
TOPIC

Accommodations Concerning DoD-Mandated Gender Dysphoria Training and the Provision of Medical Care in Certain Contexts and Referring Patients Diagnosed with Gender Dysphoria

Text of the decision

As part of implementation of the DoD policy allowing members diagnosed with gender dysphoria members to serve, military medical providers are required to treat and take specialized training on the treatment of gender dysphoric patients. A military medical provider (hereinafter "Provider") assigned to a United States Air Force (USAF) base, objected on conscience grounds to: (1) providing medical treatment services to gender dysphoria patients, (2) referring members diagnosed with gender dysphoria to other providers, and (3) completing the specialized medical personnel training for treatment of gender dysphoria patients.

Refusal to provide medical treatment services to members diagnosed with gender dysphoria based on an accommodation rooted in a religious conviction will be supported. Refusal to refer or complete mandatory training regarding gender dysphoria will not be upheld. However, the Air Force Surgeon General (AF/SG) may make the decision that providers who will not be providing care to members diagnosed with gender dysphoria be exempted on religious grounds from referral and training requirements unless AF/SG determines that training is a necessary part of clinical training for all medical providers.

Background

Provider is a staff physician in a small base clinic. Provider signed a "Staff Rights" memorandum[1] wherein she invoked her right "not to participate in procedures/patient care activities that are contrary to [her] moral, ethical, religious, or cultural beliefs," including, among other rights: (a) induced abortion (medical/surgical, including prescribing and referral), (b) contraceptive services, (c) gender dysphoria transition medicine (including referral or prescribing), and (d) euthanasia.[2] Provider acknowledged she remains obligated to provide care "when a patient's life is in jeopardy (the patient will not be abandoned)" and, under those circumstances, would "withdraw only when alternate sources of care are available."[3]

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[1] Staff Rights memoranda are related to refusal of care. See, e.g., Daniel Meier, "The refusal of care", Heathcare Risk Management Review, 26 January 2015, at https://www.hrmronline.com/article/the-refusal-of-care (briefly summarizing the modern refusal of care movement, beginning with HIV/AIDS scares in the 1980s through Ebola outbreaks and American Medical Association and American Dental Association treatment of the topic).

[2] The AF/JAA legal advisor to the AF/SG confirmed that Air Force medical providers do not perform euthanasia.

[3] As there are existing policy guidelines on how to handle a provider's request for (a) and (b), and military medical providers do not perform (d), this legal review is limited to advising AF/SG on Petitioner's request for (c).

Subsequently, base clinic personnel were notified of the SecAF-directed gender dysphoria training. Provider notified her chain of command, via e-mail, she would not attend the training based on conscience grounds that prevent her from participating in medical services that would be involved in the medical treatment of patients with gender dysphoria, including service as a primary care physician. She acknowledged she would have a responsibility to treat patients, including gender dysphoria patients, for "acute medical illness that arises."

In subsequent discussions with leadership regarding referrals for medical treatment related to gender dysphoria, Provider indicated her feelings of discomfort with directly referring patients requiring medical treatment related to gender dysphoria. "From both a moral and religious[4] standpoint," Provider writes, "referrals for gender transition services would constitute direct material participation in the treatment itself." Provider clarifies her willingness to work with members diagnosed with gender dysphoria for medical conditions such as diabetes or heart disease but again refuses to be involved in any care related to gender transition such as prescribing cross-sex hormone therapy. Provider began making arrangements to establish an informal process with other colleagues to refer the patient to them so they can make appropriate referrals the patient requests.

Provider's supervisor acknowledged receipt of the "Staff Rights" memorandum but proceeded with plans to train all clinic staff members, including Provider. Provider filed a complaint with her U.S. senator, alleging, "My leadership is implementing gender dysphoria training. I have also heard the Air Force will be opening larger hospitals up for gender dysphoria medicine. As a physician, I am expected to complete training related to facilitating care for these individuals, as well as provide primary care and referral for services throughout my career. To participate in any way in this process would violate some of my deepest held moral convictions…." Provider added she was informed by her commander, that "any request for exceptions to training or gender transition referrals on the grounds of conscience or other will be denied and she has explicitly stated to me in our last meeting that failure to complete the training will result in official written orders that I would then be required to follow or face punishment under the UCMJ."[5]

Discussion

Department of Defense Policy for Members with Gender Dysphoria

On 30 June 2016, the Secretary of Defense released Directive-Type Memorandum (DTM) 16-005, "Military Service of Transgender Members," which "[e]stablishes policy, assigns responsibilities, and prescribes procedures for the standards of retention, accession, separation, inservice transition, and medical coverage for transgender personnel serving in the Military Services."

