
RECENT ADMINISTRATIVE POLICY

ADMINISTRATIVE LAW — IDENTITY RECORDS — SOCIAL SECURITY ADMINISTRATION ELIMINATES SURGICAL REQUIREMENT FOR CHANGING TRANS INDIVIDUALS' GENDER MARKERS. — SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, RM 10212.200 *Changing Numident Data for Reasons Other than Name Change* (2013).

On June 14, 2013, the Social Security Administration (SSA) announced a new policy for trans individuals¹ seeking to change their gender designation in their Social Security records.² Under the SSA's previous policy, trans people seeking to change their gender markers were required to provide documentation of sex reassignment surgery (SRS).³ Under the new policy, they can choose to submit either government-issued documentation that reflects a gender change, a court order directing legal recognition of the change, or a physician's statement confirming the trans individual has received "appropriate clinical treatment for gender transition."⁴ This policy change, which garnered little attention outside the LGBT press,⁵ was the consequence of a deliberate advocacy strategy to engage in the administrative policymaking process and will tangibly improve millions of trans people's lives.

Despite their numerical prevalence,⁶ trans people face severe and pervasive discrimination within American society. The first comprehensive national survey on trans discrimination, conducted in 2011, found that trans people are four times as likely as the general population to live in extreme poverty, twice as likely to be unemployed, and

¹ Although many definitions exist, "trans" is generally understood as an umbrella term encompassing a range of people that includes those who identify as "transgender," "transsexual," or "gender nonconforming." Professor Dean Spade defines "transgender," itself an umbrella term, as describing people who "live their lives identifying as and expressing a different gender than the one assigned to them at birth." Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 751 (2008); see also *id.* at 733 n.12 (surveying how some of these terms have been used over time).

² SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, RM 10212.200 *Changing Numident Data for Reasons Other than Name Change* (2013) [hereinafter POMS], archived at <http://perma.cc/VBN4-F92F>.

³ NAT'L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER PEOPLE AND THE SOCIAL SECURITY ADMINISTRATION 1 (2013), available at http://transequality.org/Resources/SSAResource_June2013.pdf.

⁴ POMS, *supra* note 2, (B)(2).

⁵ See, e.g., Sunnive Brydum, *Social Security Removes Surgical Requirement for Gender Marker Change*, ADVOCATE (June 14, 2013, 1:17 PM), <http://www.advocate.com/politics/transgender/2013/06/14/social-security-removes-surgical-requirement-gender-marker-change>.

⁶ It is estimated that there are anywhere between nearly 700,000 and over 3 million trans Americans. See NAT'L CTR. FOR TRANSGENDER EQUAL., UNDERSTANDING TRANSGENDER 1 (2009), available at http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf.

almost twice as likely to be homeless.⁷ Forty-seven percent of those surveyed reported experiencing an adverse job outcome (such as being fired, not hired, or denied a promotion) because of their trans status.⁸ Discrimination is especially prevalent in institutional settings: 19% reported being refused medical care due to their trans status; 15% of those who had been to prison reported being sexually assaulted there; and of those who expressed a gender-nonconforming identity in grades K–12, 78% reported harassment, 35% physical assault, and 12% sexual violence.⁹ A shocking 41% of those surveyed have attempted suicide — compared to just 1.6% of the general population.¹⁰ These negative outcomes occur even though trans people have a higher level of educational attainment and civic participation than the general population.¹¹

Within such a context, access to gender-affirming identity documents takes on crucial importance. In everyday life, identity documents are frequently needed to “travel, open bank accounts, start new jobs, purchase alcohol . . . [and] some cold medicines[. . .] [and] vot[e];”¹² and they are also needed in encounters with police.¹³ Possessing identity documents that do not match their gender expression exposes trans people to the risks of harassment, denial of services, and even violence in routine social settings.¹⁴ However, only 21% of trans people have reported being able to update all of their identity records — while 33% have not been able to update *any*.¹⁵ This state of affairs reflects the widely varying policies governing gender reclassification at the federal, state, and local levels, which lead to disparate outcomes for individuals similarly situated with respect to their gender transition.¹⁶

⁷ JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–4 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf. Survey respondents were almost “four times more likely to have a household income of less than \$10,000/year” than were members of the general population. *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Id.* at 3, 6.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 23, 30. Trans people are 25% more likely to be registered to vote and twice as likely to have served in the military as the general population. *See id.* at 30.

