

HEALTH IS HEALTH:
SECTION 1557 OF THE AFFORDABLE CARE ACT AND
TRANSGENDER HEALTHCARE RIGHTS IN WISCONSIN AND
THE UNITED STATES

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Sasha Buchert identifies as a transgender woman.² One day, Sasha walked into a doctor’s office for a checkup to have a few moles screened since her mom was always heckling her about it.³ At first, the doctors acted kind and helpful as they walked Sasha through the process of taking on transgender patients, even though that wasn’t the reason why she was there.⁴ Nevertheless, Sasha still agreed to participate in the process of taking on patients because she believed it was a positive step forward for her healthcare providers.⁵

A week later, however, Sasha received a phone call from her provider who asked, “Well Sasha, have you had *the surgery*?”⁶ To Sasha, this question was “jarring as a trans person because it was implying that the sum of [her] healthcare needs is ‘the surgery.’”⁷ After recovering from this offensive question, Sasha responded that she has not received sexual reassignment surgery.⁸ The provider

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2. Basic Rights Oregon, *Transgender Health Care Stories: Sasha’s Story*, YouTube (Apr. 7, 2014), <https://www.youtube.com/watch?v=lq-Ffhj5LJw> [<https://perma.cc/JYW8-T2ZK>] [hereinafter *Sasha’s Story*].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Sasha’s Story*, *supra* note 1.

8. *Id.*

subsequently stated that they could not cover her care after all.⁹ After this unfair discrimination by a healthcare provider, Sasha explained that “being denied this healthcare is devastating . . . having the ability to transition to your authentic gender through medically necessary healthcare is critical, and having access to that would allow me to move beyond this dominant force of needing healthcare in my life to pursuing a life that everybody else wants.”¹⁰

Sasha’s story, unfortunately, is the reality for many transgender patients in today’s healthcare system. Transgender patients face discrimination in many aspects of the healthcare system from judgmental discussions with doctors and nurses to unjust denials in health insurance coverage. They are often denied access to transgender-related services as well as non-transgender services based solely on their gender identity. Whether they are in need of attention in the emergency room or are coming in for a standard checkup, transgender patients often deal with discriminatory conduct by providers and must overcome the sense of opposition within our healthcare system.

In order to resolve these issues and promote a welcoming environment for transgender patients in healthcare, the Department of Health and Human Services (HHS) issued a final rule on May 13, 2016, implementing Section 1557 of the Affordable Care Act (ACA), or the United States’ comprehensive healthcare reform law.¹¹ Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs and activities funded by HHS, activities that HHS itself administers, and by all participant’s whose plans are offered through the health insurance marketplace.¹² And for the first time in federal civil rights law, Section 1557 expressly prohibits discrimination on the basis of sex, thus strengthening transgender healthcare rights.¹³

HHS’s final rule implementing Section 1557 is a substantial step towards equal access to medically necessary health services for transgender patients. However, Wisconsin’s recent involvement in a lawsuit questioning the constitutionality of the final rule is a step back from the promotion of equal rights to transgender men and women across the United States, specifically in the State of Wisconsin. In *Franciscan Alliance, Inc. v. Burwell*, Wisconsin, along with seven other states and three religiously affiliated healthcare providers, sued the federal government, challenging the final rule promulgation of Section 1557 in the ACA.¹⁴ Unfortunately on December 31, 2016, the U.S. District Court for the Northern District of Texas enjoined HHS’s Office of Civil Rights from enforcing

9. *Id.*

10. *Id.*

11. U.S. DEPT. OF HEALTH AND HUM. SERV., SUMMARY: FINAL RULE IMPLEMENTING SECTION 1557 OF THE AFFORDABLE CARE ACT (June 7, 2016), <https://www.hhs.gov/sites/default/files/2016-06-07-section-1557-final-rule-summary-508.pdf> [<https://perma.cc/K55D-ZZ4P>].

12. *Id.*

13. *Id.*

14. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016).

provisions relating to transgender healthcare rights under Section 1557's nondiscrimination provision.¹⁵

Contrary to Wisconsin's opinion and involvement in *Franciscan Alliance*, transgender health services are medically necessary, coverage and performance of these services do not impede on an already tense relationship between doctors and patients identifying as transgender, and Section 1557 brings judicial precedent and the standards of care in transgender healthcare in line with one another. The final rule of Section 1557 bridges the gap between transgender patients and their ability to access necessary and essential health services each citizen rightfully deserves in the United States healthcare system.

Part I describes the legal and historical framework leading to the implementation of Section 1557's final rule. Part I also includes a brief background on the ACA and its impact in Wisconsin. Finally, Part I introduces the recent court order placing an injunction on the implementation of Section 1557 due to the *Franciscan Alliance* decision.

Part II next argues that the doctor-patient relationship is not jeopardized by this promulgation of Section 1557 because the relationship between transgender patients and healthcare providers is already lacking. Part II describes the discrimination faced by transgender patients in healthcare and further argues that these transition-related procedures are medically necessary under various definitions found in health plans. Part II then demonstrates how judicial precedent prior to HHS's final rule promulgation construed Section 1557 as prohibiting discrimination based on sex.

Part III concludes with public policy arguments regarding the absolute necessity of Section 1557's final rule and how the final rule would make a positive, significant impact in Wisconsin and throughout the United States if properly implemented. Part III describes the future for transgender healthcare services including the promotion of transition-related services and provider guidelines to properly care for transgender patients. Finally, Part III closes with a call for action to increase publicity of transgender health rights.

I. BACKGROUND

A. *One Step Forward, Two Steps Back for Transgender Rights.*

As the gender binary is slowly dissipating, gender classification can no longer be sorted into rigid, concrete categories of male and female. Instead, the harsh line dividing how individuals determine their gender identity is disintegrating as people across the United States accept transgender individuals as part of their communities. A dominant factor in the changing gender binary originates from the growing transgender rights movement, which promotes transgender equality and the advancement of legal rights for all transgender men and women, so they may obtain the same civil rights as every other citizen in the United States, like equal access to healthcare. While the transgender rights movement gained speed and exposure over the last few years, there is still a long journey ahead.

