



Comments Re: Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals, Final Rule, RIN 0790-AJ37
September 2019

The National Center for Transgender Equality (NCTE) appreciates the Department of Defense's work to adopt and implement a modernized policy for updating gender data in the Defense Enrollment Eligibility Reporting System (DEERS) for retirees, dependents, and contractors. The 2016 Interim Final Rule adopted an approach consistent with those of numerous federal and state agencies. This approach helps protect individuals' privacy and avoid unnecessary confusion, embarrassment, and harassment that can be caused when an individual's record does not match their deeply-held gender identity and the way they live their everyday lives.

DOD should finalize procedures that are no more restrictive than the Interim Final Rule for retirees, dependents, contractors, and other DOD persons. DOD should not extend the current ban on transgender service members to restrict DEERS updates for retirees, dependents, contractors, or other DOD persons, and should not codify any portion of the current service member ban in this Final Rule in light of ongoing litigation.

I. DOD should finalize provisions permitting gender designation changes for retirees and dependents.

The provisions of the final rule codified at 32 C.F.R. § 161.23(k) are similar to numerous other existing federal policies for changing gender markers, such as those for federal civilian personnel records, Social Security records, U.S. passports, and consular reports of birth abroad. The vast majority of states provide similar procedures for driver's licenses and state identification cards,ⁱ as well as for birth certificates.ⁱⁱ

Having updated records consistent with an individual's gender identity and the way they live their everyday life is critical, because incongruent records can effectively disclose an individual's transgender status—leading to embarrassment, harassment, or discrimination—or simply cause unnecessary confusion. The potential problems caused for DOD individuals whose records do not match their gender identity are illustrated by findings from the 2015 US Transgender Survey, which surveyed nearly 28,000 transgender adults in all 50 states. Respondents who had presented identification with a name or gender that did not match their gender presentation reported a range of negative reactions from businesses and government officials. One-quarter (25%) of respondents in this situation reported having been verbally harassed after showing incongruent identification, 9% reported having been asked to leave, and 2% reported being physically assaulted.ⁱⁱⁱ

II. DOD Should Not Expand the Transgender Service Member Ban to Retiree, Dependent, Contractor, or Civilian DOD ID Document Changes.

DOD's current ban on transgender service members, as set forth in DTM 19-004, expressly applies only to "accession, retention, separation, in-service transition, and medical care for Service members and applicants."^{iv} So long as it remains in effect, this ban generally prohibits current service members from changing their gender marker in DEERS.^v However, this policy has no application to persons other than current service members, and should not be applied to retirees, dependents, contractors, or civilian personnel.

Doing so would raise numerous constitutional issues, as federal courts have repeatedly held that prohibiting individuals from updating official records of obtaining accurate identification because of their transgender status may violate guarantees of privacy^{vi} and equal protection.^{vii} Whatever may be the case with respect to the current service member policy, such restrictions on persons other than current military service members would not be subject to any form of judicial deference.^{viii}

Moreover, restricting gender changes for DOD contractors or civilian personnel would undermine or violate existing EEO protections, including those established by Title VII of the Civil Rights Act of 1964,^{ix} Executive Order 11246,^x Executive Order 11478,^{xi} the Civil Service Reform Act,^{xii} and DOD EEO regulations and policies.^{xiii}

III. DOD Should Not Codify Policy Regarding ID Gender Changes for Current Service Members in Light of Ongoing Litigation.

While the Interim Final Rule incorporated by reference then-existing DOD procedures for DEERS gender changes for current military service members, codifying the current ban on DEERS gender changes for service members would be inappropriate. The current service member policy is the subject of several ongoing lawsuits that may not be resolved for some time.^{xiv} Codifying any portion of the challenged policy would likely generate unnecessary and costly litigation, and may require additional rulemaking in the future pending the outcome of the current legal challenges.

Please feel free to contact NCTE Director of Policy, Harper Jean Tobin, Esq., at hjtobin@transequality.org or (202) 804-6047 with any questions regarding these recommendations.