¹² *ID Documents and Privacy*, NAT’L CENTER FOR TRANSGENDER EQUALITY, http://transequality.org/Issues/federal_documents.html (last visited Mar. 1, 2014).

¹³ *See Spade, supra* note 1, at 737.

¹⁴ *See GRANT ET AL., supra* note 7, at 5; *ID Documents and Privacy, supra* note 12. Of trans people who have been forced to present gender incongruent ID, 40% have been harassed, 15% have been denied services, and 3% have been assaulted. *See GRANT ET AL., supra* note 7, at 5.

¹⁵ *See GRANT ET AL., supra* note 7, at 139.

¹⁶ *See Spade, supra* note 1, at 737. On one end of the spectrum, self-identification alone is sufficient for gender reclassification at San Francisco, New York, and Boston homeless shelters. *Id.* at 735, fig.1. On the other end of the spectrum, no amount of legal recognition or surgical treatment can alter gender classification for the purposes of prison placement in any state, or changing one’s birth certificate in Tennessee. *Id.*

As a piece of federal documentation, one's Social Security record is of special importance. Ever since the Social Security Number (SSN) became the first unique national identification system in 1935, Social Security records have been used for an "enormous variety" of governmental and commercial purposes, including federal criminal investigations and taxpayer, military, and veteran identifications.¹⁷ Today, Social Security records are used to verify not only Social Security and disability benefits, but also many federal and state welfare benefits (including food stamps), as well as immigration status.¹⁸

Although the Social Security Act does not require it, the SSA records gender data.¹⁹ This data is not used for identification purposes by the SSA itself: Social Security cards do not bear a gender marker,²⁰ gender is not used to determine benefit eligibility or marital status, and gender does not factor into most of the SSA's federal-local benefit matching programs.²¹ Instead, the primary use is statistical: allowing the government to track gender-related differences in benefits administration.²² However, the use of Social Security records for verification in administrative and employment settings sometimes includes gender identification.²³

The SSA's gender reclassification policies are delineated in the Program Operations Manual System (POMS), "a primary source of information" used by employees of the SSA.²⁴ The previous policy required individuals to furnish documentation of SRS, stating that in order to change gender data, "[t]he surgeon or attending physician must provide a letter verifying the sex change surgery has been completed."²⁵ Under the new policy, trans people can choose to submit either government-issued documentation that reflects a gender change (such as an updated passport or birth certificate), a court order directing legal recognition of the change, or a physician's statement confirming they have received "appropriate clinical treatment for gender transition."²⁶

¹⁷ *Id.* at 762; *see id.* at 761 & n.139.

¹⁸ *See id.* at 762 n.140.

¹⁹ *See* Memorandum from the Nat'l Ctr. for Transgender Equal. & Nat'l Gay and Lesbian Task Force, Gender Change in Social Security Account Records 2 (Sept. 2011) (on file with the Harvard Law School Library) [hereinafter SSA Memo].

²⁰ Spade, *supra* note 1, at 762.

²¹ *See* SSA Memo, *supra* note 19, at 2.

²² *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-105, RETIREMENT SECURITY (2007)).

²³ *See* Spade, *supra* note 1, at 762 & n.140.

²⁴ *See* POMS Home, SOC. SECURITY ADMIN., <https://secure.ssa.gov> (last visited Mar. 1, 2014).

²⁵ *See* SSA Memo, *supra* note 19, at 2 (citing SOC. SEC. ADMIN., PROGRAM OPERATION MANUAL SYSTEM, RM 00203.215 *Changing Numident Data—Other than Name Change* (2007)) (emphasis omitted).

²⁶ POMS, *supra* note 2, (B)(2).

Millions of trans people's lives will be materially improved by this policy change, since it lowers the barriers to legal gender recognition for trans people nationally and thus improves their ability to obtain other gender-affirming identity documents, while diminishing the likelihood of "outing" and discrimination from institutions that rely upon Social Security records. It is also an instructive example of a policy change that resulted not from an adversarial litigation strategy, but from an effort to engage in the administrative policymaking process. Because POMS provisions are considered interpretive rules, promulgation of amendments is not subject to public notice-and-comment procedures,²⁷ and there is currently no public information on what motivated this policy change. However, conversations with advocates and a review of memoranda made available for this comment suggest that the new policy resulted from concerted advocacy efforts.

