

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**NOTICE OF SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT OF
PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR
CLARIFICATION AND, IF NECESSARY, A PARTIAL STAY OF
PRELIMINARY INJUNCTION PENDING APPEAL**

Plaintiffs respectfully submit the attached Exhibit 1 Department of Defense “Policy Memorandum 2-5, Transgender Applicant Processing” issued to Sector Commanders, Battalion Commanders, MEPS Commanders, and Directors and Special Staff Officers (“Memorandum”) as supplemental authority in further support of Plaintiffs’ Opposition to Defendants’ Motion for Clarification and, if Necessary, a Partial Stay of Preliminary Injunction Pending Appeal [ECF No. 95].

The seven-page Memorandum, dated December 8, 2017, provides guidance for processing transgender applicants for military service beginning on January 1, 2018. It sets out detailed procedures for processing such applicants, and cross-references a second memorandum of the same date, from the Deputy Secretary of Defense, entitled “Medical Standards for Appointment, Enlistment, or Induction of Transgender Applicants into the Military Services.”

The Memorandum was issued two days after Lernes J. Hebert signed a declaration dated December 6, 2017 [ECF No. 91-1], which Defendants submitted in support of their December 12, 2017 Motion for an emergency stay [ECF No. 91]. Defendants—despite relying heavily on the

Hebert Declaration to support their vague claims about administrative difficulties, *see* ECF No. 91 at 4–6—did not bring the subsequent Memorandum to this Court’s attention when making their Motion, nor did they mention it during a Conference with Plaintiffs and the Court on December 13, 2017. *See* ECF No. 94.¹

The Memorandum became public this afternoon when filed in *Karnoski v. Trump*, No. 17-36009 (9th Cir.), by the State of Washington, which received the Memorandum through the Washington National Guard. Plaintiffs respectfully submit that this detailed guidance further belies Defendants’ conclusory and unsubstantiated claims that they are not prepared to comply with the injunction and begin processing new accessions on January 1, the date that Secretary Mattis previously set. *See* ECF No. 95 at 6–10.

¹ Despite its self-evident relevancy to their Motion, Defendants have similarly not put the cross-referenced Deputy Secretary of Defense memorandum before this Court, nor disclosed that document to Plaintiffs.

Dated: December 19, 2017

David M. Zionts*
Carolyn F. Corwin*
Mark H. Lynch (Bar No. 12560)
Jaclyn E. Martínez Resly*
Jeff Bozman*
Marianne F. Kies (Bar No. 18606)
Christopher J. Hanson*
Joshua Rovenger†
Tom Plotkin*‡
Peter J. Komorowski (Bar No. 20034)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 778-5987
dzionts@cov.com
ccorwin@cov.com
mlynch@cov.com
jmartinezresly@cov.com
jbozman@cov.com
mkies@cov.com
chanson@cov.com
jrovenger@cov.com
tplotkin@cov.com
pkomorowski@cov.com

Mitchell A. Kamin*
Nicholas A. Lampros*
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
mkamin@cov.com
nlampros@cov.com

* Admitted *pro hac vice*

† *Pro hac vice* application forthcoming

‡ Admitted to the Bars of Pennsylvania and New Jersey, admission to the Bar of the District of Columbia pending; and supervised by the principals of the firm.

Respectfully submitted,

/s/ Peter J. Komorowski
Deborah A. Jeon (Bar No. 06905)
David Rocah (Bar No. 27315)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF MARYLAND
3600 Clipper Mill Road, #350
Baltimore, MD 21211
Telephone: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org

Joshua A. Block*
Chase B. Strangio*
James Esseks*
Leslie Cooper*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2627
Fax: 212-549-2650
jblock@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
lcooper@aclu.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2017, copies of the foregoing and any exhibits were served via CM/ECF on all counsel of record.

/s/ Peter J. Komorowski

Peter J. Komorowski

EXHIBIT 1



DEPARTMENT OF DEFENSE
HEADQUARTERS, UNITED STATES MILITARY ENTRANCE PROCESSING COMMAND
2834 GREEN BAY ROAD
NORTH CHICAGO, ILLINOIS 60064-3091

MECD

DEC 08 2017

MEMORANDUM FOR SECTOR COMMANDERS
BATTALION COMMANDERS
MEPS COMMANDERS
DIRECTORS AND SPECIAL STAFF OFFICERS

SUBJECT: Policy Memorandum 2-5, Transgender Applicant Processing

References:

- (a) Deputy Secretary of Defense Memorandum, "Medical Standards for Appointment, Enlistment, or Induction of Transgender Applicants into the Military Services," dated December 8, 2017.
- (b) DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services."
- (c) DoDI 1300.28, "In-Service Transition for Transgender Service Members," dated June 30, 2016.
- (d) USMEPCOM Regulation 40-1, "Medical Qualification Program," dated July 24, 2017.
- (e) Army Regulation 601-270/OPNAVINST 1100.4C CH-2/AFI 36-2003/MCO 1100.75/COMDTINST M. 1100.2E, "Military Entrance Processing Station," RAR dated September 13, 2011.

