

THE RIGHTS OF TRANSGENDER PEOPLE IN **WASHINGTON STATE**



ACLU
Washington

This guide is designed to help transgender individuals understand their legal rights in Washington State.

It is not meant to provide legal advice.

The current legal system assumes individuals identify as one gender, either male or female. While this guide provides an understanding of the current legal system, the ACLU recognizes that many people do not identify as male or female. A person may identify or express as a specific gender, both genders, or neither gender.

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DISCRIMINATION & HARASSMENT

Are there laws that clearly prohibit discrimination against transgender people?

Yes. Our state anti-discrimination law, known as the Washington Law Against Discrimination (WLAD), clearly prohibits discrimination because of “gender expression or identity.”¹

The WLAD protects people from discrimination based on gender expression or actual or perceived gender identity. This protection includes, but is not limited to, the following areas:

- Places of public accommodation (i.e., places that serve the public), including restaurants, hotels, and public schools;²
- Housing, including the renting, buying, and selling of homes;³
- Employment, specifically in state, municipal, and private workplaces with eight or more employees;⁴
- Credit transactions, including loans and credit cards;⁵ and
- Insurance transactions, including health insurance.⁶

Washington law also protects people from:

- Violence and threats motivated by gender expression or actual or perceived gender identity,⁷ and
- Student-on-student harassment, intimidation, and bullying motivated by gender expression or actual or perceived gender identity in public schools.⁸

Further, at least five cities and one county in Washington have passed their own laws prohibiting discrimination based on gender expression or identity, including:

- Burien (barring discrimination in places of public accommodation, housing, and employment);⁹
- Olympia (barring discrimination in housing);¹⁰
- Seattle (barring discrimination in places of public accommodation, housing, and employment);¹¹
- Tacoma (barring discrimination in places of public accommodation, housing, employment, and education);¹² and

- King County (barring discrimination in places of public accommodation, housing, employment, and education).¹³

In 2009, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into federal law. This law allows the federal government to assist state and local authorities in the investigation and prosecution of hate crimes motivated by bias against a person's gender identity or expression.¹⁴

In addition, federal civil rights laws such as Title VII, which prohibits discrimination based on sex in employment, and Title IX, which prohibits discrimination based on sex in educational programs that receive federal funding, have been applied to prohibit discrimination based on gender identity. However, the Trump administration has opposed the inclusion of gender identity under Title VII and has rescinded federal guidance that provided protections for transgender students under Title IX.¹⁵ The Trump administration's actions have not changed the underlying laws of Title VII and Title IX. (See page 3 for further discussion).

Charged with enforcing the WLAD, the Washington State Human Rights Commission (HRC) works to prevent and eliminate discrimination by investigating civil rights complaints and providing education and training opportunities throughout Washington. For information on how to file a formal complaint with the HRC, call 1-800-233-3247 or visit www.hum.wa.gov

What does “gender expression or identity” mean under the law?

As defined under the WLAD, “gender expression or identity” means “having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.”¹⁶ Under this definition, transgender individuals are protected by the WLAD from discrimination based on their transgender status.¹⁷

Do laws prohibiting discrimination based on “sex” protect transgender people?--See next page for answer--

This field of law is rapidly changing under the Trump administration. The U.S. Ninth Circuit Court of Appeals—whose jurisdiction includes Washington—has made clear that transgender people are protected from sexual harassment and discrimination based on their gender expression or identity under the federal Title VII law, which prohibits sex discrimination in employment.¹⁸

During the Obama administration, federal agencies expanded protections for transgender people. However, the Trump administration has begun to rescind these protections. In 2012, the Equal Employment Opportunity Commission (EEOC) – the agency responsible for enforcing anti-discrimination provisions under Title VII – held that federal law prohibits discrimination against transgender employees.¹⁹ In 2014, the DOJ issued a memo stating that Title VII protects people from discrimination based on gender identity, including transgender status. However, in October 2017, DOJ rescinded the 2014 memo and issued a new memo, which found that Title VII’s prohibition on sex discrimination does not encompass gender identity per se, including transgender status.²⁰

As of October 2017, the U.S. department of Labor (DOL) still lists gender identity as protected under Title VII.²¹ The U.S. Department of Housing and Urban Development (HUD) declared in 2012 that housing discrimination based on gender nonconformity violates the federal Fair Housing Act and adopted regulations prohibiting discrimination on the basis of gender expression or identity in federally-funded housing programs, single-sex emergency shelters, or other facilities.²²

The ACLU believes that the federal Title IX education law, which prohibits discrimination based on sex in education programs or activities that receive federal funding, also protects transgender individuals from sexual harassment and discrimination based on their gender expression or identity. The Obama Administration embraced this interpretation of Title IX. In 2014, the U.S. Department of Education (ED) affirmed that public and private schools receiving federal funding may not discriminate against transgender students.²³ In May 2016, the DOJ and ED issued a joint guidance letter explaining that Title IX’s bar against sex discrimination protects transgender students from discrimination on the basis of gender

identity.²⁴ In February 2017, the Trump Administration rescinded the May 2016 guidance allowing students to use sex-segregated facilities in accordance with their gender identity.²⁵

This reversal represents a change in the executive branch's position, but not a change in Title IX law: the statute and its protections against sex discrimination still stand, and the extent of those protections will be subject to further litigation in the courts. The ACLU believes that schools continue to have a legal obligation to protect transgender students from harassment and discrimination under Title IX, despite the withdrawal of the Obama-era guidance.