An attachment to DTM 16-005 provides detailed policy in each of the areas listed above, directing:

[4] Several religions take positions adverse to gender dysphoria, including (in alphabetical order) some Christian sects, some Hindu, some Islamic sects, and Orthodox and Hasidic Judaism.
[5] Provider's chain of command disputed referring to potential UCMJ action in its response to the Congressional inquiry.

> Not later than October 1, 2016, the USD(P&R) will issue further guidance on the provision of necessary medical care and treatment to transgender Service Members. Until the issuance of such guidance, the Military Departments and Services will handle requests from transgender Service members for particular care or to transition on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.[6]

In paragraph 6 of the attachment, SecDef detailed "Education and Training" requirements: "The USD(P&R) will expeditiously develop and promulgate education and training materials to provide relevant, useful information for transgender Service members, commanders, the force, and medical professionals regarding DoD policies and procedures on transgender service."

SecDef also issued DoDI 1300.28, *In-Service Transition for Transgender Service Members*, on 30 June 2016, with an effective date of 1 October 2016. DoDI 1300.28 reiterated the requirement that USD(P&R) develop and promulgate training, including specialized training for military medical providers, consistent with DoD's policy on members with gender dysphoria.[7] On 29 July 2016, the Assistant Secretary of Defense for Health Affairs (ASD(HA)) issued a memo to the Director of the Defense Health Agency (DHA) and the assistant secretaries for manpower and reserve affairs for each service titled "Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members." The memo mandates the "Military Health System (MHS) to either provide or arrange consultation for medically necessary care..."[8] for members diagnosed with gender dysphoria.

Paragraph 6 of the "General Provisions" section of the memo contains a "conscience clause":

> *In no circumstances will a provider be required to deliver care that he or she feels unprepared to provide either by lack of clinical skill or due to ethical, moral or religious beliefs. However, referral to an appropriate provider or level of care is required under the circumstances.* (*emphasis added*)

Paragraph 2 of the "Service and DHA Requirements and Responsibilities" section of the memo states:

> Each Service and DHA shall develop an education and training plan for both privileged and non-privileged medical personnel no later than November 1, 2016. This plan should detail how the Service will ensure familiarity with applicable Department policies and requirements, evidence-based practice guidelines and standards of care, and any Service-specific policies.[9]

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[6] Directive-Type Memorandum (DTM) 16-005, "Military Service of Transgender Members," 30 June 2016, paragraph 4.
[7] DoDI 1300.28, *In-Service Transition for Transgender Members*, 30 June 2016, paragraph 2.l(b).
[8] Assistant Secretary of Defense Memorandum, Subject: "Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members," 29 July 2016, General Provisions.
[9] AF/JAA asked the DoD Office of General Counsel if DoD expected to set policy for consideration of religious accommodation requests by members requesting to be excused from gender dysphoria training. DoD OGC opined the Services should "apply the normal rules on accommodation of religious beliefs to adjudicate the request to be excused from the required training."

Air Force Policy on Members with Gender Dysphoria

On 3 August 2016, the Secretary of the Air Force (SecAF) and Chief of Staff of the Air Force (CSAF) released a memo titled "Air Force Policy on Military Service by Transgender Airmen," which established an Air Force specific policy and implementation timeline for the Air Force to align with the requirements of DTM 16-005 and DoDI 1300.28. On 6 October 2016, SecAF and CSAF issued *Air Force Policy Memorandum for In-Service Transition for Airmen Identifying as Transgender* or AFPM2016-36-01. AFPM2016-36-01 substantially reflected the policy and procedural guidance outlined in DoDI 1300.28 with minor deviations that established service-specific policy.