15. *Id.*

In recent years, LGBTQ organizations and lawmakers laid the groundwork for significant legal developments on gender identity discrimination in many areas including employment and education. For example, the Equal Employment Opportunity Committee (EEOC) in 2012 issued a formal opinion affirming protections for transgender employees.¹⁶ The EEOC held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and therefore violates Title VII.”¹⁷ Additionally, in May of 2016, the U.S. Department of Education released a “Dear Colleague” Letter stating that a school’s Title IX obligations include prohibiting discrimination based on a student’s transgender status.¹⁸

These events are all historic milestones for the transgender community, but there are many obstacles still in their path. For example, 2016 recently became the “deadliest year on record” with 27 reported transgender deaths related to hate violence.¹⁹ In addition, “bathroom bills” were introduced in a number of states with hopes of restricting access to public facilities, such as restrooms, locker rooms, and various other establishments, for those who identify as transgender.²⁰ Additionally, anti-transgender biases in housing impact many families. For example, a large number of trans people reported being denied a home or apartment, being evicted, or becoming homeless at some point in their lives because of their transgender status.²¹ Furthermore, lower wages, higher unemployment rates, and reduced savings compared to the non-LGBTQ population are still prevalent in the transgender community.²² And although the Department of Defense issued a memorandum last year officially lifting the ban so transgender military personnel may serve openly, President Donald Trump recently signed a directive, which again banned all transgender individuals from

16. See *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

17. *Id.* at 11.

18. Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., and Vanita Gupta, Principle Deputy Assistant Attorney General for Civil Rights, U.S. Dep’t of Justice, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (last updated May 13, 2016) [<https://perma.cc/48UQ-M4S5>] [Hereinafter Dear Colleague Letter].

19. Alex Schmider, *2016 was the Deadliest Year on Record for Transgender People*, GLAAD (Nov. 9, 2016), <https://www.glaad.org/blog/2016-was-deadliest-year-record-transgender-people> [<https://perma.cc/7BVL-EKGY>].

20. See Joellen Kralik, “Bathroom Bill” *Legislative Tracking*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jul. 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/CY6M-9WJV>].

21. Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 106 (2011), NATIONAL CENTER FOR TRANSGENDER EQUALITY AND NATIONAL GAY AND LESBIAN TASK FORCE, http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/4XWK-ECK4>].

22. Center for American Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* 6-8 (2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf> [<https://perma.cc/M75L-5RXZ>].

serving in any capacity in the U.S. Military.²³ With many significant barriers in place, the fight for civil rights by the transgender community is an uphill battle. And one of the most significant battles is a transgender individual's right to access healthcare in the United States.

B. The Affordable Care Act and Section 1557.

To address some of these healthcare concerns affecting the transgender community in the United States, President Obama signed into law the Patient Protection and Affordable Care Act (ACA) on March 23, 2010.²⁴ The main objectives of the ACA were “to expand access to insurance, increase consumer protections, emphasize prevention and wellness, improve quality and system performance, expand the health workforce, and curb rising healthcare costs.”²⁵ This massive healthcare reform most notably expanded health insurance coverage to 32 million uninsured and created health insurance exchanges to help individuals purchase insurance.²⁶ The ACA also expanded the Medicaid program to cover those below 133 percent of the federal poverty guidelines, increased longevity in coverage for children staying under their parent's health insurance policy until they turn 26 years old, and increased consumer insurance protections to cover preexisting conditions of patients.²⁷

Specifically, in Wisconsin, the ACA reduced the number of uninsured Wisconsinites from 518,000 in 2013 to 323,000 in 2015.²⁸ In addition, the uninsured rate in Wisconsin dropped to just 5.9% in 2015.²⁹ The expansions positively impacted the LGBTQ community because more transgender individuals and families gained broader access to healthcare. Although many states, healthcare providers, and health organizations challenged this substantive law, the Supreme Court on June 28, 2012, upheld the ACA as constitutional.

Section 1557 in the ACA is designated as the nondiscrimination provision.³⁰ This provision is pertinent to citizens hoping to maintain their right to benefit

23. Jeremy Diamond, *Trump Signs Directive Banning Transgender Military Recruits*, CNN (Aug. 25, 2017, 11:02 PM), <http://www.cnn.com/2017/08/25/politics/trump-transgender-military/index.html> [https://perma.cc/GN9V-7HFZ].

24. William T. Pound, *The Affordable Care Act: A Brief Summary*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 2011), <http://www.ncsl.org/portals/1/documents/health/hraca.pdf> [https://perma.cc/8VCP-87MQ].

25. *Id.*

26. *Id.*

27. *Id.*

28. Jason Stein & Kevin Crowe, *Uninsured Rate Falls in Wisconsin*, MILWAUKEE JOURNAL SENTINEL (Sep. 13, 2016, 10:16 PM), <http://www.jsonline.com/story/news/politics/2016/09/13/uninsured-rate-falls-wisconsin/90308060/> [https://perma.cc/K73L-CA5T].

29. Press Release, The White House, Office of the Press Secretary, *Fact Sheet: The Affordable Care Act: Healthy Communities Six Years Later* (Mar. 2, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/02/fact-sheet-affordable-care-act-healthy-communities-six-years-later> [https://perma.cc/TX94-LWMK].

30. 42 U.S.C. § 18116(a)(2012).

from the health system without facing discrimination. HHS's Section 1557 of the ACA states:

“Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).”³¹

On May 13, 2016, HHS issued a final rule promulgating Section 1557, which states, “an individual shall not, on the basis of race, color, national origin, sex, age, or disability, be excluded from participation in, be denied participation in, be denied the benefits of, or otherwise be subjected to discrimination under any health program or activity to which this part applies.”³² Most notably, and in a progressive step forward, Section 1557 became the first law to prohibit discrimination on the basis of sex by healthcare providers that receive federal financial assistance, including any health program that receives funding from HHS, that HHS itself administers, and any participant in the health insurance marketplace.³³ Because the final rule prohibits the denial of healthcare based on an individual's sex, discrimination based on pregnancy, gender identity, and sex stereotyping are all prohibited.³⁴ Although the ACA's nondiscrimination provision regarding reproductive health coverage is legally significant and sparks its own extensive debate in *Franciscan Alliance*, this note particularly focuses on Section 1557's impact on individuals who identify as transgender in the healthcare system.

A highly challenged and scrutinized portion of Section 1557's final rule is the decision to define the terms “gender identity” and “sex stereotypes” by HHS.³⁵ The final rule describes “gender identity” as one's “internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth.”³⁶ This is significant specifically to the transgender community as the term suggests that services related not only to a transgender patient's basic health needs but

31. *Id.*

32. 45 CFR § 92.101(a)(2016).