Does the U.S. Constitution protect transgender people from discrimination?

Yes. In 2011, the U.S. Court of Appeals for the Eleventh Circuit became the first federal court to recognize that discrimination on the basis of transgender identity violates the Equal Protection Clause of the Fourteenth Amendment.²⁶ In this ruling the court stated that sex discrimination encompasses discrimination on the basis of gender identity or expression.

Although the U.S. Supreme Court has not ruled on this issue, it is the ACLU's position that the U.S. Constitution's guarantee of equality protects individuals from being treated differently (i.e., discriminated against or mistreated) because of their gender expression or identity. The First Amendment, which bars the government from censoring speech or expression, protects people's right to dress (an important form of personal expression) in a way that is consistent with their gender identity. And the Due Process Clause recognizes and protects individuals' interests in determining and expressing their gender through personal appearance and mannerisms.

Does the law protect a transgender person's right to use the restroom consistent with their gender identity?

Yes. The WLAD specifically protects against discrimination in employment and places of public accommodation, including public schools, based on one's gender expression or identity.²⁷ The Washington State Human Rights Commission (HRC)—the state

agency responsible for enforcing the WLAD—issued regulations in 2015 clarifying that the WLAD protects the right of transgender individuals to use restrooms and other gender-segregated facilities consistent with their gender identity.²⁸

Federal agencies have previously determined that federal civil rights law protects a transgender person’s right to use restrooms and other gender-segregated facilities consistent with their gender identity in education programs that receive federal financial assistance (i.e. public schools and some private schools). In 2015, the U.S. Department of Education determined that an Illinois school district violated the federal Title IX law by denying a transgender student access to a gender-appropriate locker room.²⁹ As mentioned above, in May 2016, the U.S. Department of Justice and U.S. Department of Education issued a joint guidance letter reiterating that Title IX protects transgender individuals from discrimination and requires schools to allow transgender students to access sex-segregated facilities consistent with their gender identity. The Trump administration later withdrew that guidance, with the stated purpose of further considering the legal issues involved.³⁰ While the Trump administration has not put forth a formal position on the question of whether Title IX protects transgender individuals from discrimination on the basis of gender identity or expression, the recent actions of federal agencies under the Trump administration suggest that the Trump administration does not believe gender identity and expression is protected. The Department of Justice has stated it will pursue gender identity discrimination cases on a case by case basis.³¹ Title IX itself remains unchanged.

If you are being harassed, intimidated, or bullied in school, keep a record of each incident and report them to your principal or counselor. To talk to someone outside of your school or to get more information on strategies to stop harassment, call the Safe Schools Coalition at 1-877-723-3723 or visit www.safeschoolscoalition.org

Additional support for the rights of transgender students in public schools to use restrooms consistent with their gender identity may be found in the Washington state Office of Superintendent of Public Instruction (OSPI)’s 2012 guidelines to school districts.³² These guidelines, which relate to the elimination of discrimination in public

schools, state that school districts should allow students to use the restrooms consistent with their gender identity consistently asserted at school.³³ The guidelines also state that any student who has a need or desire for increased privacy should be provided access to an alternative restroom, such as a staff or health office restroom, but that no student should be required to use an alternative restroom just because they are transgender or gender nonconforming.³⁴

Are there laws that specifically protect transgender students from discrimination?

Yes. Washington law protects transgender students in public schools from discrimination, intimidation, bullying, and harassment. Since provisions of the WLAD took effect in 2006, the nondiscrimination policies of Washington public schools have included gender expression and identity. In 2010, the Washington Legislature passed a law requiring that public school policies protect transgender students from bullying and harassment.³⁵

Additionally, the WLAD and the Office of Superintendent of Public Instruction (OSPI) require public school officials to allow transgender students to wear clothing that matches their gender identity (including at proms), call transgender students by the appropriate name and pronoun,³⁶ provide transgender students with access to safe and appropriate restrooms and locker rooms (or appropriate alternative places in which to change for gym class), and accommodate transgender athletes.³⁷ For transgender students participating in interscholastic athletics in public schools, OSPI regulations direct school districts to follow policies set forth by the Washington Interscholastic Activities Association (WIAA), which state that students should be allowed to participate in physical education and athletic activities in a manner that is consistent with their gender identity.³⁸

It is the ACLU's position that discrimination or harassment directed at transgender students in public schools may violate the Equal Protection Clause of the federal Constitution, under which we think schools should be held responsible for protecting transgender students from harassment on an equal basis with all other students; the First Amendment, which we think should protect the right of students to

dress in accordance with their gender expression or identity; and the Due Process Clause, which we think should protect students' liberty interest in their personal appearance.