In March 2017, AF/Al distributed the required total force training presentation, "Transgender Awareness Training for Military Personnel and Civilians that Supervise Military Personnel," with the requirement that commanders (or equivalent) provide the briefing to all of their Airmen, no later than 30 June 2017.

Medical Training Requirement

On 7 March 2017, the Air Force Medical Operations Agency (AFMOA) commander released a memo titled "AFMS Transgender Training Modules" to medical community leadership, which outlines the plan to provide specialized medical training to AFMS members. AFMOA created, in conjunction with ASD(HA), a set of training modules for AFMS members. The assigned modules were to be completed by the entire medical community no later than 31 March 2017. AFMS personnel were required to complete the following modules:

> <u>All AFMS personnel were required to complete:</u>
> Transgender Module 1: *Introduction to Policy Guidance and Concepts* (TGHC1)[10]
> AF Module 3: *Transgender Air Force Medicine* (TGHC6)[11]
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> <u>Non-Privileged personnel (anyone who may have patient contact) were also required to complete:</u>
> Transgender Module 2a: *Evidence Based Practice Guidelines and Standards of Care* (TGHC2)[12]
>
> <u>Privileged personnel (and all registered nurses) were also required to complete:</u>
> Transgender Module 2b - *Evidence Based Practice Guidelines and Standards of Care Primary Care* (TGHC3)[13]

[10] This training provides an overview of the DoD policies related to healthcare, Health Affairs guidance for treatment of gender dysphoria, definitions of terms related to members diagnosed with gender dysphoria, and common treatments and procedures.
[11] The *AFMS Transgender Training* is very similar to the AF/A1 total force training, *Transgender Awareness Training/or Military Personnel and Civilians that Supervise Military Personnel.*
[12] This training provides information about the continuum of treatments available, common barriers to obtaining healthcare, strategies for creating an effective clinical environment currently available standards of care and evidence-based clinical practice guidelines.
[13] This training provides an overview of the guidelines for primary and gender-affirming care of persons with gender dysphoria issued by the University of California San Francisco.

Conscience Clause for Medical Providers

AFI 44-102 exempts medical providers from specific actions contrary to religious beliefs,[14] in which the Air Force recognizes the rights of medical personnel to seek relief from performing or assisting in the performance of treatment services to which they object on moral, ethical, religious or professional grounds. Medical personnel who object to providing specified family planning services (e.g., contraceptives, sterilization, etc.) must follow the procedures in Section 4C. Medical personnel who object to performing or assisting in the performance of an abortion may seek relief by following the procedures in paragraph 4.5.[15]

DoD Recognition of Conscience Protection in Treatment of Gender Dysphoria Patients

ASD(HA) recognized the conscience clause applied to the treatment of members diagnosed with gender dysphoria in their memo released on 29 July 2016, which stated, "*In no circumstances will a provider be required to deliver care that he or she feels unprepared to provide either by lack of clinical skill or due to ethical, moral or religious beliefs. However, referral to an appropriate provider or level of care is required under the circumstances.*"[16] (*emphasis added*)

Free Exercise of Religion

The First Amendment of the United States Constitution states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[17] Expounding on the First Amendment, Thomas Jefferson used the famous phrase "separation of church and state" to discuss the "wall" between legislative actions and religious opinions.[18] The United States Supreme Court in *Reynolds v. United States*, in quoting Jefferson, went on to declare, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." [19]

In 1993, the United States Congress passed the *Religious Freedom Restoration Act* (RFRA), made it applicable to the "government," and defined "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United

[14] AFI 44-102, *Medical Care Management,* 17 March 2015 (certified current 3 August 2016), paragraphs 4.5 (abortion), 4.6 (family planning), and 8.4.6.6 (emergency contraception).
[15] The instruction states: "[m]edical personnel who have a personal or moral objection to abortion need not perform or assist in the abortion procedure but are obligated to facilitate timely notification of a willing provider if the patient qualifies for an abortion at a [medical treatment facility]."
[16] *Supra* note 8.
[17] U.S. Const. amend. I.
[18] *Quoted in Reynolds v. United States*, 98 U.S. 145, 164 (1878).
[19] *Id.*