Trans advocacy groups deliberately adopted an administrative lobbying strategy, taking advantage of both a more sympathetic executive branch and also the cascading effect that beneficial administrative policy changes have on future advocacy efforts.²⁸ National gender reclassification policies requiring SRS are largely based on the same flawed conception that gender transition centers on a single "sex change surgery."²⁹ Arguments for changing one such policy are thus transferable to other policies, and each change helps pave the way for the next.³⁰ Thus, by establishing a "beachhead" with one federal policy change, trans rights groups improve the chances of success with the next federal agency, and in turn with state and local officialdom.³¹ Since 2010, the National Center for Transgender Equality (NCTE) and other groups have successively eliminated SRS requirements: first at the State Department,³² and then at the Office of Personnel Management, the Veterans Health Administration, and the U.S. Citizenship and Immigration Services.³³

Lobbying for the SSA policy change was the next step in this "beachhead" strategy. Following their victories with the other federal agencies, civil rights groups began in 2011 to send memoranda to the SSA explaining the deficiencies in the SSA's approach, pointing to the other agencies' revised policies as examples of more forward-looking

²⁷ See, e.g., *Hall v. Sebelius*, 689 F. Supp. 2d 10, 20 (D.D.C. 2009).

²⁸ See Interview with Harper Jean Tobin, Dir. of Policy, Nat'l Ctr. for Transgender Equal., in Washington, D.C. (Nov. 1, 2013) (notes on file with the Harvard Law School Library).

²⁹ See *infra* notes 42–44 and accompanying text.

³⁰ See Interview with Harper Jean Tobin, *supra* note 28.

³¹ See *id.*

³² See Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates*, 19 MICH. J. GENDER & L. 373, 383 (2013). The State Department issues passports and Consular Reports of Birth Abroad. *Id.*

³³ See Interview with Harper Jean Tobin, *supra* note 28.

standards, and providing model rules for prospective adoption.³⁴ Although there is no publicly available information on the SSA's internal deliberations, the evidence suggests that these memoranda influenced SSA decisionmaking. Not only does the new policy mirror model rules provided by the NCTE and the National Gay and Lesbian Task Force,³⁵ but it also reflects much-sought-after improvements over earlier policies adopted by other agencies.³⁶

The SSA's previous approach implicated a number of policy and legal problems. From a policy perspective, unwanted disclosure of one's trans status in varied administrative settings (such as employment, immigration, and access to government services) can lead to adverse outcomes for trans people³⁷ — a cruel irony given that trans people are more likely to require state assistance in the first place due to the economic impact of anti-trans discrimination. In particular, Social Security records are used by employers for identity verification.³⁸ The SSA previously sent “gender no-match” letters to employers when the gender submitted for employee payroll purposes did not match that listed in the employee's Social Security record.³⁹ The intention was to combat fraud, but the result was often to “out” trans employees to their employers. In 2010, the SSA sent 711,488 “no-match” letters.⁴⁰ And although the SSA officially ended this practice in 2011, some state agencies use outdated systems that still check for gender record incongruities, posing a continued danger of unwanted disclosure.⁴¹

Moreover, the SRS requirement did not reflect the realities of the gender transition process, but instead relied upon an antiquated notion that gender transition centers on transformative “sex change surgery.” Since 1952, when Christine Jorgensen — the first person to receive mainstream American press attention for her trans status — traveled to Denmark for SRS procedures and was dubbed upon her return an “Ex-GI” turned “Blonde Beauty,”⁴² SRS has been popularly perceived

³⁴ See, e.g., Memorandum from James P. Firman, Chair, Leadership Council of Aging Orgs. (Jan. 4, 2013) (on file with the Harvard Law School Library) (signed by AFL-CIO, National Council on Aging, Services and Advocacy for GLBT Elders, and Wider Opportunities for Women, among others); SSA Memo, *supra* note 19.

³⁵ Compare SSA Memo, *supra* note 19, at 1, with POMS, *supra* note 2, (B)(2).

³⁶ See Interview with Harper Jean Tobin, *supra* note 28. For instance, the SSA's new policy permits submission of government-issued ID or a court order in lieu of a physician's statement, neither of which were permitted under the State Department's policy. *Id.*

³⁷ See SSA Memo, *supra* note 19, at 3–4.

³⁸ See *Social Security Administration No Longer Notifying Employers About Gender*, NAT'L CENTER FOR TRANSGENDER EQUALITY, <http://transequality.org/news11.html> (last visited Mar. 1, 2014).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 3, at 2.