NAME & GENDER CHANGES ON IDENTITY DOCUMENTS

Can a person change their name to reflect their gender identity?

Yes. In Washington, any person over the age of 18 can choose and use any name they wish, as long as the purpose of the name change is not to commit fraud. Through what is called a “common law name change,” a person may simply change their name by using a new name consistently and exclusively for all purposes.³⁹ This method is free and easy. But because many government institutions require documentation proving that a valid name change has been made, it may not create the kind of solid paper trail needed to change important identifying documents.

The other way a person can change their name is by court order, which requires the filing of a Petition for Name Change by the requesting individual and the signing of an Order for Name Change by a judge.⁴⁰ While the process is uniform across Washington counties, counties may charge different fee amounts for a name change. Low-income individuals, however, may qualify for a fee waiver. An individual must contact the District Court in the county where they reside in order to obtain the needed forms for a name change. After a Petition for Name Change has been filed, the court clerk will schedule a date when the person seeking the name change can appear before a judge or a court commissioner. Most judges will allow a name change as long as they are convinced that the purpose of the change is not to evade debts or the authorities. After the judge signs the Order, the individual must pay a recording fee to record the name change with the county auditor.

Can a person get their name and gender marker changed on their birth certificate?

Yes. To change the name on a birth certificate issued in Washington State, a person must submit to the Washington State Department of

Health (DOH):

- A copy of the current birth certificate;
- A certified copy of a name change court order;
- A completed Court Order Legal Name Change Request Form (available for download on the Washington DOH website); and
- A letter from the requestor stating the following information, as listed on the current birth certificate: name, date of birth, place of birth, and names of parents, and contact information.⁴¹

On January 27, 2018, a new DOH regulation went into effect outlining the steps required to change the gender marker on a birth certificate.⁴² The regulation also created a third gender designation – “X” – which is not exclusively male or female.⁴³ To change the gender marker on a birth certificate issued in Washington State, an adult must fill out the application provided by the state registrar. The information requested will include the full name listed on the birth certificate, the parents’ full names listed on the birth certificate, and the sex designation requested. The application must be signed and notarized.⁴⁴

- For a minor to change the gender marker on their Washington State birth certificate, a parent or guardian must submit the application. In addition to the application, the parent or legal guardian must also submit a signed statement by the minor’s licensed health care provider stating that the provider has determined that the change is consistent with the minor’s identity. Parental authorization is also required for a minor to change their name on their birth certificate.

Name and gender marker changes may be requested together (a certified copy of a court-ordered name change is required in these cases). To obtain certified copies of the amended birth certificate, a person must also submit a personal check or money order of \$20 for each certified copy, and either a completed Birth Certificate Mail Order Form or a certified copy of the birth certificate for replacement.

If the DOH denies the request to change gender designation, its decision can be appealed to a court.⁴⁵

Can a person change their name and gender marker with the Social Security Administration (SSA)?

Yes. To change their name, a person needs to provide proof of a court-ordered name change, U.S. citizenship, and identity.

As of June 2013, SSA no longer requires certification from a physician in order to update social security records to reflect a gender change. To change the gender marker on a social security card, a person may now submit to the SSA acceptable government-issued documentation reflecting a gender change, which includes a U.S. passport showing the correct gender, a birth certificate showing the correct gender, or a court order recognizing the correct gender. Alternatively, a person may also submit a signed letter from a licensed physician confirming that the person has had appropriate clinical treatment for gender transition, which does not have to mean surgery.⁴⁶

Is it advisable to change one's name and gender with the SSA?

Yes. Ensuring that the SSA's record of one's gender is consistent with the gender marker on other identity documents will help avoid problems.

The risk of problems caused by not changing SSA records is particularly high in the context of employment. In the past, the SSA sometimes contacted an employer when it noticed that the personal information it had about a social security number (usually name, but sometimes gender) in its Social Security Number Verification System (SSNVS) did not match the information being reported by the employer. These so-called "No-Match" letters often ended up "outing" transgender employees at work. Though the SSA ended its policy of allowing employers to match the gender markers of employees with the SSNVS in 2011, some systems used by state government agencies still match gender markers against SSA records.

Additionally, the possibility that a federal identification card system will be developed increases the likelihood that, in the near future, a person's SSA gender marker will be considered the last word on the person's gender.

Can a person change their name and gender on their U.S. passport?

