

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

**DEFENDANTS' MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION
PENDING APPEAL**

On October 30, 2017, the Court entered an Order preliminarily enjoining Defendants from enforcing the accession and retention directives in the President's August 25, 2017 Memorandum regarding military service by transgender individuals. ECF Nos. 60, 70. Defendants have filed a timely notice that they are appealing the Court's Order, ECF No. 66, and now request a partial stay of the Court's preliminary injunction pending the outcome of their appeal. Specifically, Defendants request that the Court stay the portion of its preliminary injunction requiring Defendants to begin accessing transgender individuals into the military on January 1, 2018, pending a decision by the D.C. Circuit on Defendants' appeal. Because the January 1, 2018 deadline for complying with the accessions portion of the Court's preliminary injunction is quickly approaching, Defendants waive their right to file a reply to any opposition that Plaintiffs may file to this motion and respectfully request a decision on their motion by 12:00 pm on Monday, December 11, 2017. Defendants have submitted a Memorandum of Points and Authorities and Declaration in support of their motion. Defendants have also filed a proposed order with this motion.

Pursuant to Local Civil Rule 7(m), Defense counsel has conferred with Plaintiffs' counsel, and Plaintiffs' counsel has indicated that Plaintiffs oppose this motion.

Dated: December 6, 2017

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION
PENDING APPEAL**

INTRODUCTION

On October 30, 2017, the Court entered an order preliminarily enjoining Defendants from enforcing the retention or accession provisions of the President's August 25, 2017 Memorandum regarding military service by transgender individuals. ECF No. 60. The Court later clarified that, with regard to the accessions provision, it had also enjoined the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy. As a result of these orders, Defendants must begin accessing transgender individuals into the military on January 1, 2018. ECF No. 70. Defendants filed a timely notice that they are appealing the Court's Order entering a preliminary injunction, ECF No. 66, and now move the Court to stay the accessions portion of its preliminary injunction for several reasons while the D.C. Circuit considers the merits of Defendants' appeal.

First, Defendants have submitted a declaration explaining that they will be seriously and irreparably harmed if forced to implement a new accessions policy on January 1, 2018. The Department of Defense is a large and complex agency with over 20,000 recruiters and 65 geographically dispersed Military Entrancing Processing Stations. Given the complex and multidisciplinary nature of the medical standards that need to be issued and the tens of thousands of geographically dispersed individuals that need to be trained, the military will not be adequately prepared to begin processing transgender applicants for military service by January 1, 2018, and requiring the military to do so may negatively impact military readiness. In addition, the Department of Defense has never before generally permitted transgender individuals to access into the military. Compelling the military to implement a new accessions policy while it is simultaneously completing a comprehensive study of military service by transgender individuals that may soon result in the adoption of different accessions standards would waste

significant military resources and sow unnecessary confusion among service members and applicants.

Second, Plaintiffs will not be harmed by a stay of the accessions portion of the Court's preliminary injunction pending the outcome of Defendants' appeal, as the only two Plaintiffs who seek to access into the military will not be eligible to do so until May 2020 and Spring 2021. *See* ECF No. 61 at 46.

Third, the public interest strongly favors allowing the military the time it needs to implement a significant change in its accessions policy in an orderly fashion.

Fourth, Defendants are likely to succeed on the merits of their appeal. The Court erred by entering a worldwide injunction, rather than providing relief tailored to the parties before it. In addition, the Court erred by finding that at least one Plaintiff had established standing to challenge—and would likely be irreparably harmed by—the accessions provision of the Presidential Memorandum, even though no Plaintiff will be eligible to commission as an officer for at least another two and a half years. This speculative, future harm does not outweigh the hardship that the injunction will impose on the military. The Court further erred by enjoining the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy, when Plaintiffs never challenged that authority and it was not before the Court. The Court also erred on the merits, in particular by reaching substantial constitutional questions and by not applying a deferential standard of review when the military is presently examining the policy at issue. Finally, the Court abused its discretion in weighing the equities to conclude that a preliminary injunction should be granted.

For these reasons, the Court should grant Defendants' motion.