States."[20] On its face, the statute applies to the U.S. Air Force.[21] RFRA states, "Nothing in this chapter shall be construed to authorize any government to burden any religious belief."[22]

Congress passed and later amended the *Enhancement of Protection of Rights of Conscience of Members of the Armed Forces and Chaplains of Such Members*[23] which states:

> (a) Protection of rights of conscience.—(1) Accommodation.-Unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Armed Forces shall accommodate individual expressions of belief of a member of the armed forces reflecting the sincerely held conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such expression of belief as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.[24]

Air Force Instruction 1-1, *Air Force Standards,* states:

> Every Airman is free to practice the religion of their choice or subscribe to no religious belief at all. You should confidently practice your own beliefs while respecting others whose viewpoints differ from your own. Every Airman also has the right to individual expressions of sincerely held beliefs, to include conscience, moral principles or religious beliefs, unless those expressions would have an adverse impact on military readiness, unit cohesion, good order, discipline, health and safety, or mission accomplishment. Your right to practice your religious beliefs does not excuse you from complying with directives, instructions and lawful orders; however, you may request religious accommodation. Commanders and supervisors at all levels must fairly consider requests for religious accommodation…. If it is necessary to deny free exercise of religion or an accommodation request, the decision must be based on the facts presented, must directly relate to the compelling government interest of military readiness, unit cohesion, good order, discipline, health and safety, or mission accomplishment, and must be by the least restrictive means necessary to avoid the cited adverse impact.[25]

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[20] 42 U.S.C. § 2000bb-2(1) (1993).
[21] It is clear from the record that Congress specifically intended RFRA to apply to the military. Hr'g Tr. at 35; *see also* S. Rep. No. 103-111, at 12 (1993) ("Under the unitary standard set forth in [RFRA], courts will review the free exercise claims of military personnel under the compelling governmental interest test."); H.R. Rep. No. 103-88 (l-993) ("Pursuant to [RFRA], the courts must review the claims of prisoners and military personnel under the compelling governmental interest test.")
[22] 42 U.S.C. §2000bb-3(c).
[23] Section 533 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, amended by Section 532 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.
[24] Section 533(c) of Pub. L. No. 112-239 required SecDef to "issue regulations implementing the protections afforded by this section." In the amendment, Section 532(b) of Pub. L. No. 113-66, the requirement was amended to require SecDef to implement regulations "not later than 90 days after the date of enactment of this Act…." DoDI 1300. 17, *Accommodation of Religious Practices Within the Military Services,* incorporated the requirements of Pub. L. No. 112-119, as amended, as an interim change published on 22 January 2014.
[25] AFI 1-1, *Air Force Standards*, 7 August 2012, Incorporating Change 1, 12 November 2014, paragraphs 2.11, 2.11.1 through 2.11.2.

DoDI 1300.17, *Accommodation of Religious Practices Within the Military Services*, states:

> [U]nless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Military Departments will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) of Service members…. This does not preclude disciplinary or administrative action for conduct by a Service member requesting religious accommodation that is proscribed by [the Uniform Code of Military Justice]…. DoD has a compelling government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels…. In so far as practicable, a Service member's expression of sincerely held beliefs (conscience, moral principles, or religious beliefs) may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.[26]

When accommodation would adversely affect the mission, the standard applied turns on whether the service member's exercise of religion[27] is *substantially burdened by the military policy or practice.*[28] A "substantial burden" is one that *significantly interferes with the exercise of religion* as opposed to minimally interfering with the exercise of religion.[29] If the exercise of religion is not substantially burdened, the needs of the requesting service member are balanced against the needs of mission accomplishment.[30] Only if it is determined that the needs of mission accomplishment outweigh the needs of the service member may the request be denied.[31] If the member's exercise of religion is substantially burdened, the request for religious accommodation may be denied only when the military policy, practice, or duty furthers a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.[32]

In resolving requests for accommodation of religious practices, careful consideration of the effect, if any, of approval or disapproval on any compelling governmental interest is essential. DoDI 1300.17 provides that the Military Departments have "a compelling government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit

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[26] DoDI 1300.17, paragraphs 4b.through 4d.