Yes. To change their name, a person must apply for a new passport by submitting to the U.S. Department of State a completed Form DS-5504, “Application for a U.S. Passport (Name Change, Data Correction, and Limited Passport Book Replacement),” along with copy of a court-ordered name change. Procedures and costs vary depending on how long it has been since the person’s last passport was issued. If more than one year has passed since one’s passport was issued and one is eligible to renew by mail, one must submit a completed Form DS-82, a copy of a court-ordered name change, and appropriate fees.⁴⁷

To change the gender marker on one’s passport, a person must apply for a new passport in person at a passport acceptance facility with a completed Form DS-11, appropriate fees, regularly required documents, and a medical certification indicating that the person has undergone the clinical treatment appropriate to facilitate gender transition, as certified by a licensed physician who is familiar with the person’s transition-related treatment. Certification from the treating physician must include both the physician’s license or certificate number, and the issuing state or jurisdiction of the medical license or certificate. No specific treatment is required, and the details of an individual’s treatment (e.g., details about surgery, hormone treatment) need not be included in the letter. Note that if the physician states that the individual “is in the process of gender transition,” rather than stating that the individual has had appropriate clinical treatment for gender transition, the State Department will only issue a limited, two-year passport (rather than the standard ten-year).⁴⁸

Can a person change their name and gender marker on their driver’s license or state-issued identification card?

Yes. To change the name on a Washington driver’s license or identification card, a person must submit a written request to the Washington State Department of Licensing (DOL) accompanied by an original or certified copy of a court-ordered name change and payment.⁴⁹ With the exception of enhanced driver licenses and enhanced ID cards, an individual may also apply for name changes in

person at a driver's licensing office with proof of a court-ordered name change. The fee for changing one's name on a driver's license is \$10-\$20.⁵⁰

To change the gender marker on a Washington driver's license or identification card, a person must mail a written request to the Washington DOL or visit a driver licensing office location.⁵¹ To make this request, a person must:

- Make sure the person's name, date of birth, and gender are up-to-date with the Social Security Administration (see page 10 for changing information with the Social Security Administration)
- If submitting the request via mail:
 - ◊ Complete a "Change of Gender Designation Request" form (available for download on the Washington State Department of Licensing website) by:
 - Filling out the "Applicant" section of the form, and
 - Having a treating physician⁵² fill out the "Medical or social service provider" section of the form.
 - ◊ Make a copy of any one of the following: the person's valid Washington State driver license/ID card, enhanced driver license or enhanced ID card, or instruction permit.
 - ◊ Mail all of the documents to the address on the form.
 - ◊ Upon receipt of these documents, the Washington DOL will send the individual a letter authorizing that person to get a new license or identification card online or at a driver's licensing office. The fee for changing one's gender marker on a driver's license is \$10 in person or \$20 online.
 - ◊ If submitting the request in person at a driver licensing office, bring:
 - ◊ A copy of any one of the following: a valid Washington State driver license/ID card, enhanced driver license or enhanced ID card, or instruction permit.
 - ◊ Payment for the \$10 fee.
 - ◊ One of the following documents showing the new gender: a valid U.S. Passport, a certified U.S. birth certificate, a valid driver's license or ID card from another U.S. state or territory, a court order indicating a gender designation change, a valid U.S. Permanent Resident Card (I-551), a valid Employment Authorization Card (I-766), or a completed "Change of Gender Designation Request" form.

Does changing the gender marker on one's birth certificate legally change one's gender?

It is unclear because Washington courts have not expressly addressed this issue. Although changing the gender marker on one's birth certificate should put to rest once and for all the question of one's legal gender, courts outside of Washington have, in certain circumstances, ignored the corrected birth certificate. To deal with this potential problem, some individuals obtain a court order declaring a legal change of gender. (To save time and money, some advocates recommend doing this when petitioning for a court-ordered name change.) The advantage of a court order is that it is generally entitled to greater respect than a birth certificate or other identity document by courts and agencies in other states.

FAMILY MATTERS

If a married spouse transitions to their affirmed gender expression or identity during the marriage, is the couple still legally married?

Yes. In 2012, Washington State began recognizing marriage for same-sex couples, including marriages between same-sex couples performed in other states. In 2013, the U.S. Supreme Court invalidated the Defense of Marriage Act, a federal law that restricted the meaning of "marriage" and "spouse" to opposite-sex couples.⁵³ In 2015, the U.S. Supreme Court ruled that state bans on same-sex marriage are unconstitutional.⁵⁴ As a result of these rulings, same-sex couples may marry in all U.S. states and territories. Same-sex couples now receive the same federal benefits as different-sex couples, including tax, military, employment (for employees of the federal government), immigration, family medical leave, social security, and veterans benefits. Same-sex couples also now receive recognition in federal legal matters, such as survivor benefits and spousal evidentiary privileges in criminal prosecutions. The universal legal recognition of same-sex marriage in the United States means that a person's gender identity has no impact on the validity of a marriage.

Can a person who has transitioned to their affirmed gender identity legally marry a person of a different gender identity?

Yes. As discussed above, the United States now recognizes marriage without regard to the gender identities of the spouses. This means that two people can legally marry in the United States regardless of whether either one or both of the spouses has transitioned prior to the marriage, and regardless of whether the legal gender identities of the spouses are different or the same.

