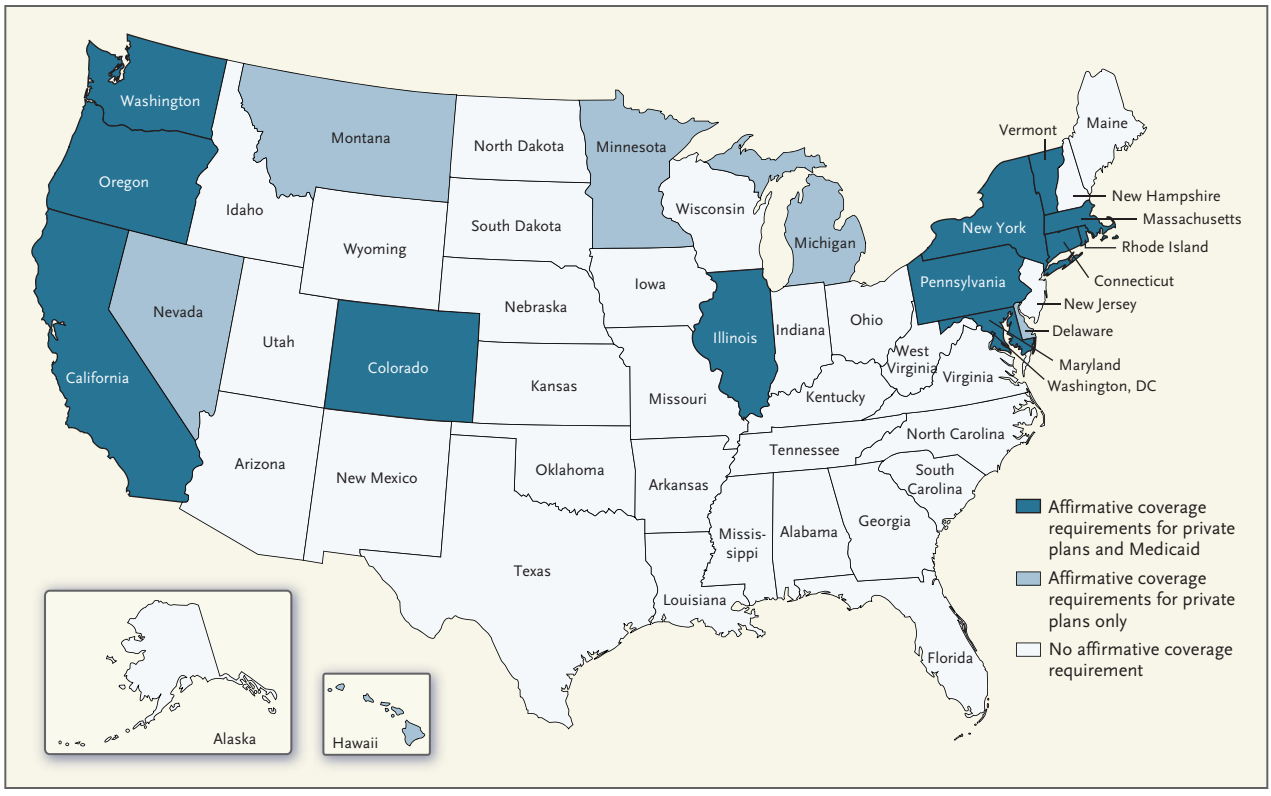
Two years later, an independent appeals board within the Department of Health and Human Services (HHS) ruled that Medicare's long-standing exclusion of transition-related surgeries was no longer justified in light of evidence supporting their effectiveness in treating gender dysphoria. A 2016 National Coverage Analysis from the Centers for Medicare and Medicaid Services confirmed that Medicare covers care related to gender transition, including surgeries, according to individual assessments of medical necessity.