33. *Id.*

34. *Id.*

35. 45 C.F.R § 92.4 (2017).

36. *Id.*

also to transition-related needs are not to be discriminated against. The final rule furthers the rights of transgender patients by also defining “sex stereotypes” to include “notions of masculinity or femininity,” which eliminates the expectation that patients will always identify with one gender and follow typical gender roles to further enhance their sex classification at birth.³⁷

C. *Wisconsin and its Role in Franciscan Alliance, Inc. v. Burwell.*

If Section 1557 of the ACA were to be properly implemented in the healthcare system, more than nineteen thousand individuals who identify as transgender and also reside in Wisconsin would gain equal and much needed access to health insurance and healthcare services.³⁸ Before the final rule implementation of Section 1557, Wisconsin’s Medicaid program offered no transgender healthcare coverage.³⁹ And of the twenty other insurance companies in the state providing healthcare coverage, not one offered fully inclusive healthcare services for transgender patients.⁴⁰ The lack of coverage and Wisconsin’s resistance to the ACA’s policies, specifically to Section 1557, negatively affects individuals seeking proper healthcare.

The healthcare barriers faced by transgender individuals and apprehension stemming from discrimination in the health system tumultuously increased by a court order from *Franciscan Alliance*. The Becket Fund for Religious Liberty first filed the complaint in the District Court for the Northern District of Texas on August 23, 2016, on behalf of Franciscan Alliance, a religious hospital network, against HHS and Sylvia Mathews Burwell, former United States Secretary of HHS.⁴¹ The complaint challenged the constitutionality of Section 1557 by arguing that the regulation “forces doctors to perform controversial and harmful medical procedures ostensibly designed to permanently change an individual’s sex—including the sex of children,” which “seeks the override the medical judgment of healthcare professionals across the country.”⁴²

The complaint also alleged that Section 1557 redefined the term “sex” to include “an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth.”⁴³ Finally, the complaint asserts that by

37. *Id.*

38. Andrew R. Flores, Jody L. Herman, Gary J. Gates & Taylor N.T. Brown, *How Many Adults Identify as Transgender in the United States?* 4 (2016), THE WILLIAMS INSTITUTE, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [https://perma.cc/4TCJ-TU7T].

39. Pat Dillon, *Equal Access: Fight for Transgender Health Care*, MADISON MAGAZINE (Jul. 17, 2016, 2:04 PM), <http://www.channel3000.com/madison-magazine/business-city-life/Equal-Access-Fighting-for-transgender-health-care/40752662> [https://perma.cc/87BP-N6U5].

40. *Id.*

41. First Amended Complaint at 2, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7 Civ. 108).

42. *Id.* at 2.

43. *Id.*

choosing not to follow Section 1557, hospitals and healthcare providers would cost states billions of dollars in federal funding, which many rely on to support treatments and other health services.⁴⁴ The lawsuit also sought to repeal Section 1557 for its violation of the Administrative Procedure Act (APA) as well as other federal laws and the Constitution.⁴⁵ After the filing, multiple parties joined Franciscan Alliance, including Specialty Physicians of Illinois and the Christian Medical & Dental Associations as well as the states of Texas, Nebraska, Kentucky, Kansas, Louisiana, Arizona, Mississippi, and Wisconsin.⁴⁶ This attack on Section 1557 and its anti-discrimination rule led to public outcry, which sparked multiple advocacy groups, including ACLU and various other LGBTQ organizations, to advocate on behalf of its members and request to intervene in the lawsuit.⁴⁷

At the turn of the New Year, many recently issued rules under the ACA, including Section 1557's final rule, were scheduled to go into effect. However, on December 31, 2016, as a result of an expedited hearing and review process from the Northern District of Texas Court, Judge Reed O'Connor granted a preliminary injunction, which halted the transgender nondiscrimination provision of Section 1557.⁴⁸ This injunction was nationwide as Judge O'Connor ruled in favor of Franciscan Alliance, Wisconsin, and the other parties involved.⁴⁹ On July 10, 2017, the Court stayed the proceedings of the case in order for HHS to revisit the Section 1557 regulation.⁵⁰

II. ANALYSIS

Section 1557 protects against discrimination on the basis of sex, sex-stereotyping, and gender identity.⁵¹ The *Franciscan Alliance* complaint, however, argues that HHS's final rule implementing Section 1557 unconstitutionally usurps the doctor-patient relationship by making "medical necessity, benefit, and prudence as a matter of federal law, and without regard to the opinions, judgment, and conscientious considerations of the many medical

44. *Id.* at 4.

45. *Id.*

46. *Id.* at 4-8.

47. Jessica Mason Pieklo, *Attacks on Health Care Anti-Discrimination Rule Could Face Legal Challenge*, REWIRE (Sept. 19, 2016, 10:01 AM), <https://rewire.news/article/2016/09/19/attacks-health-care-anti-discrimination-rule-face-legal-challenge/> [<https://perma.cc/2VAN-PLKE>].

48. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670-71 (N.D. Tex. 2016).

49. *Id.* at 670.

50. Arnall Golden Gregory LLP, *Federal Court Stays Section 1557 Litigation Pending HHS's Decision to Revisit Regulation*, JD SUPRA (July 27, 2017), <http://www.jdsupra.com/legalnews/federal-court-stays-section-1557-80882/> [<https://perma.cc/UDT5-5KHC>].

51. U.S. DEPT. OF HEALTH AND HUM. SERV., SUMMARY: FINAL RULE IMPLEMENTING SECTION 1557 OF THE AFFORDABLE CARE ACT (June 7, 2016), <https://www.hhs.gov/sites/default/files/2016-06-07-section-1557-final-rule-summary-508.pdf> [<https://perma.cc/K55D-ZZ4P>].

professionals that hold views to the contrary.”⁵² The amended complaint also declares that the alleged medical risks and ethical debates surrounding transgender healthcare are unclear, and HHS refused to clarify whether procedures are “deemed to be ‘medically necessary’ or ‘medically appropriate’ by the professional charged with the care of the patient at issue.”⁵³

A. *The Doctor-Patient Relationship.*

Before Section 1557 of the ACA, tensions continued to build between doctors and transgender patients over healthcare providers’ discriminatory conduct, overwhelming biases, and lack of proper education as described by many concerned transgender patients. Section 1557’s ban on discrimination against transgender patients will not sever the doctor-patient relationship but create the necessary foundation to build it.

