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17 **UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

18 AIDEN STOCKMAN, et al.,

19 Plaintiffs,

20 v.

21 DONALD J. TRUMP, et al.,

22 Defendants.

No. 5:17-cv-1799-JGB-KK

**DEFENDANTS'
SUPPLEMENTAL BRIEFING
IN SUPPORT OF ITS MOTION
TO DISMISS**

Date: December 11, 2017
Time: 9:00 a.m.
Courtroom: 1
Judge: Hon. Jesus G. Bernal

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1 **INTRODUCTION**

2 On November 16, 2017, this Court ordered supplemental briefing regarding
3 whether Plaintiffs John Doe 1 and John Doe 2 have separately demonstrated injury-in-fact
4 pertaining to the Sex Reassignment Surgery Directive. Court’s Order of Nov. 16, 2017,
5 ECF No. 66. The Court ordered the parties to address the meaning of the Presidential
6 Memorandum’s terms “necessary to protect the health” and “begun a course of treatment
7 to reassign his or her sex” and discuss whether and how these terms apply to John Doe 1
8 and John Doe 2. *Id.*

9 While the Defendants have answered the Court’s question as to the meaning of
10 those terms under current policy below, that policy is presently under review. Accordingly,
11 Defendants cannot at this time predict if or how the meaning of those terms will change
12 after the present policy review is complete. Further, because Plaintiffs have not shared the
13 identities of John Doe 1 and John Doe 2 with Defendants, Defendants have been unable
14 to verify the veracity of any of Plaintiffs’ claims and can only address the Court’s question
15 based on the allegations contained in Plaintiffs’ declarations.

16 In any event, it is clear from Plaintiffs’ declarations that they are not presently being
17 denied any medical care and their injury-in-fact is predicated on an assumed denial of
18 medical care in the future. This assumption is misplaced because Plaintiffs cannot predict
19 what Defendants’ future policy will be and how it will apply to them while the policy
20 review is still ongoing. Thus, Plaintiffs’ claim that they will be denied sex reassignment
21 surgery in the future based on that prediction is far too speculative to confer standing at
22 this stage. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013).

23 **ARGUMENT**

24 **I. Current Department of Defense Policy Concerning Treatment of Military**
25 **Members with Gender Dysphoria**

26 The current Department of Defense (“DoD”) policy concerning treatment of
27 military members for gender dysphoria is outlined in two primary documents. *See*
28

1 Declaration of Terry Adirim, M.D., M.P.H. (“Adirim Decl.”) ¶ 2. The first is a
 2 memorandum of July 29, 2016, from the then-Acting Assistant Secretary of Defense for
 3 Health Affairs, Karen S. Guice, M.D., entitled “Guidance for Treatment of Gender
 4 Dysphoria for Active and Reserve Component Service Members.” *See* Adirim Decl., Ex. 1.
 5 That memorandum states that DoD will adhere to the 2009 Endocrine Society standards of
 6 care as the primary clinical practice guidelines. Adirim Decl. ¶ 2. Under those guidelines,
 7 key components of medical care for treating gender dysphoria include “initial assessment
 8 and, based upon that assessment of the individual’s needs, the establishment of a treatment
 9 plan which may include real life experience . . . , cross-sex hormone therapy, and surgical
 10 transition.” *Id.* Treatment plans are to be individualized and approved by a military
 11 medical provider. Adirim Decl., Ex. 1 at 2. The memorandum further provides that with
 12 respect to surgical interventions that military hospitals are not adequately prepared to
 13 perform, DoD will follow the existing waiver process for private sector care for active duty
 14 members under the Supplemental Health Care Program. Adirim Decl. ¶ 2.

15 The second document is a memorandum of November 13, 2017, from Vice
 16 Admiral R.C. Bono, M.D., Director of the Defense Health Agency (“DHA”), entitled
 17 “Information Memorandum: Interim Defense Health Agency Procedures for Reviewing
 18 Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex
 19 Reassignment Surgical Procedures.” *See* Adirim Decl., Ex. 2. This memorandum notes
 20 that although there is a generally applicable statutory prohibition against paying non-DoD
 21 facilities for surgery for “sex gender changes,” this exclusion may be waived and that
 22 DHA’s waiver consideration will be based on the updated 2017 version of the Endocrine
 23 Society’s clinical practice guidelines.¹ Adirim Decl. ¶ 3. Those guidelines provide that
 24 medically necessary sex reassignment surgery is authorized as part of an overall treatment

25 ¹ As explained in the Adirim Declaration, the statutory limitations of 10 U.S.C. 1074(c)(2)(A),
 26 1079(a)(11) and 1074(c)(1) generally preclude DoD from paying for surgery in non-DoD facilities
 27 for “sex gender changes,” but this is subject to “such exceptions as the Secretary of Defense
 28 considers necessary,” as long as the waiver is based on a case-by-case medical determination that it
 would be necessary and appropriate for the patient and not “elective private treatment.” Adirim
 Decl. ¶ 3 n. 1.