PURPOSE. This memorandum provides interim policy guidance for processing transgender applicants for military service in accordance with Reference (a). This policy memorandum supersedes Policy Memorandum 2-5 dated August 11, 2016. This policy memorandum shall remain in effect until expressly revoked.

APPLICABILITY. This policy applies to all USMEPCOM personnel and activities.

BACKGROUND. The medical accession standards set forth in reference (a) will be implemented on January 1, 2018. The new standard permits accession of qualified transgender applicants. Implementation of the new standard, effective January 1, 2018, is mandatory. Prior to that date, the civilian and military team of USMEPCOM must prepare to implement the necessary procedural adjustments to ensure a seamless processing experience for transgender applicants. Based on references (a) – (e), this policy memorandum establishes standard operating procedures and specific processing guidance that will be applied across the command. It is an administrative tool, not a health management tool or health policy document and does not confer rights, procedural or substantive, for applicants. Any provision of USMEPCOM or individual Military Entrance Processing Station (MEPS) policy or guidance inconsistent with this memorandum is hereby superseded. The following guidance will remain in effect until expressly revoked.

USMEPCOM mission requirements and physical space limitations often will not afford the opportunity for completely private screening procedures. All applicants, including those who are transgender, may express concern about privacy in bathrooms, ortho-neuro rooms, applicant hotel rooms, or similar venues. In these cases, Commanders may employ reasonable alternate measures to provide greater privacy, should daily capacity allow. Commanders or their representatives should review standard operating procedures during the morning Commander's brief, highlighting the rights, sensitivities, and privacy needs of all applicants, while acknowledging that the daily production environment may limit a Commander's ability to provide individual screening procedures.

As always, every applicant will be treated with dignity and respect. Applicants will be evaluated per established DoD standards for the purpose of qualifying for Military Service. Out of respect for all applicants, an individual's gender identity history should not be disclosed without his/her permission, unless disclosure is made for official use in accordance with applicable law and policy. Requests for privacy should be reviewed and adjudicated so as to avoid stigmatizing of any applicant.

I have the utmost confidence that the actions of the USMEPCOM team will continue to exemplify our core values of Integrity, Teamwork, Professionalism, and Respect. Ultimately, Commanders are responsible for upholding and maintaining the high standards of the U. S. military at all times, and in all places.

POLICY.

Identity Validation: Per reference (e), identity validation is the responsibility of Military Service recruiting command personnel. To ensure appropriate enrollment in the Defense Enrollment Eligibility Reporting System (DEERS) following accession, for transgender applicants, Service recruiting command personnel are responsible for notifying USMEPCOM (or the servicing MEPS) of an individual's identity, using one of the following documents to validate an applicant's gender, consistent with reference (c): a certified true copy of a state birth certificate reflecting preferred gender, a certified true copy of a court order reflecting preferred gender, or a U.S. Passport reflecting preferred gender.

Processing: Due to the complexity of this new medical standard, during the routine preliminary screening of applicants required by reference (e), recruiters shall refrain from screening out transgender applicants based on the information contained in the Accessions Medical Prescreen Report (DD Form 2807-2), and will instead allow the MEPS medical provider to perform a medical pre-screening of all transgender applicants for military service.

For the purposes of military entrance processing, the applicant's preferred gender will be used on all forms asking for the "sex" of the applicant. For example, if the applicant was born male but currently identifies as female, female will be selected in the "sex" category. The only form on which any difference between birth sex and preferred gender will be indicated is the DD Form 2807-2.

For applicants who do not identify with either male or female, their birth sex will be used on all forms when asking for the “sex” of the applicant. For example: if applicant was born male and does not identify as male or female, male will be selected in the “sex” category.

Services will submit the USMEPCOM Form 680-3A-E, Request for Examination (UMF 680-3A-E), indicating in block 6 the preferred gender with which the applicant identifies, not the applicant’s birth sex. If an applicant’s preferred gender is different than the applicant’s birth sex, recruiters must verify the applicant’s preferred gender through review of the applicant’s birth certificate, court order, or passport. These three means to verify a gender change are the only valid means by which to do so, per reference (c) and this policy guidance.