[27] A "religious exercise" under RFRA "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Burwell v. Hobby Lobby Stores, Inc.,* S. Ct. 2751 , 2770 (2014) (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

[28] A substantial burden exists where the government has *considerably* hindered or oppressed *any* sincere religious conduct. *See, e.g., San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d I 024, I 034-35 (9th Cir. 2004) (using the dictionary definition of "substantial burden"). *Contra Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (using First Amendment precedent to conclude that a substantial burden requires a compelled violation of beliefs).

[29] DoDI 1300.17, *supra* n.20 at paragraph 3.e. (emphasis added)

[30] In OpJAGAF 1990/14, 28 February 1990, we underscored multiple U.S. Supreme Court precedents emphasizing the importance of following orders in discussing what happens when a medical provider refuses to examine patients for reasons other than objectively established religious beliefs (recommendation that a board recommendation to discharge be set aside and respondent ordered to active duty for refusal to conduct pelvic and breast examinations objectively based on avoiding temptation rather than firmly established religious beliefs).

[31] DoDI 1300.17, *supra* n.20 at paragraph 4.e.2.

[32] *Id.* at paragraph 4.e.1.

levels."[33] Requests for religious accommodations must be assessed on a case-by-case basis, considering the unique facts; the nature of the requested religious accommodation; the effect of approval or denial on the Service member's exercise of religion; and the effect of approval or denial on mission accomplishment, including unit cohesion.[34]

Delivery of Medical Care to Members Diagnosed with Gender Dysphoria

ASD(HA), in their 29 July 2016 memo, recognized the right of military medical providers to seek relief from the requirement to deliver care to gender dysphoria patients due to ethical, moral or religious beliefs; or, a lack of clinical skill. Provider invoked her right under the ASD(HA) policy to object to the requirement that she personally deliver gender transition medical care to members diagnosed with gender dysphoria on conscience grounds, specifically her religious beliefs. However, Provider limited the scope of her request by providing two situations where she could treat members diagnosed with gender dysphoria in emergency situations and for non-transition related medical care (e.g., heart disease, diabetes, etc.). She explained that she would remain obligated to provide care "when a patient's life is in jeopardy (the patient will not be abandoned)" and, under those circumstances, she would "withdraw only when alternate sources of care are available."

Provider is free to impose exceptions on her conscience request by stating the medical services she will still deliver in light of her conscience objection. The need for acute care for a patient may arise at any time and she, specifically, recognizes she may need to treat a patient, even when it violates the dictates of her conscience, in an emergency situation. She also states she could treat gender dysphoria patients for medical care not related to gender transition.

Provider's request conforms to the ASD(HA) policy and should be granted.[35] To the extent Provider will treat patients diagnosed with gender dysphoria in accordance with her identified exceptions to her religious objections, her commander is empowered to expect Provider to deliver those services under the stated circumstances. As the conscience clause in the ASD(HA) memo addresses this issue, no further accommodation analysis under DoDI 1300.17 is required.

Referral of Gender Dysphoria Members for Gender Transition Medical Care[36]

Provider also requests to be relieved of the requirement to refer patients for transition-related medical care. The ASD(HA) memo states that providers who request not to treat gender dysphoria patients on conscience grounds are still required to refer patients to an appropriate provider or level of care required under the circumstances.

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[33] *Id.* at paragraph 4.h.
[34] *Id.* at paragraph 4.i.
[35] ASD(HA) recognized that medical providers may want to not participate in transitional medical care for gender dysphoria patients because of their conscience. The AF recognizes a provider's ability to do so by submitting a statement to their SGH, as outlined in AFI 44-102, *Medical Care Management,* paragraph 4.5.
[36] "In the act of medical practice, referral is the transfer of a patient's care from one physician or clinician to another. It involves one physician recognizing that a patient under his care needs some expertise or skills that can be found in another physician. This other physician may be working in the same institution with the referring physician or in a different institution entirely." *See* "The Practice of Medical Referral: Ethical Concerns"" Anyanwu E. B., Abedi Harrison O., Onohwakpor Efe A., *American Journal of Public Health Research,* Vol. 3, No. 1, 31-35 (2015).