1 plan that generally includes behavioral health services, cross-sex hormone treatment, and
2 real life experience as a precondition to surgical interventions. Further, the memorandum
3 defines sex reassignment surgery as “all surgical procedures related to transition from the
4 birth sex to the preferred gender,” Adirim Decl., Ex. 2 at 2 n. 6, and notes that these
5 procedures include but are not limited to mastectomy, hysterectomy, gonadectomy, genital
6 reassignment, breast augmentation, and cosmetic procedures to enhance the characteristics
7 of the preferred gender, *Id.*

8 II. Plaintiffs’ Allegations

9 Plaintiff John Doe 1 alleges that he has been diagnosed with gender dysphoria, has
10 received a medical transition plan, and expects to receive cross-sex hormone treatment later
11 this year. John Doe Decl. (ECF 29-2) ¶ 17; John Doe Suppl. Decl. (ECF 47-6) ¶ 3. John
12 Doe 1 further alleges that his treatment plan includes a mastectomy in mid-2018 and that
13 he intends to have genital reconstructive surgery in or about 2020. John Doe Suppl. Decl.
14 ¶ 5.

15 Plaintiff John Doe 2 alleges that he was diagnosed with gender dysphoria in
16 October 2016, that he began taking testosterone in March 2017, and continues cross-sex
17 hormone treatment today. John Doe 2 Decl. (ECF 29-3) ¶¶ 21-22; John Doe Suppl. Decl.
18 (ECF 47-7) ¶¶ 2-3. John Doe 2 further alleges that his treatment plan includes a
19 mastectomy in April 2018, and that he intends to have genital reconstructive surgery in or
20 about 2021. John Doe Suppl. Decl. ¶¶ 4-5. Therefore, because both John Doe 1 and
21 John Doe 2 allege that they have started or very shortly will start cross-sex hormone
22 treatment, they both appear to have “begun a course of treatment to reassign his or her
23 sex” under currently DoD guidelines. *See* Adirim Decl. 6.

24 In the case of female-to-male transitions, which John Doe 1 and John Doe 2 are
25 undergoing according to their declarations, a mastectomy may be recognized as medically
26 necessary after initiation of cross-sex hormone treatment (unless medically
27 contraindicated). Adirim Decl. ¶ 5. For a hysterectomy or genital reconstruction surgery
28 to be considered medically necessary, 12 months of cross-sex hormone treatment (unless

1 medically contraindicated) and 12 months of full-time real life experience are required. *Id.*
2 Thus, it also appears from their allegations that sex reassignment surgeries such as a
3 mastectomy, may be “necessary to protect the health” of both John Doe 1 and John Doe 2
4 under the DoD definitions currently in place. *See* Adirim Decl. 6.

5 **III. Policy Review Following the President’s Memorandum**

6 The Presidential Memorandum of August 25, 2017 directs that, effective March 23,
7 2018, DoD will halt the use of DoD funds for sex reassignment surgical procedures,
8 “except to the extent necessary to protect the health of an individual who has already
9 begun a course of treatment to reassign his or her sex.” Presidential Memorandum, 82 FR
10 41319. The Secretary of Defense’s memorandum of September 14, 2017, entitled “Terms
11 of Reference – Implementation of Presidential Memorandum on Military Service by
12 Transgender Individuals,” directs a panel of experts to develop an implementation plan
13 that will include a listing of surgical procedures that will be prohibited from funding unless
14 necessary to protect the health of a service member. Adirim Decl., Ex. 3.

15 DoD anticipates that prior to March 23, 2018, the Secretary of Defense will,
16 following review of the work product of the panel of experts, issue instructions to the
17 DoD on prospective policy on funding sex reassignment surgery, including guidance on
18 implementation of the exception clause in the President’s memorandum. Adirim Decl. ¶ 4.
19 However, that guidance is currently being developed and has not yet been issued.

20 As of now, Defendants therefore cannot state what the full scope and impact of
21 future policy will be with respect to sex reassignment surgery until the pending review is
22 completed, including whether or not DoD’s current understanding of the terms “necessary
23 to protect the health” or “begun a course of treatment to reassign his or her sex” will be
24 altered in that future policy. At a minimum, it is possible that Plaintiffs John Doe 1 and
25 John Doe 2 will be able to continue receiving treatment under the exception set forth in
26 the President’s Memorandum in a manner similar to what they are able to receive today.

27 Plaintiffs’ argument that the President’s Memorandum will foreclose such treatment
28 is based on an assumption that current policy will be changed in a manner that curtails their

1 ability to receive medical care after March 23, 2018. Such speculation does not establish an
2 injury-in-fact for John Doe 1 and John Doe 2 to challenge the Sex Reassignment Surgery
3 Directive at this stage. As noted in Defendant’s declaration, any unresolved issues
4 regarding the Sex Reassignment Surgery Directive should be addressed in the ongoing
5 policy review scheduled for final implementation in March 2018, well in advance of the
6 projected surgery dates for both John Doe 1 and John Doe 2, which as alleged are mid-
7 2018 and April 2018, respectively. Adirim Decl. ¶ 6; John Doe Suppl. Decl. ¶ 5; John Doe
8 Suppl. Decl. ¶ 4. If John Doe 1 and John Doe 2 are ultimately informed that the military
9 will not pay for those specific surgeries, they can bring suit at that time. Until that time,
10 however, the risk that they may be harmed by the sex reassignment surgery directive in the
11 future is not sufficiently imminent to establish standing. *Cf. Doe v. Trump*, --- F.Supp.3d ---,
12 2017 WL 4873042 at *24 (D.D.C. Oct. 30, 2017) (holding that the plaintiffs lacked standing
13 to pursue their medical treatment claims because “the risk of being impacted by the Sex
14 Reassignment Surgery Directive is not sufficiently great to confer standing”).

15 **CONCLUSION**

16 For the foregoing reasons and the reasons articulated in Defendant’s Motion to
17 Dismiss and Reply, the Court should dismiss Plaintiffs’ claims.

18 Dated: December 1, 2017

Respectfully submitted,
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