Pending release of the updated DD Form 2807-2, the current DD Form 2807-2 “SECTION III-APPLICANT COMMENTS” will be used to identify transgender applicants to the medical department. The following annotations will be placed in Section III for **ALL APPLICANTS**, “Birth Sex: (male or female)” and “Preferred Gender: (male or female).” If birth sex and preferred gender are different, the recruiter will:

- a. Verify preferred gender using only a birth certificate, court order, or passport, per reference (c) and this policy guidance.
- b. Obtain the letter/s from the appropriate licensed medical provider/s, attesting that the applicant has been medically stable according to the standards prescribed in reference (a).
- c. Include with the prescreen submission the letter/s and all related medical documents provided by the applicant (e.g., documentation of counseling, surgery, hormone treatments) that facilitated the applicant’s gender transition.

All projections and processing actions will be based on the preferred gender of the applicant. Transgender applicants will be addressed by their preferred gender name and pronoun. To avoid confusion, MEPS personnel will ask the applicant for his/her preferred name.

A transgender male (birth sex female, preferred gender male) will be projected by the Services as a male; a transgender female (birth sex male, preferred gender female) will be projected by the Services as a female. Room assignment, height/weight standards, ortho-neuro exam, specimen observation, underwear requirements, chaperone, and bathroom assignments will be made based on the applicant’s preferred gender identified by the sponsoring Service. However, although an individual might identify with a preferred gender, he/she may retain the anatomical characteristics of their birth sex. Medical examinations and labs may need to be tailored to the specific anatomical characteristics presented by the applicant.

Transgender male applicants who have not undergone surgical/hormone therapy will wear undergarments consistent with their physical anatomy (as per routine in the USMEPCOM regulations for all applicants), will be administered a pregnancy test, and will receive medical review and examination specific to female anatomical characteristics during the physical examination portion of processing.

Transgender female applicants who have not undergone surgical/hormone therapy will wear undergarments consistent with their physical anatomy (as per routine in the USMEPCOM regulations for all applicants), will not be administered a pregnancy test, and will receive medical review and examination specific to male anatomical characteristics during the physical examination portion of processing.

The gender of the chaperone will be the same as the applicant's preferred gender. The examining provider must confirm whether the applicant "does" or "does not" want a chaperone before beginning the medical examination (where the applicant will be in a state of undress). When the gender of the examiner is the opposite of the applicant's preferred gender, a chaperone must be provided while the applicant is in a state of undress. When the examiner's gender is the same as the applicant's preferred gender, a chaperone will be provided on request of either the applicant or the medical provider. The applicant or medical provider may request a chaperone at any time, and the examination will not proceed further until a chaperone is provided.

FOR MEPS MEDICAL DEPARTMENT

In accordance with Reference (a):

a. As to a transgender male (birth sex female, preferred gender male), a history of sex reassignment surgery or major genital reconstruction is disqualifying, unless, as certified by a licensed surgeon whose scope of practice includes the attested surgical procedure(s) (to include OB/GYN, urology, or plastic surgery):

- 1) A period of 18 months has elapsed since the date of the most recent of any such surgery during which period no further surgical follow-up or monitoring was required; and
- 2) No functional limitations or complications persist, nor is any additional surgery required; and
- 3) The applicant is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning.

b. As to a transgender female (birth sex male, preferred gender female), a history of sex reassignment surgery or major genital reconstruction is disqualifying, unless, as certified by a licensed surgeon whose scope of practice includes the attested surgical procedure(s) (to include urology or plastic surgery):

- 1) A period of 18 months has elapsed since the date of the most recent of any such surgery, during which period no further surgical follow-up or monitoring was required; and
- 2) No functional limitations or complications persist, nor is any additional surgery required; and
- 3) The applicant is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning.

c. As to any transgender applicant, a history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider who treats gender dysphoria, such as a primary care provider, endocrinologist, or licensed mental health provider (psychiatrist, clinical psychologist, clinical social worker with a master's degree or doctorate in clinical social work, or psychiatric nurse practitioner):

1) The applicant has completed all elements of a medical treatment plan associated with the applicant's gender transition; and

2) The applicant has been stable, without clinically significant distress or impairment in social, occupational, or other important areas of functioning, in the preferred gender for the previous 18 months; and

3) If the applicant is presently receiving cross-sex hormone therapy post gender transition, the individual has been stable without adverse side effects, functional limitations, or complications on such hormones for at least the 18 consecutive months immediately preceding examination by the MEPS medical department.