Provider has stated she is comfortable with the informal procedure she and her colleagues worked out when it comes to treatment of patients diagnosed with gender dysphoria. In this informal procedure, when Provider has a patient diagnosed with gender dysphoria that needs a referral for care in which she finds she cannot participate, she turns the patient over to a colleague to make the referrals for the needed medical care. Provider is comfortable with this informal process because it does not require her to make a medical referral,[37] which she considers to be providing care in violation of his conscience.

While allowing Provider to continue to use the informal referral process has initial appeal as a practical solution, it has significant limitations. First, ASD(HA) considered this issue in the policy memo and expressly rejected the position that the conscience clause included relief from making medical referrals. Second, this informal process requires another medical provider to take Provider's assigned patients, which places a burden on other medical providers to accommodate Provider. It is not clear that the medical providers who are to take on Provider's patients would do so willingly. Third, while the informal process may work at the small clinic, it may not work in other small clinics or even large medical treatment facilities, where mission requirements may not make shifting work feasible. Fourth, granting Provider this request would set precedent for the Air Force in a way that could restrict AF/SG decisions in this area in the future. Fifth, as discussed in the next paragraph, requiring Provider to make medical referrals is not a *substantial burden* on her right of free exercise.

To the extent that Provider has made a religious accommodation request not covered by the ASD(HA) conscience clause, we must turn to DoDI 1300.17 to analyze the whether the referral requirement places a *substantial burden* on Provider's free exercise rights. Provider's request and her subsequent conversations with her chain of command makes clear she considers referring patients diagnosed with gender dysphoria for transition-related care to be a *substantial burden.* However, the referral required for gender dysphoria treatment *minimally interferes* with Provider's free exercise rights.[38] Under the current referral procedure, when a military member presents to a provider, in that provider's role as a primary care manager (PCM), Air Force clinical practice dictates the provider refer the patient to the mental health clinic for evaluation for gender dysphoria and the patient is re-assigned to another PCM for any future transition-related medical care. The Air Force is not threatening to discipline or take adverse action against Provider if she does not follow the referral process. Further, the originating provider would not have any reason to continue involvement with the patient and would be wholly unaware of any transition-related treatment the patient received after the referral. We conclude this process *significantly interferes* with Provider's free exercise of religion and is thus not a *substantial burden.*

[37] *See supra* n.30 for a definition of "referral".

[38] "Compelling [] participation in the accommodation process by threat of severe monetary penalty is a substantial burden on [one's] exercise of religion." *Sharpe Holdings, Inc. v. United States HHS*, 801 F.3d 927, 942 (8th Cir. 2015). *See also Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 2015 U.S. App. LEXIS 13813, 2015 WL 4665049, at *7 (2d Cir. Aug. 7, 2015) (noting that while the court will accept the sincerity of an objector's beliefs, "it must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, the burden is 'substantial' under RFRA."); *Little Sisters of the Poor for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015).

DoDI 1300.17 states: "If [a member's free exercise right] is not substantially burdened, the needs of the requesting service member are balanced against the needs of mission accomplishment." [39] In this type of balancing test, Provider's chain of command's interest in providing patients necessary, appropriate and timely medical care outweighs Provider's free exercise right. The clinic has a need to provide patients necessary, appropriate, and timely medical care. That need includes providing necessary, appropriate, and timely medical care to gender dysphoria patients.

For the reasons stated above, we recommend against adopting the informal referral process favored by Provider. Neither the ASD(HA) conscience clause provision nor DoDI 1300.17 compel AF/SG to adopt an informal referral process for Provider. However, if the informal process is adopted, we recommend that it be identified as a case-specific approval and only applicable to Provider's practice in the medical treatment facility to which she is currently assigned.