Does undergoing gender confirmation surgery during marriage affect parental rights?

Not necessarily. Many transgender parents retain custody of their children, and Washington courts have indicated that a trial court cannot restrict a parent's rights based on the fact that the person is transgender. However, transgender parents sometimes may fare poorly in custody and visitation disputes, where judges base their decisions on what they believe to be in the children's best interest. At least one Washington court has upheld a trial court's consideration of the impact of a parent's impending gender transition in determining primary residency.⁵⁵

HEALTH CARE COVERAGE

Are there laws that protect transgender people from discrimination in health care and health insurance?

Yes. The WLAD prohibits discrimination against transgender people in places of public accommodation, which includes hospitals and other health facilities. Thus, under Washington law, hospitals and clinics may not refuse to treat transgender patients or treat transgender patients differently from other patients because of their gender expression or identity. The WLAD also prohibits discrimination against transgender people in insurance transactions. It follows that, under Washington law, health care insurers may not refuse to issue health insurance coverage, decline to renew health insurance coverage, cancel health insurance coverage, or specify different benefits, terms, rates, conditions, or types of health insurance coverage on the basis of a person's gender expression or identity.⁵⁶

Transgender discrimination in health care is also illegal under the federal Patient Protection and Affordable Care Act (ACA). Section 1557 of the ACA prohibits discrimination on the basis of sex by any health program receiving federal assistance, as well as within any state Health Insurance Marketplace established under the ACA. In a 2016 rule, HHS explicitly stated that under Section 1557 discrimination "on the basis of sex" includes discrimination on the basis of gender identity.⁵⁷ However, in December 2016 a Texas court issued a nationwide injunction to the portion of the 2016 HHS rule prohibiting discrimination on the basis of gender identity (and termination of pregnancy). The ACLU believes that the injunction should not prevent Section 1557 gender identity claims from being decided by the courts. A recent California court decision denied a motion to stay a Section 1557 gender identity claim. The Court found that discrimination on the basis of transgender identity was protected under the ACA and that the injunction was not applicable as the Court's analysis relied on the language of the statute itself, not the enjoined 2016 HHS rule.⁵⁸

Are there government health care programs that provide coverage for transition-related care?

Yes. Coverage for transition-related care varies among government health care programs. Under Medicare, a federal program for individuals over 65 and individuals who are disabled, insurance coverage for surgical and nonsurgical transition-related procedures is available. In May 2014, the U.S. Department of Health and Human Services (HHS) ended its outdated policy of categorically excluding Medicare coverage for transition-related surgery. As a result, decisions about coverage for transition-related care are now made on an individual basis like all other services under Medicare. This does not necessarily mean that Medicare will cover gender affirming surgeries for all patients, but it does mean that Medicare will no longer automatically deny claims for transition-related medical procedures.

Medicaid is a joint federal and state program for individuals and families with limited resources. Washington State's Medicaid program is known as Washington Apple Health. As of 2015 the Washington Apple Health program covers many medically necessary surgical and nonsurgical services for transgender individuals. These include services such as transition related hormones, primary care visits, mental health visits, and various surgeries.⁵⁹ However, even with Apple Health coverage it is still often difficult in Washington to obtain transition related surgeries as there are very few providers willing to accept Apple Health coverage for these procedures. Working with a primary care provider and an advocacy organization may assist transgender individuals in finding surgeons willing to accept Apple Health.

For public employees of Washington State, the Public Employee Benefits Board (PEBB) offers coverage for surgical and nonsurgical transition-related care, including hormones and gender confirming surgery.⁶⁰

For active duty and retired armed forces members under the federal TRICARE program, only coverage for nonsurgical transition-related care is available. Thus, coverage includes hormones and mental health services, but not gender confirmation surgery.⁶¹

Does private health insurance cover transition-related surgery or other transition-related medical treatment?

In June 2014, Washington's Office of Insurance Commissioner (OIC) stated that transgender discrimination in private health insurance plans is illegal under the WLAD and the federal Affordable Care Act. As a result, private health insurance plans sold in Washington State must provide health care coverage to transgender policyholders on terms equal to coverage provided to non-transgender policyholders. For example, if an insurer covers breast reduction surgery to lessen back pain, that insurer could not deny breast reduction surgery for transition purposes if the provider deemed the treatment to be medically necessary.⁶² OIC's rule does not apply to Washington Medicaid (Apple Health), because Medicaid is regulated by a different state agency, the Health Care Authority.

Private health plans that are "self-insured" are often exempt from state law requirements and therefore are generally not subject to the OIC's directive requiring equality in health insurance coverage for transgender individuals. However, self-insured plans must still abide by federal and state anti-discrimination

laws to the extent the laws are applicable. Self-insured plans are private health insurance plans for employees that are fully insured by the employer rather than by an outside insurance company, meaning the employer pays the insurance claims. Because self-insured plans often rely on outside insurance companies for administrative support, it is often difficult for employees to know whether or not their plan is self-insured. If you are not sure whether your plan is self-insured, ask your employer. Self-insured plans are primarily offered by large employers with more than 500 employees.