d. As to any transgender applicant, a history of gender dysphoria is disqualifying, unless, as certified by a licensed mental health provider (psychiatrist, clinical psychologist, clinical social worker with a master's degree or doctorate in clinical social work, or psychiatric nurse practitioner) who treats gender dysphoria, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for at least the 18 consecutive months immediately preceding examination by the MEPS medical department.

e. Licensed medical provider is defined as "a health care professional who is licensed, credentialed, and granted clinical practice privileges to provide health care services within the provider's scope of practice, in a medical treatment facility."

f. For the purpose of accession, transgender applicants must be stable in the preferred gender for a period of 18 consecutive months post gender transition. "Stable in the preferred gender" is defined as "medical and surgical interventions for gender transition are complete, with the exception of continued use of a stable cross-sex hormone protocol, if applicable, no functional limitations or complications persist, and the individual is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning."

g. The following action will be taken for applicants, who during processing at the MEPS, disclose that they are transgender, but who have not taken the legal and/or medical steps to transition to their preferred gender or to demonstrate stability in their preferred gender as defined in this guidance: Applicant will be interviewed by a MEPS medical provider. If the applicant discloses to the MEPS medical provider that his/her preferred gender is other than the applicant's birth sex, as recorded on the applicant's DD Form 2807-2, or discloses additional medical information that calls into question whether stability in their preferred gender has been demonstrated, the applicant will be placed in open status (S-O), if medical treatment records are requested; or in temporary disqualified status (S-3T), if medical treatment records substantiate stability, but do not substantiate that the applicant meets the requirement that he/she be stable for 18

months in the preferred gender. In the latter case, the applicant will be given a Reevaluation Believed Justified (RBJ) date on the DD Form 2808 of 18 months minus the period of previously documented stability. In addition, in cases in which a transgender applicant is temporarily disqualified because he/she does not meet the 18 month stability requirement in the preferred gender, the sponsoring Service may request a Medical Exception to Policy (ETP), using the procedures in reference (d) to submit the applicant for consideration for a medical waiver by the Service Medical Waiver Review Authority (SMWRA), as authorized by reference (a).

h. The following action will be taken for applicants, who during prescreening, disclose that they are transgender, but who have not taken the legal and/or medical steps to transition to their preferred gender or to demonstrate stability in their preferred gender as defined this guidance: The MEPS medical provider will determine if Processing is Authorized (PA) in accordance with paragraph 2-3 of reference (d). If medical treatment records substantiate stability, but do not substantiate that the applicant meets the requirement that he/she is stable for 18 months in the preferred gender, the applicant will be given a Return Justified (RJ) date on the DD Form 2807-2 of 18 months minus the period of previously documented stability. In cases during prescreening in which an RJ date has been assigned, or in cases in which the MEPS medical provider has determined Processing is Not Justified (PNJ), the SMWRA (upon request of the Service) may Request Processing (PRW) in accordance with the procedures contained in paragraph 2-3 of reference (d).

i. For consistency, as USMEPCOM implements this new standard, and given the complexity and inter-dimensionality of medical qualification decisions, copies of the medical processing records: DD Form 2807-2, Report of Medical History (DD Form 2807-1), Report of Medical Examination (DD Form 2808), and the supporting medical records for all transgender applicant will be submitted to the USMEPCOM Medical Plans and Policy Directorate (J-7) for review after MEPS medical providers have rendered a medical qualification determination in regard to that applicant. The J-7 review is instituted to ensure consistency in the application of the new standard and to gather best practices and lessons learned as they pertain to this guidance. Supplemental guidance may be provided following J-7 review. J-7 review will not delay accession of transgender applicants determined to be qualified under the foregoing standards.

j. The Services must submit DD Form 2807-2 with substantiating and supporting medical documents, as specified in the USMEPCOM Medical Prescreen Documents List, together with all other documentation requested by the MEPS provider, for an applicant to be considered for a medical examination at the MEPS, IAW USMEPCOM Regulation, Medical Qualification Program (UMR 40-1), para 2-2c.

The point of contact for operational aspects of this policy is the Accession Division, J-3/MEOP-AD, (847) 688-3680 ext. 7519, email osd.north-chicago.usmepcom.list.hq-j3-meop-accession-division@mail.mil. The point of contact for all medical related questions is the Clinical Operations Division, J-7/MEMD-COD, (847) 688-3680 ext. 7132, email osd.north-chicago.usmepcom.list.hq-j7-memd-clinical-ops-div@mail.mil.



David S. Kemp
CAPT, USN
Commanding