The *Franciscan Alliance* complaint argues that HHS’ final rule implementing Section 1557 will undermine the physician-patient relationship that it “zealously protects.”⁵⁴ It contends that Section 1557 usurps the doctor-patient relationship because it destabilizes the “independent medical judgment and a physician’s duty to his or her patient’s permanent well-being and replaces them with rigid commands.”⁵⁵ To the opposition, no longer will physicians be able to “honor their duties to their patients” because federal laws, including the nondiscrimination provision, impede on the necessary connection a doctor must secure with a patient in order to build trust and provide the utmost care.⁵⁶

Contrary to the opposition’s opinion on doctor-patient relationships, over 7,000 transgender people were surveyed in a national transgender discrimination report, and 28% of respondents reported verbal harassment in the doctor’s office, emergency room, or other medical setting, and 2% of respondents reported being physically attacked.⁵⁷ Although the lack of access to healthcare deters many transgender patients from seeking medically necessary healthcare, gender identity discrimination by providers creates a significant barrier to proper treatment as well.

Gender identity discrimination takes on a variety of forms including shaming, othering, and blaming.⁵⁸ For example, when describing a “shaming” encounter with a previous primary care provider, a patient identifying as a transgender male stated, “The nurse actually said to me, ‘So, that’s a pretty—

52. First Amended Complaint, *supra* note 40, at 13.

53. *Id.* at 14.

54. *Id.* at 4.

55. *Id.* at 24.

56. *Id.* at 2-4.

57. JAMIE M. GRANT ET AL., NATIONAL TRANSGENDER DISCRIMINATION SURVEY REPORT ON HEALTH AND HEALTH CARE 6 (2010), http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf [<https://perma.cc/AZL7-NFG3>].

58. Tonia Poteat, Danielle German & Deanna Kerrigan, *Managing Uncertainty: A Grounded Theory of Stigma in Transgender Health Care Encounters*, 84 SOC. SCI. & MED. 22, 27 (2013).

that's a boy's name. Do you think you're a little boy?"⁵⁹ Likewise, a primary care provider "othered" transgender patients when he proclaimed, "These can be difficult patients, particularly trans women often have had pretty rough experiences and are pretty rough people and not necessarily compliant with visits or medications, follow up."⁶⁰ Another transgender patient described an unnecessary "blaming" encounter after being criticized for "read[ing] too much on the internet" when presenting outside medical research during an appointment with a provider.⁶¹

Furthermore, other types of discriminatory conduct described by transgender patients include the misuse of pronouns, incorrect use of a name, inappropriate questions about a patient's body, and the complete denial of patient services based on his or her gender identity.⁶² This blatant discrimination places the medical provider in a position of authority that undermines the patient's voice.⁶³ The provider's perceived authority also creates negativity for transgender patients in a healthcare setting, which then adversely affects the doctor-patient relationship.⁶⁴

This perceived position of authority, however, is often over-exaggerated as many transgender patients express concerns that their healthcare providers are uneducated and poorly informed with regards to transgender health, leading many patients to re-educate their doctors and nurses about their health needs and medically necessary treatments.⁶⁵ To describe the effects of the lack of transgender health education, one transgender patient stated, "I was trying to figure out what was going on with me. I didn't want the additional burden of having to educate my provider on top of that. And the last thing I wanted was to be a training case for a practitioner who had never provided care to a transgendered person before."⁶⁶ Transgender patients approach doctors in different ways by challenging the medical decisions of their providers, which often forces a wedge between the doctor and the patient.⁶⁷ Often, providers are shown to lack the training and medical knowledge needed to meet the needs of

59. *Id.*

60. *Id.*

61. *Id.*

62. Transgender Law Center, *Transgender Health and the Law: Identifying and Fighting Health Care Discrimination*, TRANSLAW (July 2004), <http://translaw.wpengine.com/wp-content/uploads/2012/07/99737410-Health-Law-Fact.pdf> [<https://perma.cc/PY26-UL2W>].

63. Poteat et al., *supra* note 57, at 28.

64. *Id.*

65. *Id.* at 26.

66. *Id.*

67. See John W. Snelgrove, Amanda M. Jasudavisius, Bradley W. Rowe, Evan M. Head & Greta R. Bauer, "Completely Out-At-Sea" with "Two-Gender Medicine": A Qualitative Analysis of Physician-Side Barriers to Providing Healthcare for Transgender Patients 10, BIOMED CENTRAL (May 4, 2012), <https://bmchealthservres.biomedcentral.com/articles/10.1186/1472-6963-12-110> [<https://perma.cc/T848-AGGS>].

transgender individuals by often failing to remain up-to-date on sensitivity training.⁶⁸

Due to gender identity discrimination in healthcare, a positive doctor-patient relationship may be non-existent for many transgender people because providers do not lay the proper foundation to build the trust necessary between a doctor and patient. Consequently, the final rule does not usurp the doctor-patient relationship because these types of comments and harassment undermine the idea that a proper relationship existed prior to the ACA and Section 1557. The final rule cannot undermine trust, which does not exist.

The lack of a positive doctor-patient relationship factors into the overall mistrust of the healthcare system for many patients identifying as transgender. This mistrust led 28% of patients in the National Transgender Health Discrimination Survey to avoid their medical treatment when sick or injured altogether.⁶⁹ Unfortunately, some who avoid medical care may seek treatment through unsafe means.⁷⁰ But due to Section 1557's final rule, patients who refused to go to a hospital or clinic for fears of discrimination may now have the courage and confidence to pursue the treatments needed to live a healthy life.

B. "Medically Necessary" Transgender Healthcare Services.

Access to quality healthcare is essential for thousands of transgender patients. This healthcare includes primary and emergency care as well as transition treatments such as hormone therapy and gender reassignment surgery. These types of procedures are not "experimental" or "cosmetic" but an absolute necessity for the mental and physical health of the patient. Section 1557's final rule lays the foundation for providers to finally meet their transgender patients' health needs by offering medically necessary care. In HHS's explanation of Section 1557's final rule determination, exclusions of healthcare services related to gender dysphoria and transition-related procedures are now recognized as "outdated and not based on current standards of care."⁷¹ However, the *Franciscan Alliance* court stated, "Plaintiffs . . . note that transition-related procedures are viewed by many in the medical community as harmful."⁷² This view completely disregards the standards of care promoted and followed by professional associations across the United States.