The Washington State Office of Insurance Commissioner (OIC) encourages transgender individuals who have experienced discriminatory exclusions or denials of service in private health insurance plans to file a complaint for investigation. For information on filing a complaint with the OIC, visit www.insurance.wa.gov or call 1-800-562-6900.

RIGHTS IN JAILS & PRISONS

Updates coming soon!

Updates coming soon!

Updates coming soon!

Updates coming soon!

Updates coming soon!

Updates coming soon!

IMMIGRATION

May a transgender immigrant be granted asylum in the United States because of anti-transgender harassment in the individual's country of origin?

Yes. More and more transgender immigrants are being granted asylum after making the case that they have been persecuted at home because of their failure to conform to cultural gender roles and/or sexual orientation.⁶³

Although many of the courts addressing the issue confuse sexual orientation with gender identity or expression, it is clear that transgender people are a “particular social group” entitled to the protection of asylum laws.

To qualify for asylum in the U.S. on these grounds, a person must show that they are transgender, that they suffered past persecution in their home country, or have a well-founded fear of future persecution if they were to return home, because they are transgender, and that their government either persecuted them or refused to do anything to protect them from persecution by others.⁶⁴

NOTES ON WORDS & PHRASES USED

Terminology used to discuss gender expression and identity varies within transgender communities and has changed over time. To respect every individual's right to self-identify, the term(s) preferred by an individual should always be used. For clarity, here is a general list of common words and phrases used in this guide and elsewhere:

Transgender: A broad term for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some people prefer the term “trans,” an abbreviation for “transgender.” Please note: “Transgender” is correctly used as an adjective, not a noun — thus, “transgender people” is appropriate, but “transgenders” is often viewed as disrespectful. Use of the term as a past-tense verb — for instance, “transgendered” — is also often viewed as disrespectful. “Transsexual” is an older term for people whose gender identity is different from their assigned sex at birth and who seek to transition from male to female or female to male. Many people do not use or prefer the term “transsexual” because of its overly clinical association.

Gender Expression: The way a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyle, and/or voice or body characteristics.

Gender Identity: A person's internal sense of being male, female, or something else. Please note: Because gender identity is internal, a person's gender identity is not necessarily visible to others.

Sex: The classification of people as male or female based on a combination of bodily characteristics, including chromosomes, hormones, internal and external reproductive organs, and features that appear during puberty.

Gender Non-Conforming: A term for individuals whose gender expression is different from social expectations of masculinity and femininity. Please note: Not all gender non-conforming people identify as transgender, and not all transgender people are gender non-conforming. This term is not a synonym for “transgender.”

Gender Transition: The time when a person begins living as the gender with which they identify rather than the gender they were assigned at birth, which often includes changing one's first name, using new pronouns, and dressing and grooming differently. Transitioning may or may not also include medical and legal aspects, such as changing official documents (e.g., driver's license) to reflect one's gender identity, taking hormones, or having surgery. The exact steps involved in transition vary from person to person.

Sex or Gender Confirmation Surgery: Surgical procedures that may be part of gender transition. Gender confirmation surgery may involve a wide variety of different procedures, including those sometimes referred to as "top surgery" (breast augmentation or removal) and "bottom surgery" (genital alteration). These surgeries are medically necessary for some people, but not all people want, need, or can have surgery as part of their transition. Please note: This term is preferable to the commonly used phrase "sex reassignment surgery," which incorrectly suggests that all transgender people need surgery to "reassign" their sex before their gender identity can be respected. Many people consider "sex change surgery" and "sex change operation" to be derogatory terms.

Gender Dysphoria: The formal medical diagnosis given to transgender individuals as a prerequisite for certain types of transition-related medical care. Please note: Formerly known as "Gender Identity Disorder," this diagnostic term was revised to better characterize the experiences of transgender individuals and remove the negative connotations of "disorder."

Transgender Woman: A transgender person who currently identifies as a woman (see also "MTF").

MTF: A person who transitions from "male-to-female," meaning a person who was assigned male at birth, but identifies and lives as a female (see also "Transgender Woman").

Transgender Man: A transgender person who currently identifies as a man (see also "FTM").

FTM: A person who transitions from “female-to-male,” meaning a person who was assigned female at birth, but identifies and lives as a male (see also “Transgender Man”).

Queer: A term used to refer to lesbian, gay, bisexual, and often also transgender people. Some use queer as an alternative to “gay” in an effort to be more inclusive. Depending on the user, the term has either a derogatory or an affirming connotation, as many have sought to reclaim the term that was once widely used in a negative way.

Genderqueer: A term used by some people who identify as neither entirely male nor entirely female. Please note: This term is not a synonym for “transgender.”