BACKGROUND

The Court is familiar with the procedural history of this case, and Defendants will summarize it only briefly here. Plaintiffs filed this case on August 9, 2017, ECF No. 1, and amended their complaint on August 31, 2017, ECF No. 9. In their Amended Complaint, Plaintiffs sought “declaratory, preliminary, and permanent injunctive relief against the implementation of the President’s directive to prohibit transgender individuals from enlisting or serving openly in the Armed Forces.” ECF No. 9 ¶ 9. On August 31, Plaintiffs also moved for a preliminary injunction seeking the same relief. ECF No. 13. Defendants opposed Plaintiffs motion for preliminary relief and, in the same brief, moved to dismiss. ECF 45.

On October 30, 2017, the Court partially granted Defendant’s motion to dismiss and partially granted Plaintiffs’ motion for a preliminary injunction. ECF No. 60. The Court dismissed Plaintiffs’ challenge to the surgical procedures provision of the Presidential Memorandum but allowed the remainder of their case to proceed. *Id.* It also entered an order preliminarily enjoining Defendants from enforcing the retention and accession provisions. *Id.* The Court explained that the “effect of the Court’s Order is to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017.” *Id.*

On November 21, 2017, Defendants filed a notice of appeal. ECF No. 66. The following day, Defendants sought clarification regarding whether the Court’s preliminary injunction prohibited Secretary Mattis from exercising his independent authority to extend the effective date of the new accessions policy past January 1, 2018. ECF No. 67. On November 27, the Court issued an Order stating that, under the *status quo* before the President issued his Memorandum,

policies were in place that “allowed for the accession of transgender individuals into the military beginning on January 1, 2018.” ECF No. 70 at 2. “Any action by any of the Defendants that changes this status quo is preliminarily enjoined.” *Id.* (emphasis in original).

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 62(c), a party may seek to stay a preliminary injunction pending an appeal. *See Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 11 (D.D.C. 2014). “In the D.C. Circuit, a court assesses four factors when considering a motion to stay and injunction pending appeal: (1) the moving party’s likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest.” *Id.* (citing *Wash. Met. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).¹

ARGUMENT

The Court should stay the accessions portion of the preliminary injunction until the D.C. Circuit decides Defendants’ appeal.

¹ Following the Supreme Court’s decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), “in this circuit, it remains an open question whether the likelihood of success factor is an independent, free-standing requirement, or whether, in cases where the three other factors strongly favor issuing an injunction, a plaintiff need only raise a serious legal question on the merits.” *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (quotations omitted). “Given the uncertainty, courts in this jurisdiction have continued to analyze motions for preliminary injunctions under the sliding scale approach” *Akiachak Native Cmty.*, 995 F. Supp. 2d at 11. Under that approach, a “motion to stay may be granted when a serious legal question is presented, when little if any harm will befall other interested persons or the public, and when denial of the order would inflict irreparable injury on the movant.” *Id.*; see *Wash. Metro. Area Transit Comm’n*, 559 F.2d at 844.

I. Defendants Will Be Irreparably Harmed If They Are Forced to Implement a New Accessions Policy by January 1, 2018.

Defendants have submitted a declaration from Lernes J. Herbert (“Herbert Decl.”), Acting Deputy Assistant Secretary of Defense for Military Personnel Policy, explaining that, in order to adequately prepare to access transgender individuals, the military will need to promulgate new, complex, and interdisciplinary medical standards that will necessarily require evaluation across several medical specialties, including behavior and mental health, surgical procedures, and endocrinology. Herbert Decl. ¶6. The military must then train “tens of thousands” of geographically dispersed personnel on the application of those complex medical standards. *Id.* ¶5. These personnel include 20,367 recruiters, 2,785 employees across 65 Military Entrance Processing Stations, 32 Service Medical Waiver Authorities, and personnel at nine (9) initial military entrance locations (“boot camps”) and the associated medical hospitals that support them. *Id.*

Moreover, given the complexity of the interdisciplinary medical standards that need to be issued and the number of geographically dispersed individuals that need to be carefully trained on those standards, the Department would not be adequately and properly prepared to begin processing transgender applicants on January 1, 2018. *Id.* ¶¶6, 9. Thus, if the military is “compelled to execute transgender accessions by January 1,” then “applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition” and thereby enter the military even though they are “not physically or psychologically equipped to engage in combat/operational service.” *Id.* ¶8. Because Defendants are likely to suffer serious and irreparable harms if they are forced to begin accessing transgender individuals beginning on January 1, 2018, the Court should stay the accessions portion of its preliminary injunction until the D.C. Circuit decides Defendants’ appeal.