⁴² JOANNE MEYEROWITZ, *HOW SEX CHANGED 1* (2002).

as the core of the transition process. Administrative schemes governing gender reclassification have reflected this perception.⁴³

In reality, studies suggest that a majority of trans people have not had SRS, and a significant minority are not interested in any surgical procedures.⁴⁴ Some trans people prefer not to undergo SRS, either because they may not personally need or desire it, or because of possible health and fertility risks.⁴⁵ Others who desire SRS are barred by cost: private insurance, Medicare, and Medicaid do not cover most SRS-related procedures, and costs can total tens of thousands of dollars.⁴⁶ Another issue is that other treatments like hormone therapy are much more common⁴⁷ and have a much greater impact on external appearance, and thus on “surviving daily life.”⁴⁸ Thus, conditioning legal gender recognition on SRS rather than other medical treatments essentially guaranteed that a large percentage of trans people would be subject to harassment due to their gender markers on their IDs not matching their external appearance.

Medical practices have adapted to these realities more quickly than the law. The Standards of Care (SOC) promulgated by the World Professional Association for Transgender Health (WPATH), the leading international organization dedicated to trans medical treatment, do not mandate SRS, but instead regard it as one treatment option among many, to be considered within each patient’s individual context.⁴⁹ Both WPATH⁵⁰ and the American Psychological Association⁵¹ have disavowed conditioning legal gender identity recognition upon SRS.

⁴³ See Mottet, *supra* note 32, at 380, 400 (discussing such assumptions in the context of the 1977 Model State Vital Statistics Act); Spade, *supra* note 1, at 756 (noting that “many ID-issuing agencies will not change gender markers on ID for transgender people without evidence that the person has undergone surgery”).

⁴⁴ See GRANT ET AL., *supra* note 7, at 79 (finding that a minority of trans people have had any form of SRS).

⁴⁵ See Spade, *supra* note 1, at 754–55.

⁴⁶ See JAMISON GREEN, BECOMING A VISIBLE MAN 119 (2004).

⁴⁷ See GRANT ET AL., *supra* note 7, at 78 (finding that 62% of trans people have undergone hormone therapy, with the likelihood increasing with age).

⁴⁸ Spade, *supra* note 1, at 755; *see also id.* (noting that these “external markers of gender are far more important than genital status, which is usually only known to one’s closest intimates”).

⁴⁹ See Eli Coleman et al., World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165, 171 (2011). WPATH’s recommendations are not binding on doctors, but the SOC are widely followed by health care professionals.

⁵⁰ See *Identity Recognition Statement*, WORLD PROF. ASS’N FOR TRANSGENDER HEALTH (June 16, 2010), http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%2006-6-10%2000%20letterhead.pdf.

⁵¹ See *APA Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination*, AM. PSYCHOL. ASS’N (Aug. 2008), <http://www.apa.org/about/policy/transgender.aspx>.

From a legal perspective, the SSA's old policy infringed upon privacy rights⁵² by increasing the risk of unwanted disclosure of individuals' trans status.⁵³ The previous policy also interfered with medical autonomy rights⁵⁴ by requiring trans individuals who would prefer not to undergo SRS to decide between honoring that personal preference and undergoing unwanted surgery simply to achieve legal recognition of their gender status.⁵⁵ Finally, the SRS requirement was inconsistent with other public policies related to trans people, since other gender reclassification policies, as well as existing nondiscrimination law, recognize and protect trans people based on their "gender identity," regardless of medical status.⁵⁶

In contrast, the SSA's new policy lowers the barriers to legal gender recognition for trans people in the SSA context, reflects the realities of the gender transition process, and conforms to medical best practices.⁵⁷ Nor will it affect the SSA's statistical purposes for collecting gender data: since trans people are a small fraction of the population, the change is "unlikely to have a noticeable impact."⁵⁸

The revised policy also indirectly benefits trans people in two ways. First, having one authoritative gender-affirming record makes it easier for trans people to have their gender identity recognized in other official contexts, since many gender reclassification policies — including

⁵² The Supreme Court has recognized an "individual interest in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), which lower courts have interpreted as protecting individuals from unwanted disclosure of their trans status, *see, e.g., Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("The excruciatingly [sic] private and intimate nature of transsexualism . . . is really beyond debate.").

⁵³ *See SSA Memo, supra* note 19, at 3–4; *cf. K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (finding the absence of any Department of Motor Vehicles procedure allowing licensees to change the gender markers on their driver's licenses created an impermissible threat of unwanted disclosure).

⁵⁴ The Supreme Court has recognized an individual "interest in independence in making certain kinds of important decisions," including medical decisions regarding procreation and contraception. *See Whalen*, 429 U.S. at 599–600 & n.26.