Two-Spirit: A term that refers to historical and current First Nations people whose bodies simultaneously manifest both masculine and feminine spirits. This term is used by some people in Native American LGBT communities to honor their heritage and provide an alternative to Western labels of gay, lesbian, bisexual, or transgender.

ACLU OF WASHINGTON

The American Civil Liberties Union of Washington is a nonprofit, nonpartisan membership organization devoted to protecting the civil liberties of all people in Washington and extending rights to groups that historically have been denied equal treatment.

As one of the ACLU’s more than 50 local affiliates around the U.S., the ACLU of Washington works for equal rights and legal protections against discrimination and harassment for the LGBT community through litigation and legal advocacy, through lobbying at the state legislature and local governments, and by public education. The ACLU of Washington does not handle matters that arise outside of the state of Washington.

The ACLU of Washington offers information in response to specific inquiries or concerns and advice on how to assert individual rights and engage in advocacy; provides referrals to other organizations better able to offer such information or advice in specific situations; and undertakes impact litigation (i.e., pursues lawsuits that will defend or extend fundamental civil liberties and civil rights that will affect a large number of people).

If you feel you have been the victim of discrimination based on your gender expression or identity, please consider contacting the ACLU of Washington in one of the following ways:

- **Online:** Submit a request for help online by visiting www.aclu-wa.org/help.
- **By phone:** Call the ACLU of Washington's Intake and Referral Line at **206.624.2180** (open Tuesday through Thursday, 10:00am–3:00pm).
- **By mail:** Write to American Civil Liberties Union of Washington, 901 Fifth Avenue, Suite 630, Seattle, WA 98164 and provide the following information: your name, mailing address, telephone number and e-mail address (if available); a brief description of the problem or issue about which you are contacting the ACLU of Washington, including any relevant dates and the names of any individuals or organizations involved; a description or copy of any relevant documentation; whether you are presently represented by an attorney in the matter you are writing about; whether you have taken any steps to resolve the matter you are writing about and, if so, a description of these steps; and a description of what you would like the ACLU of Washington to do concerning this matter.

ADDITIONAL RESOURCES

For additional resources and information about transgender rights, please see:

- Ingersoll Gender Center (www.ingersollgendercenter.org)
- Gender Justice League (www.genderjusticeleague.org)
- Washington State Human Rights Commission (www.hum.wa.gov)

ENDNOTES

¹ RCW 49.60.040(26).

² RCW 49.60.030(1)(b); RCW 49.60.040(2), (14); RCW 49.60.215.

³ RCW 49.60.030(1)(c); RCW 49.60.040(21) to (22); RCW 49.60.222 to .225.

⁴ RCW 49.60.030(1)(a); RCW 49.60.040(11); RCW 49.60.180.

⁵ RCW 49.60.030(1)(d); RCW 49.60.040(6); RCW 49.60.176.

⁶ RCW 49.60.030(1)(e); RCW 49.60.178.

⁷ RCW 9A.36.080 (malicious harassment); see also 9A.36.080(6)(a) (which imports the definition of “sexual orientation” used in RCW 49.60).

⁸ RCW 28A.300.285.

⁹ BURIEN, WASH., LAW AGAINST DISCRIMINATION, ch. 8.50 (2017) (available at <http://www.codepublishing.com/wa/burien/html/Burien08/Burien0850.html>).

¹⁰ OLYMPIA, WASH., MUN. CODE, ch. 5.80, UNFAIR HOUSING PRACTICES (available at <http://www.codepublishing.com/WA/Olympia/html/Olympia05/Olympia0580.html>).

¹¹ SEATTLE, WASH., MUN. CODE § 14.04 (employment); SEATTLE, WASH., MUN. CODE § 14.06 (public accommodations); SEATTLE, WASH., MUN. CODE § 14.08 (housing); SEATTLE, WASH., MUN. CODE § 14.10 (contracting); SEATTLE, WASH., MUN. CODE § 18.12 (parks), (available at https://library.municode.com/wa/seattle/codes/municipal_code).

¹² TACOMA, WASH., MUN. CODE, ch. 1.29, <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title01-AdministrationAndPersonnel.PDF>.

¹³ KING COUNTY, WASH., CODE § 12.18 (fair employment); KING COUNTY, WASH., CODE § 12.20 (fair housing); KING COUNTY, WASH., CODE § 12.22 (public accommodations); KING COUNTY, WASH., CODE § 12.17 (fair contracting), http://www.kingcounty.gov/council/legislation/kc_code.aspx.

¹⁴ Hate Crime Acts, 18 U.S.C. § 249 (2012).

¹⁵ Memorandum from the U.S. Attorney Gen. to U.S. Attorneys, Heads of Dep’t Components (Oct. 4, 2017) (available at <http://www.cnn.com/2017/10/05/politics/jeff-sessions-transgender-title-vii/index.html>); Dear Colleague Letter from Sandra Battle, T.E. Wheeler, U.S. Dep’t of Justice and U.S. Dep’t of Educ. (Feb. 22, 2017) (available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>).