With a mission to promote evidence-based healthcare for transgender patients, the World Professional Association for Transgender Health (WPATH) works to further understand and treat gender dysphoria through various medical providers.⁷³ WPATH recently published its 7th version of *The Standards of Care*

68. *Id.* at 11.

69. GRANT ET AL., *supra* note 56, at 7.

70. Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 381 (2007).

71. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 672 (N.D. Tex. 2016).

72. *Id.*

73. The World Professional Association for Transgender Health, *Mission and Values*, WPATH (2017),

with the purpose of establishing the absolute highest standards of healthcare for transgender individuals in the healthcare system.⁷⁴ It also provides health professionals with important clinical guidance for a patient's specific needs.⁷⁵

In the *Standards of Care*, WPATH specifically states that “feminizing/masculinizing hormone therapy—the administration of exogenous endocrine agents to induce feminizing or masculinizing changes—is a medically necessary intervention for many transsexual, transgender, and gender nonconforming individuals” and “sex reassignment surgery is effective and medically necessary” to treat gender dysphoria.⁷⁶ They further support these statements through a series of studies that examine patient satisfaction of these health services. Most follow-up studies show “an undeniable beneficial effect of sex reassignment surgery” related to “well being, cosmesis [physical appearance], and sexual function.”⁷⁷ Between 87% and 97% of patients also reported improved psychosocial outcomes after having hormone therapies.⁷⁸ And with over 2,000 patients observed and 79 studies implemented in recent history, researchers found that combined hormone therapy and sex reassignment surgery exhibited an overall effectiveness for transgender persons.⁷⁹

As the medical field continuously advances, improvements on the overall wellbeing of transgender patients who elect surgery or other forms of care for gender dysphoria will only keep improving. But providers do not need to look to the future. In light of today's research, it is well established that transgender-related treatments and procedures are effective and beneficial. In addition to WPATH, many reputable medical organizations across the United States issued policy statements supporting transgender healthcare rights and found transgender-related services as medically necessary. As the largest organization of physicians and medical students in the United States, the American Medical Association (AMA) “supports the equal rights, privileges and freedom of all individuals and opposes discrimination based on sex, sexual orientation, gender identity, race, religion, disability, ethnic origin, national origin, or age.”⁸⁰ In 2008, the association issued a resolution, which stated, “RESOLVED, [t]hat the

http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=39 [https://perma.cc/DV54-ZWJQ].

74. THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 1 (2011),

[https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) [https://perma.cc/2YMS-5D9B].

75. *Id.*

76. *Id.* at 33, 54.

77. *Id.* at 107.

78. *Id.* at 108.

79. *Id.*

80. American Medical Association (AMA), *Policies on Lesbian, Gay, Bisexual, Transgender & Queer (LGBTQ) Issues* (2016), <https://www.ama-assn.org/delivering-care/policies-lesbian-gay-bisexual-transgender-queer-lgbtq-issues> [https://perma.cc/KDH9-78G5].

AMA support public and private health insurance coverage for treatment of gender identity disorder.”⁸¹

Furthermore, the largest professional organization of psychologists in the United States, the American Psychological Association (APA) issued a statement resolving that the APA “recognizes the efficacy, benefit, and medical necessity of gender transition treatments” and “supports access to appropriate treatment in institutional settings for people of all gender identities and expressions; including access to appropriate healthcare services including gender transition therapies.”⁸²

In addition to the AMA and APA, the American Psychiatric Association, American Public Health Association, and many other professional organizations as well as numerous civil rights organizations and legal rights groups including ACLU and the National Lawyers Guild openly support the coverage and treatment of transgender-related services.⁸³ The promotion of high-quality care, acceptance, and overall support from these professional organizations should not be downplayed when deciding the need for full coverage and proper access to transition-related procedures, especially when HHS confirms the need to legally end discrimination on the basis of sex through Section 1557’s transgender healthcare mandate.⁸⁴

Even if a patient wanted to acquire a medical service from a health provider, he or she may be denied insurance coverage, as providers consider the service not medically necessary, which outright blocks any ability to have a treatment covered by insurance or offered in a safe medical environment.⁸⁵ By categorizing many of these services as medically unnecessary, life changing hormone therapy is deemed too “experimental” and various plastic surgeries obtained typically during transition are treated as “cosmetic.”⁸⁶ This allows health insurance companies, hospitals, and clinics to deny services, which gender-conforming patients can easily access.⁸⁷

Take, for a general example, Wisconsin’s Dean Health Plan, a for-profit, integrated healthcare organization under the SSM Health System.⁸⁸ The Dean

81. AMA, *Resolution 122.2* (2008), <http://www.imatyfa.org/assets/ama122.pdf> [<https://perma.cc/GVG7-AJRC>].

82. American Psychological Association (APA), *Transgender, Gender Identity, & Gender Expression Non-Discrimination* (Aug. 2008), <http://www.apa.org/about/policy/transgender.aspx> [<https://perma.cc/J6NX-A8T6>].

83. See Lambda Legal, *Professional Organizations Statements Support Transgender People in Health Care*, LAMDA LEGAL, http://www.trans-parenting.com/wp-content/uploads/2015/08/fs_professional-org-statements-supporting-trans-health_4.pdf [<https://perma.cc/CS6P-UTVV>] (last visited Nov. 19, 2017).

84. See, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31385 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

85. Transgender Law Center, *Transgender Health and the Law: Identifying and Fighting Health Care Discrimination* (July 2004), <http://translaw.wpengine.com/wp-content/uploads/2012/07/99737410-Health-Law-Fact.pdf> [<https://perma.cc/E6VQ-GML5>].

86. See *Id.*

87. See *Id.*

88. SSM Health, *Overview of Dean*, DEAN HEALTH PLAN, www.deancare.com/about-us/overview/ [<https://perma.cc/R7DE-ZWE9>] (last visited Nov. 4, 2017).

Health Plan's policy contains a standard definition of "medically necessary" treatment for health coverage claims:

"Medically Necessary Definition - The Dean Health Plan benefit certificate defines medical necessary care as those treatment, services or supplies provided by a hospital or health care provider that are required to identify or treat a member's illness or injury and which, as determined by our Medical Affairs Division, are:

- Consistent with the Member's illness or injury; and
- In accordance with generally accepted standards of medical practice; and
- Not solely for the convenience of a member, hospital, or other provider; and
- The most appropriate supply or level of service that can be safely provided to the member in the most cost effective manner."⁸⁹

Based on this "medically necessary" definition, transgender treatments and surgeries are often denied.⁹⁰ However, according to the updated standards of care for transgender patients, these services are completely essential in order to "have the ability to transition to your authentic gender through medically necessary health care."⁹¹ As asserted below, each element of the Wisconsin Dean Health Plan's "medically necessary" standard is adequately met using the standards of today's transgender healthcare.

