



April 8, 2016

Dear Health Care Facility Administrator,

We are writing to you as the manager of a public hospital or health care facility in North Carolina. A bill recently passed by the North Carolina General Assembly, House Bill 2, purports to impose requirements on your agency that violate federal law and could subject your agency to federal lawsuits, investigations, and loss of federal funding. House Bill 2 is the subject of ongoing litigation, and the North Carolina Department of Justice has declined to defend it in court.

We share the following information so that your agency is fully informed when making important decisions about how best to treat patients, clients, visitors, staff, and other individuals in your facilities with dignity and respect. Allowing transgender individuals to access restrooms and other facilities consistent with their gender identity is not only in the best interest of individuals' health, it is also required by federal law.

Discrimination against transgender patients is harmful and counter to the mission of health care

Excluding transgender people from facilities that correspond to their gender identity sends a message to transgender people and everyone around them, including staff, that there is something wrong with transgender people and that they are not entitled to the same dignity as other people. In a health care context, this is particularly harmful because such treatment can exacerbate gender dysphoria, a medical condition that many transgender people experience and for which the approved treatment is to live in accordance with their gender identity.ⁱ Being forced to use facilities inconsistent with their innate identity can cause acute stress and anxiety for patients, aggravate other medical conditions, and contribute to harassment, depression, and suicidality.

We all care about privacy and safety in restrooms. Allowing transgender people to use restrooms appropriate for their gender identity does not jeopardize, but rather protects, privacy and safety. North Carolina already has laws against sexual assault or invading others' privacy in restrooms. To the extent that any person feels uncomfortable using a restroom with another person, private facilities can be made available upon request, so long as no one is forced into separate facilities.

Refusing to allow transgender patients to use facilities consistent with their gender identity violates federal anti-discrimination law and risks litigation and loss of federal funds

House Bill 2 requires state and local government agencies to discriminate against transgender patients, staff, and other individuals. However, compliance with House Bill 2 creates serious legal and fiscal risks for public health care entities because it conflicts with federal laws, including the Affordable Care Act of 2010 (ACA). Section 1557 of the ACA prohibits sex discrimination in all federally funded health programs and activities.ⁱⁱ This includes entities that receive grants or payments through Medicare, Medicaid, or other programs of the U.S Department of Health and Human Services (HHS).

Federal courts and proposed HHS regulations interpret this prohibition to include discrimination based on gender identity, transgender status, or gender transition.ⁱⁱⁱ Moreover, HHS's proposed regulation requires all health care programs to "treat individuals consistent with their gender identity," including with respect to access to restrooms and other facilities.^{iv} Facilities that have refused to treat patients in a manner consistent with their gender identity have faced lawsuits in federal court and administrative investigations by HHS.^v

With regard to your employees, Title VII of the Civil Rights Act of 1964 prohibits sex discrimination by state and local government employers.^{vi} The U.S. Justice Department and Equal Employment Opportunity Commission have recognized that Title VII prohibits gender identity discrimination and requires employers to provide equal access to workplace restrooms and changing facilities consistent with an employee's identity.^{vii} Private employers have faced lawsuits for denying such restroom access to transgender employees, including by the EEOC,^{viii} and the Justice Department has also sued a state university for gender identity discrimination.^{ix} Federal courts have also held that discrimination against transgender individuals violates the Equal Protection Clause of the U.S. Constitution.^x In addition, the Occupational Safety and Health Administration (OSHA) has also said that restroom restrictions for transgender workers can threaten their health and safety,^{xi} opening employers to OSHA complaints.

Thus, public health care agencies in North Carolina that engage in discriminatory practices pursuant to House Bill 2 would violate federal law. While House Bill 2 includes no enforcement mechanisms, violations of the ACA and Title VII could result in federal litigation by patients, family members, or employees, or the U.S. EEOC or Justice Department, as well as federal administrative investigations and potential loss of federal funding.

We hope this letter is helpful in addressing some of the questions and concerns raised by House Bill 2. You may wish to consult other resources such as *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community*^{xii} or *Creating Equal Access to Quality Health Care for Transgender Patients*^{xiii} for information about how to provide a safe and supportive environment for all patients and employees and ensure compliance with federal laws and regulations. If you have any questions, please feel free to contact Harper Jean Tobin at the National Center for Transgender Equality at hjtobin@transequality.org or (202) 745-2303.

Thank you for the work you do every day to ensure quality health care for all.

Sincerely,

A handwritten signature in black ink, appearing to read 'HJTobin', with a stylized flourish at the end.

Harper Jean Tobin
Director of Policy
National Center for Transgender Equality

ⁱ See, e.g., *De'Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (recognizing gender dysphoria, then known as “gender identity disorder,” as a serious medical condition for which generally accepted protocols include living as the gender with which the patient identifies).

ⁱⁱ 42 U.S.C. § 18116.

ⁱⁱⁱ *Rumble v. Fairview Health Serv.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

^{iv} Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54219.

^v E.g. *Rumble*, No. 14–cv–2037; Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services, Office for Civil Rights and the Brooklyn Hospital Center, Transaction No. 12-147291 (July 2015), <http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/vra.pdf>.

^{vi} 42 U.S.C. § 2000e-2.

^{vii} Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395 (Apr. 1, 2015).

^{viii} *EEOC v. Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646-ADM-SER (D. Minn. filed June 4, 2015, settled Jan. 20, 2016).

^{ix} *United States v. Se. Okla. State Univ.*, No. civ–15–324–c, 2015 WL 4606079 (W.D. Okla. Jul. 10, 2015).

^x *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

^{xi} U.S. Occupational Safety & Health Admin., *A Guide to Restroom Access for Transgender Workers* (2015), <https://www.osha.gov/Publications/OSHA3795.pdf>.

^{xii} Joint Comm’n, *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community* (2014), <http://www.jointcommission.org/assets/1/18/LGBTFieldGuide.pdf>.

^{xiii} New York City Bar, Lambda Legal & Human Rights Campaign, *Creating Equal Access to Quality Health Care for Transgender Patients: Transgender-Affirming Hospital Policies* (2013), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_transgender-affirming-hospital-policies.pdf.