⁵⁵ While a D.C. district court has suggested the right to medical autonomy does not extend to the decision, in and of itself, to pursue gender transition in the employment context, *see Schroer v. Billington*, 525 F. Supp. 2d 58, 64–65 (D.D.C. 2007), no federal court has directly addressed the burden caused by unnecessarily conditioning recognition of legal status on a medical decision.

⁵⁶ *See Mottet, supra* note 32, at 410–13. For instance, driver's license gender reclassification policies, access to sex-segregated facilities, and gender classification policies in institutional settings like homeless shelters have moved away from medical requirements. *Id.* at 411–13.

⁵⁷ POMS, *supra* note 2, (B)(2). The new policy explicitly notes that "[s]urgery is no longer required to change the sex field." *Id.*

⁵⁸ SSA Memo, *supra* note 19, at 2. Some government agencies have also argued that "accurate" identity documents should identify the gender assigned to an individual at birth. *See, e.g., Brief of Appellant* at 24, *K.L. v. Dep't of Admin., Div. of Motor Vehicles*, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012) (No. 3AN-11-05431 CI). However, for most legitimate state identification purposes, such as searching for a suspected criminal based on police records, gender records that reflect a person's external gender expression are far more useful than those records that reflect the gender assigned to a person at birth. *See id.* at 25; Mottet, *supra* note 32, at 415.

the SSA's own new policy⁵⁹ — either accept or require gender marker changes to other forms of ID in order to change a recorded gender marker.⁶⁰ Moreover, it provides aid in adjudicative contexts (such as when a court order is required for a birth certificate gender marker change⁶¹), since judges often take the number and type of identity documents a trans person has changed as indicia of the legitimacy of their gender identity.⁶² When pressing one's gender claim with a state agency or a skeptical judge, one is greatly aided by being able to invoke the authority of the U.S. government in legitimizing that claim.⁶³ Second, as discussed above, this latest victory will aid in the “beach-head” strategy rights groups have adopted for altering gender reclassification policies. The SSA was the last federal agency keeping identity records affecting a broad swath of the general population that resisted changing its policy.⁶⁴ A largely uniform national approach presents a powerful argument for change to other government actors that still require SRS, including the Department of Defense (for its payroll and pension systems), a few minor agencies,⁶⁵ and on the state level, birth certificate issuers and Departments of Motor Vehicles.⁶⁶

Much work remains to be done, but the SSA's new policy on gender reclassification is a promising sign of greater realism — and greater humanity — in our national policies toward trans people. Set in a wider context of positive movement in other areas, such as employment discrimination⁶⁷ and protection in schools,⁶⁸ this policy change evinces the mutually reinforcing effects of increased levels of public and institutional awareness of trans issues.

⁵⁹ See POMS, *supra* note 2, (B)(2).

⁶⁰ See Spade, *supra* note 1, at 736. This state of affairs creates both positive and negative feedback loops, where changing (or being denied the ability to change) a gender marker improves (or hinders) one's ability to successfully change the rest of one's documents. This circumstance may explain why 33% of trans people have not been able to change *any* of their documents. See GRANT ET AL., *supra* note 7, at 139.

⁶¹ In twenty-five of the fifty-three jurisdictions (out of fifty-seven) that allow such changes, a court order is required, Mottet, *supra* note 32, at 382–83, imposing extra cost burdens upon trans litigants, *see id.* at 434.

⁶² See, e.g., *K.L.*, 2012 WL 2685183, at *1.

⁶³ Cf. Brief of Appellant, *supra* note 58, at 8 (discussing how an advocacy group used changed federal standards to argue for eliminating a surgical requirement for state driver's licenses).

⁶⁴ Interview with Harper Jean Tobin, *supra* note 28.

⁶⁵ *Id.* (such as the United States Railroad Retirement Board).

⁶⁶ For overviews of state and local SRS requirements, see GRANT ET AL., *supra* note 7, at 140–45; Mottet, *supra* note 32, at 400–02, 411–12. For instance, at least thirty-three states have a surgical requirement with regards to birth certificate gender marker changes. *Id.* at 400–01.

⁶⁷ See, e.g., *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012) (recognizing anti-trans discrimination as “sex” discrimination for Title VII purposes).

⁶⁸ 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West) (to be codified at CAL. EDUC. CODE § 221.5) (giving California public students the right to participate in sex-segregated programs, activities, and facilities consistent with their identity).