First and as previously stated, a procedure is deemed medically necessary when it is "consistent with the Member's illness or injury."⁹² To determine whether a procedure is medically necessary, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) is an approved handbook by the American Psychiatric Association that healthcare providers in the United States use as the universal authority for mental disorder diagnosis and provides the standard for diagnosing gender dysphoria.⁹³ As described by the American Psychiatric Association, "gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify."⁹⁴ A gender dysphoria diagnosis involves "a difference between one's experienced/expressed gender and assigned gender, and significant distress or problems functioning."⁹⁵

89. Dean Health Plan, *Non-Covered Medical Procedures and Services MP9415* 8 (Nov. 1, 2016), <https://www.deancare.com/app/files/public/4771/pdf-medicalpolicies-9415-NonSvcsPolicy.pdf> [<https://perma.cc/YF2R-76HS>].

90. Transgender Law Center, *supra* note 84, at 2.

91. *Sasha's Story*, *supra* note 1.

92. SSM Health, *supra* note 87.

93. *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N (2017), <https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> [<https://perma.cc/X4AK-MQYV>].

94. *See What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (2017), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/8U8T-RGW8>].

95. *Id.*

If a transgender patient is diagnosed with “gender dysphoria,” an approved mental disorder in the universally authoritative DSM-5, then the first element of the medically necessary definition is satisfied. However, there are some setbacks to this diagnosis. Although this is a positive step from calling it “gender identity disorder,” the term “gender dysphoria” marks it as a psychiatric disease.⁹⁶ Still, “gender dysphoria” and Section 1557 gives patients a medical and legal authority to argue for coverage inclusion of these life-changing procedures.

Next, the second and third elements are “in accordance with generally accepted standards of medical practice” and “not solely for the convenience of a member, hospital, or other provider.”⁹⁷ As stated above, the *Standards of Care* by WPATH consistently proclaim that gender transition-related procedures are good medical practice and appropriate treatment.⁹⁸ Furthermore, they clarified their position on the medical necessity of transition-related treatments like hormone therapy and sex reassignment surgery in a 2008 statement:

[S]ex reassignment, properly indicated and performed as provided by the Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria. Sex reassignment plays an undisputed role in contributing toward favorable outcomes, and comprises Real Life Experience, legal name and sex change on identity documents, as well as medically necessary hormone treatment, counseling, psychotherapy, and other medical procedures.⁹⁹

As shown previously in the *Standards of Care*, transition related procedures have a beneficial effect to many patients who seek out these procedures.¹⁰⁰ Additionally, numerous agencies and professional organizations have supported these types of procedures as stated before.¹⁰¹

And finally, the last element states that procedures should be “the most appropriate supply or level of service that can be safely provided to the member in the most cost effective manner.”¹⁰² *Franciscan Alliance* clearly states how providers are concerned “if a doctor would perform a mastectomy as part of a medically-necessary treatment for breast cancer, it would be illegal for the same doctor to decline to perform a mastectomy for a medical transition, even if the doctor believed removing healthy breast tissue was contrary to the patient’s

96. Kayley Whalen, *(In)Validating Transgender Identities: Progress and Trouble in the DSM-5*, NAT’L LGBTQ TASK FORCE, <http://www.thetaskforce.org/invalidating-transgender-identities-progress-and-trouble-in-the-dsm-5/> [<https://perma.cc/U6HK-KN9M>] (last visited Nov. 4, 2017).

97. SSM Health, *supra* note 87.

98. See Lambda Legal, *supra* note 82.

99. *Id.* at 4.

100. THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 73, at 55, 107.

101. See Lambda Legal, *supra* note 82.

102. SSM Health, *supra* note 87.

medical interest.”¹⁰³ But the court emphasizes that it is the same procedure.¹⁰⁴ However, the complaint states that a “legitimate nondiscriminatory reason can justify a limitation of services.”¹⁰⁵ Neither the complaint nor the court’s opinion put forth the justification that these procedures are any less safe when performed on transgender patients as compared to other patients requiring these services. If the provider’s judgment is based on the typical standards of care promoted by professional health organizations, then a transition related procedure should be provided and covered by insurance.

Additional issues occur when, even with the most updated resources on transition-related procedures, sex reassignment surgeries, hormone therapies, and other transition-related procedures are deemed “experimental.” For example, take the “Experimental and/or Investigational” policy definition:

Experimental and/or Investigational - According to the Dean Health Plan benefit certificate, these are surgical procedures or medical procedures/treatments, supplies or devices, or drugs which at the time provided or sought to be provided, are in the judgment of the Dean Health Plan, Inc. Medical Directors not currently recognized as accepted medical practice and/or the procedure, treatment, supply, device or drug includes, but is not limited to, one of the following:

Has not been approved by the appropriate governmental agency. . . for the purpose it is being used for, which includes the patient’s medical condition is not demonstrated to be as beneficial as established alternatives.¹⁰⁶

This language is a difficult standard for transition-related treatments to meet because the Food and Drug Administration (FDA) has not approved medications for gender dysphoria.¹⁰⁷ Within this standard, health insurance companies and health providers can find a loophole to deny patients gender-non-conforming procedures even when each of the elements from the “medically necessary” standard are met.

As described, the medically necessary standard for transition-related procedures is a significant barrier for the transgender community in Wisconsin. Although Wisconsin does not currently have a statewide ban on insurance exclusions for transgender healthcare, it no longer provides transgender healthcare coverage to state employees.¹⁰⁸ Wisconsin Department of Employee

103. First Amended Complaint, *supra* note 40, at 14.

104. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 673 (N.D. Tex. 2016).

105. *Id.*

106. *SSM Health*, *supra* note 87, at 9.

107. See Fenway Health, *The Medical Care of Transgender Persons*, NAT’L LGBT HEALTH EDUC. CTR. 5 (2015), <http://www.lgbthealtheducation.org/wp-content/uploads/COM-2245-The-Medical-Care-of-Transgender-Persons.pdf> [<https://perma.cc/JRH2-SNWW>].