The ACA is also affecting the availability of transition-related coverage. Section 1557 of the ACA bans discrimination on the basis of sex, and in May 2016, HHS issued a regulation interpreting this provision as encompassing discrimination based on gender identity. Section 1557's sex-discrimination protections, which are based on Title IX of the Education Amendments of 1972, apply to all health system entities that receive federal funds, including participants in Medicare, Medicaid, or a health insurance marketplace. Like California's law, the federal regulation does not require health plans to cover any specific service; rather, it prohibits plans from excluding a service related to gender transition for transgender people when the same service is covered for cisgender people.

On December 31, 2016, a federal judge in Texas issued a nationwide preliminary injunction enjoining federal enforcement of the regulation's protections for transgender people. According to the court, the definition of sex in Section 1557 does not encompass gender identity, implying that HHS exceeded its authority by adopting regulations that explicitly protect transgender people.

Other courts are also grappling with the degree to which federal sex-nondiscrimination laws expressly protect transgender people. In late 2016, the Supreme Court announced that it would hear *G.G. v. Gloucester County School Board*, which concerns the applicability of Title IX's sex-discrimination protections to the rights of transgender students. In March 2017, however, the Court remanded this case back to the Fourth Circuit Court of Appeals for further consideration, after the Trump administration rescinded Obama-era guidance interpreting Title IX as prohibiting discrimination on the basis of gender identity. The case is expected to return to the Supreme Court within the next year or two, but the delay means ongoing uncertainty about the degree to which federal sex-nondiscrimination laws extend to gender identity. The fate of cases brought by transgender people under Section 1557 remains uncertain as well, and similar questions affect cases brought under Title VII of the federal Civil Rights Act, which has been interpreted as protecting transgender employees from sex discrimination on the job, including transgender-related exclusions in employee benefits.

Some employers have seized on this uncertainty as an opportunity to double down on transgender exclusions. The state of Wisconsin, for instance, resurrected the exclusion in its employee-benefit plans immediately after the injunction, cutting off coverage for transition-related care even though Section 1557's requirements remain in force. Many other employers, however, are continuing to expand availability of transgender-inclusive coverage. Private-sector employers seeking to attract diverse workers — especially millennials, who are much more likely than older generations to embrace transgender issues — are rapidly modernizing their benefits. In 2002, no Fortune 500



State Coverage for Transition-Related Care.

company offered employee coverage for gender transition, but by the end of 2016, 50% did.[4] Many public employers, including public universities, municipalities, counties, states, and the Federal Employees Health Benefits Program, now cover transition-related care.

Of particular note, given the Trump administration's proposed deference to states on transgender issues, individual state regulators have also taken steps to ensure that transgender people have access to care related to gender transition. Since 2012, a total of 18 states (including California) and the District of Columbia have interpreted their own laws as prohibiting private plans from discriminating against transgender people, and 12 states and the District of Columbia have updated their Medicaid rules to affirmatively cover transition-related care (see map).

To date, the experience of employers and states shows that these reforms impose minimal or no new costs. A cost-utility analysis prompted by Massachusetts' expansion of transgender-inclusive coverage, for instance, determined that covering transition-related services is cost-effective, particularly given the high financial and human costs associated with untreated gender dysphoria.[5] An economic-impact analysis of California's regulation found that removing transgender exclusions had an "immaterial" effect on premium costs, leading the California Department of Insurance to conclude that "the benefits of eliminating discrimination far exceed the insignificant costs"; those benefits include improved health outcomes among transgender people, such as reduced suicide risk, lower rates of substance use, and increased adherence to HIV treatment.

Transgender people's need for care that affirms their true selves and promotes their health and well-being parallels all Americans' desire for high-quality, affordable health insurance coverage and health care. As assaults on nondiscrimination protections for transgender people and attacks on the ACA continue, critical federal protections should be defended at all costs. But regardless of the outcome of these battles, I believe the wave of positive change transforming transgender Americans' access to health insurance and care will continue to grow.

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