Specialized Medical Training Requirement

DoD has mandated specialized medical training for all privileged and non-privileged medical personnel to "ensure familiarity with applicable Department policies and requirements, evidence-based practice guidelines and standards of care, and any Service-specific policies." As a privileged medical provider, Provider was required to take Transgender Module I: *Introduction to Policy Guidance and Concepts* (TGHC l); AF Module 3: *Transgender Air Force Medicine* (TGHC6); and Transgender Module 2b-*Evidence Based Practice Guidelines and Standards of Care Primary Care* (TGHC3). Provider clarified to her chain of command she took Transgender Module 1 but refuses to take AF Module 3 or Transgender Module 2b.

The mandate for specialized medical training provided no exceptions. In addition, the conscience provision in the ASD(HA) memo does not expressly provide relief from the requirement to take specialized training.[40] Because existing policy and regulation do not extend conscience protection to the requirement to take the specialized medical training, Provider cannot invoke conscience protection from this requirement.

To the extent Provider requests a religious accommodation beyond the scope of the ASD(HA) memo and AFI 44-102, we must again turn to DoDI 1300.17 to analyze her request. Provider asserts the nature of the gender dysphoria medicine program has minimal effect on the overall military mission, and her decision to abstain from participating in this program will have no significant adverse effect on any of the cited factors in the DoD Instruction. She stated her request also does not impose any significant burden on either the command or any other members of her flight, but rather simply requires the authorization to abstain from participating.

DoD and the Air Force have determined the training is necessary to implement DoD's gender dysphoria policy. Making sure that the medical community is aware of how gender dysphoria patients should access the healthcare system and what types of treatment can be offered contributes to maintaining morale, readiness, and good order and discipline. Given that taking the training does not substantially burden Provider's exercise of religion, in that she is not delivering care and

[39] DoDI 1300.17, *supra* n.20 at paragraph 3.e.
[40] AFI 44-102 similarly scopes the conscience protection to performance or assisting in the perfomance of the objected to medical care.

the Air Force is required to implement all DoD policies to include the gender dysphoria policy, it appears the balancing of the member's needs against mission accomplishment should weigh in favor of mission accomplishment.

Importantly, Provider makes her own case for why she, as a military medical provider, needs the training. In her request and in statements made to her chain of command, she recognizes two situations may arise where she has a duty to treat gender dysphoria patients: (a) emergency care, and (b) medical care not involving gender transition. Both situations require Provider to have a professional understanding of the impact gender transition has on a patient, in order to provide any non-transition-related care.

AF/SG must make the determination if a privileged provider, who will not be providing care to patients diagnosed with gender dysphoria on conscience grounds, needs to take training modules 2b and 3. DoD OGC's position is that the Services "apply the normal rules on accommodation of religious beliefs to adjudicate the request to be excused from the required training." Taking the training minimally interferes with Provider's free exercise rights. However, to deny Provider's request and compel her to take the training, AF/SG must establish that if Provider does not take the training it will cause an *adverse impact* on the mission.[41] AF/SG may establish *adverse impact* by establishing[42] that there is a clinical reason Provider must take the training.

Lastly, AF/SG may grant Provider's request as a valid extension of the ASD(HA) conscience clause provision. Although the provision does not expressly address training, it may be inferred that relieving a medical provider from the responsibility to provide care to certain patients necessarily incorporates relief from taking training associated with said care.

Approval Authority

AF/SG is the approval authority for Provider's requests. AF/SG is empowered to develop "all policies concerning medical operation" in Air Force Policy Directive (AFPD) 44-1.[43] Additionally, AF/SG is the approval authority for AFI 44-102, *Medical Care Management,* which contains conscience clause provisions covering abortion, family planning services, and emergency contraception. [44]

[41] *See* DoDI 1300.17, paragraph 4.e.
[42] Before setting policy in this area, we advise AF/SG to consult medical experts to determine if there is a clinical basis for privileged providers, who will not be treating gender dysphoria patients, to take the specialized medical training for treatment of gender dysphoria patients.
[43] Air Force Policy Directive (AFPD) 44-1, *Medical Operations*, 9 June 2016, paragraph 2.1.
[44] *See supra* note 14.

Conclusion

In summary, the free exercise of Provider's religion may exempt her from providing care to patients diagnosed with gender dysphoria, but may not exempt her referring these patients to other providers, and it does not exempt her from SecDef-mandated training. The waiver authority for such training is AF/SG.

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