108. *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN (Aug. 22, 2017), <http://www.hrc.org/state-maps/transgender-healthcare> [<https://perma.cc/2SXQ-KAPU>] (click “Select State” and select “Wisconsin”).

Trust Funds' Group Insurance Board announced on February 1, 2017, that the gender reassignment exclusion was reinstated for all state employees and again excludes "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment."¹⁰⁹ This is a major setback because it can cost as much as \$100,000 out of pocket if insurance provides little to no coverage.¹¹⁰ On average, it costs \$5,000 to \$10,000 for a breast augmentation, \$1,500/year for hormone therapies, and \$25,000 for double mastectomies.¹¹¹

Recently, a University of Wisconsin School of Medicine and Public Health student filed a complaint for the denial of coverage for gender reassignment surgery.¹¹² These services, without coverage, can cost thousands of dollars, and in the medical student's case, it would cost her \$21,000 out of pocket.¹¹³ However, state consultants estimate the yearly cost of covering all transgender patients in Wisconsin on the state healthcare plan is between \$100,000 to \$250,000, which is "less than two-tenths of 1 percent of the health program budget at most."¹¹⁴ The benefits of including these services for transgender patients clearly outweigh the additional costs for the state.

Although there is substantial research into medically necessary standards of care for transgender patients as well as support by professional organizations for access to transition-related procedures across the United States, the opposition downplays the need to end discrimination of sex and gender identity with hospital providers, clinics, and staff. By rescinding the final rule of Section 1557, proponents are damaging the hopes of receiving medically necessary care and procedures for transgender men and women. This is shown in the case of Wisconsin where the state quickly took away coverage once the court issued the injunction.

C. Recent Case Law Interpreting Section 1557.

The final rule furthermore does not redefine the word "sex." Instead, it prohibits discrimination based on sex. This includes on the basis of sex

109. *Gender Reassignment Exclusion Reinstated*, WIS. DEP'T OF EMP. TRUST FUNDS (February 2, 2017), http://etf.wi.gov/news/ht_20170201.htm [<https://perma.cc/2XS9-GTFR>].

110. Christ Taylor, *Transgender Surgery Can Cost More Than \$100,000*, TIME (Oct. 29, 2015, 11:53 AM), <http://time.com/money/4092680/transgender-surgery-costs/> [<https://perma.cc/QD2T-HUHB>].

111. See Gabriel Bell, *How Much Does Gender Reassignment Surgery Actually Cost*, HEATSTREET (Nov. 21, 2016, 2:01 PM), <https://heatst.com/biz/gender-reassignment-cost/> [<https://web.archive.org/web/20170704183859/https://heatst.com/biz/gender-reassignment-cost/>].

112. David Wahlberg, *Transgender UW Research Denied Coverage for Gender Confirmation Surgery, Complaint Says*, WIS. ST. J. (July 27, 2016), http://host.madison.com/wsj/news/local/health-med-fit/transgender-uw-researcher-denied-coverage-for-gender-confirmation-surgery-complaint/article_0b84452b-8e03-51f8-906b-3071319bf544.html [<https://perma.cc/65SG-L969>].

113. *Id.*

114. Samantha Allen, *Wisconsin Pulls Plug on Trans Health Care*, THE DAILY BEAST (Feb. 7, 2017, 1:02 AM), <http://www.thedailybeast.com/articles/2017/02/07/wisconsin-pulls-plug-on-trans-health-care.html> [<https://perma.cc/NP8Z-596A>].

stereotyping and gender identity. Nowhere in the final rule does it redefine “sex” so that it no longer refers to an individual’s status as male or female. According to the plaintiffs in *Franciscan Alliance*, “HHS actions attempt to expand the definition that is not in accordance with law.”¹¹⁵ The complaint also alleges that Congressional intent shows “gender identity” was purposely not included under “sex” in Section 1557. Thus, the term “sex” should retain its original and only meaning—one’s immutable, biological sex as acknowledged at or before birth.¹¹⁶ But before the promulgation of the final rule and the heated debate over the term “sex,” courts had already interpreted Section 1557 to uphold transgender persons’ claims of unfair discrimination on the basis of sex under Section 1557, thus upholding the constitutional interpretation of the provision to include discrimination against gender identity when using the phrase discrimination based on sex. The final rule further supports this jurisprudence.

Since the enactment of the ACA, courts in multiple jurisdictions ruled on cases involving Section 1557 and transgender healthcare rights before the HHS’s promulgation of the final rule in 2016. Each of their statutory interpretations provide additional insight into the workings of Section 1557. When reviewing the case law, multiple courts upheld the anti-discrimination provision in the ACA and found acts to be discriminatory against transgender patients.

For example, *Rumble v. Fairview Health Services* was the first case offering an in-depth interpretation and close examination of Section 1557 before promulgation of HHS’s final rule.¹¹⁷ In *Rumble*, a transgender man sought healthcare services at Fairview Health Services in Minnesota.¹¹⁸ During his time at the Fairview emergency department and hospital, Plaintiff Rumble alleged that he was blatantly discriminated against under Section 1557 because of his status as a transgender man.¹¹⁹ Testimony claimed that Rumble was treated with hostility, asked inappropriate questions such as whether he ever had sex with objects, and had severe pain directly caused by the doctor’s jabbing during the examination.¹²⁰

The Court held that the plaintiff adequately stated a claim for a violation under Section 1557 and stated, “it is plausible that Dr. Steinman mistreated Plaintiff because of Rumble’s gender identity, and the mistreatment was not ‘random poor treatment that anyone might have received.’”¹²¹ This case symbolizes the continuing jurisprudential development in health law and its changing stance in transgender healthcare. Section 1557 gives transgender patients, like Rumble who are unfairly treated while obtaining emergency and necessary health services, the opportunity to seek justice and damages in federal

115. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 685 (N.D. Tex. 2016).

116. *See id.* at 671.

117. *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *24, (D. Minn. 2015).

118. *Id.* at *1-3.

119. *Id.* at *2.

120. *Id.* *30-31.

121. *Id.* *35-36 (emphasis and brackets omitted).

court. Therefore, the final rule's objective reaffirms this notion of equal access to the healthcare system.