The Department is also in the process of a high-level review of military service by transgender individuals that is scheduled to conclude in the next few weeks and could result in an accessions policy that differs from the one that the Court has ordered the military to implement by January 1, 2018. *Id.* ¶4, 10. In these circumstances, implementing a new accessions policy that would permit the accession of transgender individuals while the Department is in the process of concluding a comprehensive study that may ultimately lead to the implementation of a different policy would present not only the prospect of significant duplicative costs and administrative burdens but the high potential for sowing confusion in the ranks as well. *Id.* ¶10.

II. Plaintiffs Will Not Be Harmed by a Stay of the Accession Provision of the Court’s Preliminary Injunction.

The Plaintiffs in this case who seek to access into the military will not be eligible to commission as officers until at least May 2020 and will not be harmed by a temporary stay of the portion of the Court’s injunction dealing with accessions. As this Court recognized in its Opinion, Plaintiff Kibby is not scheduled to graduate from the Naval Academy and become eligible to accept a commission until May 2020. ECF No. 61 at 44, 46. Plaintiff Kohere is in his first semester of college and, based upon a four year program, will not graduate and become eligible to commission until spring 2021. ECF No. 45-3. Defendants’ appeal will be decided long before either Plaintiffs Kibby or Kohere seek to commission into the military. They will not, therefore, be harmed by a stay of the accessions portion of the Court’s injunction.

III. A Stay of the Accession Provision of the Court’s Preliminary Injunction Is in the Public Interest.

In these circumstances, it is not in the public interest for the Court to compel the military to begin accessing transgender individuals before it has had an opportunity to issue the necessary medical standards and train its personnel on those standards to ensure that military applicants are properly screened. *See Gilligan v. Morgan*, 413 U.S. 1 at 10 (“The complex subtle, and

professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”).

III. Defendants Are Likely to Prevail on the Merits of Their Appeal.

Defendants can also show a likelihood of success on the merits of their appeal of the preliminary injunction. First, the Court erred by entering a worldwide injunction, particularly in light of the fact that only two Plaintiffs are challenging the accession provision of the Presidential Memorandum. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (explaining that equitable relief should “be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”).

Second, the Court erred by concluding that at least one Plaintiff has established standing and a likelihood of irreparable harm from the accessions provision of the Presidential Memorandum, despite the fact that he will not be eligible to commission into the military until 2020. *See* ECF No. 45-2 ¶10 (explaining that Plaintiff Kibby is not scheduled to graduate from the Naval Academy until May 2020); *see also* ECF No. 45-3 ¶ 8(c) (explaining that, based on a four-year program, Plaintiff Kohere will not graduate from college until Spring 2021). This speculative, future harm does not outweigh the hardship that the injunction will impose on the military.

Third, the Court erred by enjoining the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy when the Secretary’s authority has not been challenged in this case and was not properly before the Court.

Fourth, the Court erred on the merits, in particular by reaching substantial constitutional questions and not applying the appropriate level of deference when the military is presently examining the policy at issue.

Fifth, for the reasons given above, the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted.

Accordingly, Defendants are likely to succeed on these issues in their appeal and have, at the very least, presented serious questions that are sufficient in light of the other factors to warrant a stay. *See Akiachak Native Cmty*, 995 F. Supp. 2d at 11.

CONCLUSION

For the reasons set forth above, the Court should stay the portion of its preliminary injunction dealing with accessions pending a decision by the D.C. Circuit on Defendants' appeal of the preliminary injunction.