ⁱ See, e.g., American Ass'n of Motor Vehicle Administrators, *Resource Guide on Gender Designation on Driver's Licenses and Identification Cards* (Sept. 2016), http://www.aamva.org/GenderDesignationOnDLID_Sept2016.

ⁱⁱ National Center for Transgender Equality, *Summary of State Birth Certificate Gender Change Laws* (July 2019), <https://transequality.org/sites/default/files/docs/id/Summary%20of%20State%20Birth%20Certificate%20Laws%20July%202019.pdf>.

ⁱⁱⁱ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*, 89-90. Washington, DC: National Center for Transgender Equality.

^{iv} DOD Directive-Type Memorandum 19-004, *Military Service by Transgender Persons and Persons with Gender Dysphoria*, at 1 (Mar. 12, 2019). The DTM flowed from Presidential Memoranda of August 25, 2017 and March 23,

2018 and from a Secretary of Defense Memorandum of February 22, 2018. None of these issuances discussed retirees, dependents, contractors, or civilian DOD personnel.

^v DTM 19-004, at 9. Certain “exempt” service members may update their gender marker in DEERS under the same procedures provided by the previous policy, *id.* at 8, although DOD has reserved the right to reverse this exemption “should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy.” DOD *Report and Recommendations on Military Service by Transgender Persons* 43 (Feb. 2018).

^{vi} See, e.g., *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (holding that individuals have a constitutional right to privacy concerning transgender status); *Love v. Johnson*, 146 F.Supp.3d 848, 855 (E.D. Mich. 2015); (holding privacy concerns regarding transgender status “cut at the ‘very essence of personhood’ protected under the substantive component of the Due Process Clause”); *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp.3d 327, 333 (D.P.R. 2018) (“there are few areas which more closely intimate facts of a personal nature than one’s transgender status”).

^{vii} See, e.g., *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (holding anti-transgender discrimination subject to heightened scrutiny under the Equal Protection Clause); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017) (same); *Dodds v. U.S. Dept. of Education*, 845 F.3d 217 (6th Cir. 2016) (same); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (same); *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018) (finding the practice of denying transgender individuals’ applications to change the sexes listed on their birth certificates violated Equal Protection Clause); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) (anti-transgender discrimination subject to heightened scrutiny); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (same); *Adkins v. City of New York*, 143 F.Supp.3d 134 (S.D.N.Y. 2015) (same).

^{viii} See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981) (applying deference doctrine to “professional military judgments” about “the composition, training, equipping, and control of a military force”); *Brown v. Glines*, 444 U.S. 348, 354 (1980) (applying deference doctrine to policies toward “members of the military services”); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (tying military deference doctrine to the “specialized society” necessary among current service members); *id.* at 758 (describing deference as focused on “members of the military” and a “fundamental necessity for obedience, and the consequent necessity for imposition of discipline” during military service).

^{ix} See *Complainant v. Dep’t of Veterans Affairs*, EEOC Appeal No. 0120133123 (Apr. 16, 2014) (a sex discrimination allegation involving the failure to revise agency records pursuant to changes in gender identity stated a valid Title VII claim).

^x Exec. Order 11246 § 202 (prohibiting discrimination based on gender identity in federal contracts).

^{xi} Exec. Order 11478 § 1 (prohibiting discrimination based on gender identity in federal civilian employment).

^{xixii} See 5 U.S.C. § 2302; 5 C.F.R. § 900.603.

^{xiii} See, e.g., AR 690-12, Civilian Personnel Equal Employment Opportunity and Diversity.

^{xiv} *Stockman v. Trump*, No. 5:17-cv-01799-JGB-KKx, filed Sept. 5, 2017 (C.D. Cal); *Karnoski v. Trump*, No. 2:17-cv-01297-MJP, filed Aug. 29, 2017 (W.D. Wash.); *Stone v. Trump*, No. 1:17-cv-02459-MJG, filed Aug. 28, 2017 (D. Md); *Doe v. Trump*, No. 1:17-cv-01597-CKK, filed Aug. 9, 2017 (D.D.C).