Another case involving the coverage of transgender healthcare procedures is *Cruz v. Zucker*.¹²² In *Cruz*, Medicaid recipients with gender dysphoria sought medical procedures including various plastic surgeries in order to reduce their severe anxiety from gender dysphoria.¹²³ Recipients argued that they were unfairly discriminated against under Section 1557 because Medicaid denied them coverage for these procedures.¹²⁴ Specifically, the recipients argued that the "Youth Exclusion" policy discriminated on the basis of sex.¹²⁵ The procedures in dispute included breast augmentation, facial feminizing surgery, and body sculpting procedures.¹²⁶ After a lengthy trial, Judge Jed Rakoff ordered Medicaid officials in New York to provide coverage for gender transition procedures that were once deemed cosmetic and transition therapy, including for those under the age of 18.¹²⁷

And finally, the Wisconsin case in *Fields v. Smith* challenged a law that denied access to necessary treatment, including hormone therapy and sex reassignment surgery, for three transgender women who at the time were incarcerated.¹²⁸ After six years of litigation, the Supreme Court denied certiorari leaving in the place the 7th circuit's opinion upholding transgender prisoners' rights to healthcare access in Wisconsin, including healthcare procedures deemed to be transition-related.¹²⁹

Each of these cases demonstrate how courts in multiple jurisdictions applied Section 1557 to cases involving transition-related procedures, insurance coverage problems, anti-discrimination violations, and access to healthcare in a variety of health systems. These cases are integral to how Section 1557 moves forward in today's case of *Franciscan Alliance*. They demonstrate changing times where transgender rights are at the forefront of litigation. These cases also describe how judges interpreted Section 1557 in the context of each specific claim or grievance. Although these cases were not subject to the overall issues regarding the constitutionality of HHS's final rule they do, however, give great insight as how the courts applied Section 1557 before any additional guidance was given. Based on the courts interpretation, there should be no discrimination towards transgender individuals and their families under the Affordable Care Act and the healthcare system.

122. *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015).

123. *Id.* at 336.

124. *Id.* at 338-39.

125. *Id.* at 348.

126. *Id.* at 338.

127. LeGaL Foundation, *LGBT Law Notes* 526 (2016), <http://www.nyls.edu/faculty/wp-content/uploads/sites/148/2016/12/LGBTLN.12.20164.pdf> [<https://perma.cc/SP4K-PAKS>].

128. *Fields v. Smith*, 712 F. Supp. 2d 830 (Wis. 2010).

129. *See Smith v. Fields*, 132 S. Ct. 1810 (2012); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

III. CONCLUSION

A. *Section 1557 and the Future of Transgender Health Services.*

Section 1557 brings to fruition the need for immediate improvements on healthcare access for transgender individuals and families across the United States. These improvements not only include access to care but access to the highest quality of care from providers, absent unnecessary discrimination and bias. In order to adequately service transgender patients with all of their healthcare needs, Section 1557 must be implemented immediately, without discrimination based on their gender identity or any other sex-stereotyping. In order to further improve the doctor-patient relationship between healthcare providers and transgender patients, further education on transgender health is warranted under Section 1557. In addition, Section 1557's equal access to care and the inclusion of medical services for transgender patients under an individual or family's health insurance must remain intact. If the State of Wisconsin chooses to not abide by Section 1557, the impact on the transgender community would be detrimental, and the fines imposed on the State could lead to tremendous budget deficiencies.

As the challenges from promulgating a rule like Section 1557 continue to mount, there are many other ways to boost transgender health services. For example, Planned Parenthood recently announced new services for transgender people as clinics started hormonal replacement therapy in late 2016.¹³⁰ The Association of American Medical Colleges also released their first guidelines for training physicians for the care of LGBTQ individuals.¹³¹ Furthermore, the Fenway Health Institute provided education programs and resources to help with testing, integrated care, and patient advocacy specifically directed towards transgender patients.

WPATH also established a database so transgender men and women may search for healthcare professionals with expertise in working with transgender people.¹³² The Gay and Lesbian Medical Association Health Professionals

130. *Planned Parenthood Announces Services for Transgender Patients*, FOX 13 NEWS (Sept. 26, 2016, 8:12 AM), <http://www.fox13news.com/news/local-news/207786186-story> [<https://perma.cc/B8NW-6T7E>].

131. *AAMC Releases Medical Education Guidelines to Improve Health Care for People Who are LGBT, Gender Nonconforming, or Born with Differences of Sex Development*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES (Nov. 18, 2014), <https://www.aamc.org/newsroom/newsreleases/414490/11182014.html> [<http://web.archive.org/web/20170321125649/https://www.aamc.org/newsroom/newsrelease/s/414490/11182014.html>]; *Implementing Curricular and Institutional Climate Changes to Improve Health Care for Individuals Who are LGBT, Gender Nonconforming, or Born with DSD: A Resource for Medical Educators*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES (2014), <https://members.aamc.org/eweb/upload/Executive%20LGBT%20FINAL.pdf> [<https://perma.cc/LGV4-ZJZW>].

132. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *Find a Provider*, http://www.wpath.org/uploaded_files/140/custom/find_a_provider.cfm?CFID=15842021&CFTOKEN=a8dea164a1b33ed2-89C685A8-0378-DD72-DDC75993B45207A6 [<https://perma.cc/G7RS-Z4D3>] (last visited Nov. 3, 2017).

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Advancing LGBT Equality also developed a similar database.¹³³ In addition to these databases, the Transgender Awareness Week and Transgender Day of Remembrance, which is remembered on November 20, annually, is extremely important to recognize and memorialize those who were killed because of transgender discrimination as well as bring national attention to the violence that continues today against the transgender community, which the ACA's Section 1557 tried to prevent through its nondiscrimination provision.

Still, the nationwide injunction and stay prohibiting the enforcement of Section 1557 throughout the United States is a step backwards for transgender healthcare rights. A revision or policy change to Section 1557's final rule promulgation by the HHS, or a full repeal of the ACA's complex and substantial law, will substantially and negatively affect many transgender patients' access to coverage and care.

However, Section 1557, at its core conceptualizes one thing: that health is health. No matter an individual's sex or gender identity, each American citizen should have equal access to medically necessary healthcare and have a positive experience when stepping into any health provider's office. Healthcare should be a fundamental human right for everyone and Section 1557 allows health to be health for all.

133. GAY AND LESBIAN MEDICAL ASSOCIATION, *Find a Provider*, <http://www.glma.org/index.cfm?fuseaction=Page.viewPage&pageId=939&grandparentID=534&parentID=938&nodeID=1> [https://perma.cc/KTD6-T94B] (last visited Nov. 3, 2017).