Dated: December 6, 2017

Respectfully submitted,

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DECLARATION OF LERNES J. HEBERT

I, Lernes J. Hebert, do hereby declare as follows:

1. I am currently the Acting Deputy Assistant Secretary of Defense, Military Personnel Policy, in the Office of the Under Secretary of Defense for Personnel and Readiness. In that capacity, I am responsible for overseeing the human resource policies impacting the sustainment of the all-volunteer-force for the Department of Defense (“DoD” or “the Department”), which consists of 1.4 million active duty military personnel and 1.1 million Guard and Reserve personnel. I have served in Military Personnel Policy since August 2003 and have led the Department through a number of major personnel initiatives and policy changes. Prior to my retirement from the United States Air Force in the rank of Colonel after 24 years of active service, I served at every level of the field of personnel management to include key assignments in the Office of the Secretary of Defense, the Air Staff, at the Air Force Personnel Center, and with Air Combat Command. I hold a Master of Science Degree in

National Security Strategy from the National War College and a Master of Arts degree in Management and Computer Resource Management from Webster University.

2. In the exercise of my official duties, I have been made aware of the above-referenced litigation pending in the U.S. District Court for the District of Columbia, as well as three additional suits by transgender individuals pending in other jurisdictions. Specifically, I am aware of the preliminary injunction entered by the Court in this action on October 30, 2017, with respect to two aspects of the Presidential Memorandum of August 25, 2017, including the provision directing DoD to maintain the Department's longstanding policy which generally prohibits accession of transgender individuals into military service. I have also been made aware of the Court's November 27, 2017 order in response to Defendants' motion to clarify. My understanding of the effect of the October 30 and November 27 orders is that January 1, 2018, is now the effective date of the accessions provisions of Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, which allows for the accession of transgender individuals into the military.

3. I submit this declaration in support of Defendants' Motion for a Partial Stay of the Court's Preliminary Injunction Orders Pending Appeal. The purpose of this declaration is to provide the Court with my assessment, based on my experience and professional judgment, regarding the feasibility of implementing the court's orders by January 1, 2018, and the harmful impact to the military, its missions, and readiness if it is required to comply with the Court's orders that mandate the January 1, 2018 effective date for the accessions policy in DTM 16-005. The statements made herein are based on my personal knowledge and information available to me in the course of my official duties.

4. Secretary of Defense Mattis exercised his authority on June 30, 2017, to defer the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017). Subsequently, the Presidential Memorandum of August 25, 2017, directed the Secretary of Defense (and the Secretary of Homeland Security with respect to the U.S. Coast Guard) to maintain the then-currently effective policy restricting accession by transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the President. The Presidential Memorandum also directed the Secretary of Defense to submit an implementation plan to the President by February 21, 2018, with respect to the policy set forth in the memorandum concerning accession and service by transgender individuals in the military. The Presidential Memorandum further directed that the implementation plan shall adhere to the determinations made by the Secretary as to what steps are appropriate and consistent with military effectiveness, lethality, budgetary constraints, and existing law. The review being undertaken by the Panel of Experts appointed by the Secretary on September 14, 2017, to carry out the study directed by the President remains ongoing. The Panel's work is expected to result in recommendations to the Secretary of Defense early next year. The Department would also establish the policy, standards, and procedures to support those Panel recommendations adopted by the Secretary. Thus, at present, the Department is studying revisions to policy concerning military service by transgender individuals, to be completed in early 2018, while at the same time preparing to operate under a judicial order to implement DTM 16-005 by January 1, 2018.

5. Implementing the Court's orders with respect to the accessions policy in DTM 16-005 by January 1, 2018, will impose extraordinary burdens on the Department and the

military services. For organizations as large and as complex as DoD and the military services, the study, development, and implementation of significant personnel policies is necessarily a substantial undertaking. As set forth below, there are considerable requirements associated with implementing this significant and complex policy change across the Department, considering that those personnel directly responsible for execution number in the tens of thousands and are geographically dispersed across the United States. Specifically, implementation of a new accession policy necessitates preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly versed in the policy and its implementation procedures. This requires that the following personnel have a working knowledge or in-depth medical understanding of the standards and identity validation requirements associated with processing an applicant under new requirements:

- 20,367 recruiters (responsible for resolving any gender identity conflict between an applicant's government identification documents and the gender in which they present themselves and assisting the applicant complete the Accession Medical Prescreen Report (DD Form 2807-2), including providing substantiating and supporting medical documents);
- 2,785 employees across 65 geographically dispersed Military Entrance Processing Stations (MEPS), including 568 medical division personnel, 102 Chief and Assistant Chief Medical Officers, and approximately 375 fee-based medical providers, all necessitating in-depth knowledge of the standards;
- 32 Service Medical Waiver Authorities authorized to grant medical waiver requests following a thorough evaluation of the applicant's medical history and recommendation from the MEPS Chief Medical Officer; and

- Personnel at the nine initial military entrance training locations ("boot camps") and the associated military hospitals that support them.

6. Beyond the sheer number of components and personnel involved, the implementation of accessions criteria is itself a complex undertaking. Accession criteria are based on service needs and are designed to ensure that those individuals accepted are "qualified, effective, and able-bodied persons" (10 U.S.C. § 505) who are capable of successfully performing military duties. Such duties involve a wide range of demands including exposure to danger, emotional stress, harsh environments, and the operation of dangerous, sensitive or classified equipment. Such demands are not normally found in civilian occupations. Further, all military members must be available for worldwide duty 24 hours a day without restriction or delay. This duty may be in remote areas lacking immediate and comprehensive medical support. An important objective of this thorough applicant screening is to ensure that persons accepted for the military are physically and psychologically qualified to withstand such isolation and rigors. These policies exist to protect both the individuals concerned, as well as members of their units and the overall readiness of the force. The accession screening process requires military and medical professionals well versed in the standards, and their applicability to military readiness, to ensure both the individual and the Department's best interests are served. In the case of the transgender accession standards, the standards themselves are complex, interdisciplinary standards necessitating evaluation across several systems of the body, to include behavioral and mental health (e.g. diagnosis of gender dysphoria or related comorbidities), surgical procedures (particularly thoracic and genital), and endocrinology (for the purposes of cross-sex hormone therapy). No other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history.

7. It is also important to remember that this court-mandated policy change comes at a time when the military's operational tempo remains high and DoD's primary focus is on ongoing combat and contingency operations overseas.

8. If the Department is compelled to execute transgender accessions by January 1 absent sufficient guidance, resources, and training, the possibility exists that transgender applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition. As a result, an applicant may be accessed for military service who is not physically or psychologically equipped to engage in combat/operational service.

9. In addition, although the Department was in the process of implementing DTM 16-005 after its issuance in June 2016, that process was first extended by the Secretary in June 2017, and then deferred further pending completion of the study directed by the President on August 25, 2017. In addition, key personnel involved in that accession enterprise have rotated in the past several months, necessitating additional preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly prepared. Thus, notwithstanding the implementation efforts made to date, the Department still would not be adequately and properly prepared to begin processing transgender applicants for military service by January 1, 2018.

10. Finally, especially given that this extensive and elaborate process of implementing the DTM 16-005 accessions policy is time-consuming and costly, the Department will be twice burdened if it is required to implement DTM 16-005 by January 1, and then potentially a different policy after the Department concludes its study and finalizes a policy. It is possible that the accession standards and the implementing procedures that result from that

ongoing policy review could be different from those that the Court has directed DoD to implement on January 1, 2018. Carrying out the implementation enterprise again, after the ongoing policy review is completed, would not only present the prospect of significant duplicative costs and administrative burdens, but the high potential for sowing confusion in the ranks as to the applicable policy.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 12/06/17



Lernes J. Hebert

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[PROPOSED] ORDER

For the reasons set forth in Defendants' Motion for a Partial Stay of Preliminary Injunction Pending Appeal and the accompanying Memorandum of Points and Authorities and Declaration, the Court GRANTS Defendants' motion. The portion of the Court's preliminary injunction order concerning accessions is, hereby, stayed pending the outcome of Defendants' appeal.

Date: _____

District Court Judge