¹⁶ RCW 49.60.040(26).

¹⁷ The Washington State Human Rights Commission (“WSHRC”)—the agency in charge of enforcing individual rights under the WLAD—explains:

A common term is “transgender.” This term covers a broad range of people who experience and/or express their gender differently from what most people expect. They may express themselves as the gender that does not match the sex listed on their original birth certificate, or they may physically change their sex through medical treatment. This is sometimes called transsexual. The term “transgender” also includes people who are cross-dressers or otherwise gender non-conforming. Gender identity and expression also includes males and females who do not express their gender in stereotypically masculine or feminine ways, such as through their appearance or mannerisms. A person does not need to have had surgery or otherwise have undergone medical treatment in order to be considered transgender[], or to be protected under the Law Against Discrimination.

WASH. STATE HUMAN RIGHTS COMM'N, Guide to Sexual Orientation and Gender Identity and the Washington Law Against Discrimination (2014), https://www.hum.wa.gov/media/dynamic/files/351_Updated%20SO%20GI%20Guide.pdf.

¹⁸ *Schwenck v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). Federal courts across the country have held similarly. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Schroer v. Billington*, 577 F.Supp.2d 293, 305 (D.D.C. 2008).

¹⁹ *Macy v. Holder*, 2012 WL 1435995, *1-2 (E.E.O.C. 2012).

²⁰ Memorandum from the U.S. Attorney Gen. to U.S. Attorneys Heads of Dep't Components (Oct. 4, 2017) (available at <https://www.justice.gov/opa/press-release/file/1001886/download>).

²¹ U.S. Gov., Official Guide to Government Information and Services: Labor Laws and Issues, (2017), <https://www.usa.gov/labor-laws>.

²² U.S. Dep't of Hous. and Urban Dev.: Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5562 (Feb. 3, 2012) (codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 579, 574, 882, 891, and 982) (available at <http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>). By way of illustration, the HUD website contains the following example:

A property manager refuses to rent an apartment to a prospective tenant who is transgender. If the housing denial is because of the prospective tenant's non-conformity with gender stereotypes, it constitutes illegal discrimination on the basis of sex under the Fair Housing Act.

U.S. Dep't of Hous. and Urban Dev., Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families, HUD.GOV,http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination; Office of Community Planning and Development, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Notice CPD 15-02, Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters or Other Facilities, (2015), available at <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>

²³ U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Questions and Answers on Title IX and Sexual Violence 5, (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

²⁴ For a copy of the May 2016 guidance from the U.S. Department of Justice and U.S. Department of Education, see Dear Colleague Letter from Catherine E. Lhamon, Vanita Gupta, U.S. Dep't of Justice & U.S. Dep't of Educ. (May 13, 2016)(available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>).

²⁵ See Dear Colleague Letter from Sandra Battle, T.E. Wheeler, U.S. Dep't of Justice & U.S. Dep't of Educ. (Feb. 22, 2017) (available at <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf>); U.S. Dep't of Educ. Office of Civil Rights, Resources of Transgender and Gender Non-Conforming Students, <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>.

²⁶ *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

²⁷ Gender identity protections do cover access to gender identity-appropriate restrooms. See, e.g., *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, State of Colorado, Division of Civil Rights Charge No. P20130034X (Determination June 17, 2013) (available at http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (Determination of Dir. Steven Chavez in the Coy Mathis case).

²⁸ WAC 162-32-060.

²⁹ Student A v. Township High Sch. Dist. 211, U.S. Dep't of Educ. Office of Civil Rights Case No. 05-14-1055 (Nov. 2, 2015) (available at <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>).

³⁰ Dear Colleague Letter from Sandra Battle, T.E. Wheeler, U.S. Dep't of Justice and U.S. Dep't of Educ. (Feb. 22, 2017) (available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>).

³¹ Letter from Candice Jackson, Acting Assistant Sec'y for Office for Civil Rights, Dep't of Educ., to Reg'l Dirs., (June. 6, 2017) (available at <https://assets.documentcloud.org/documents/3866929/Trump-administration-s-guidance-to-Office-for.pdf>) (Regarding OCR Instructions to the Field re Complaints Involving Transgender Students).

³² Susanne Beauchaine et al., Wash. Superintendent of Pub. Instruction, Office of Superintendent of Pub. Instruction, Prohibiting Discrimination in Washington Public Schools: Guidelines for School Districts to Implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 (2012) (available at <http://www.k12.wa.us/equity/pubdocs/Prohibiting-DiscriminationInPublicSchools.pdf>) (hereinafter "OSPI Guidelines"). These guidelines are designed to assist schools in implementing RCW 28A.642 (prohibiting discrimination in Washington public schools based on race, creed, religion, color, national origin, sexual orientation including gender expression or identity, veteran or military status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability); RCW 28A.640 (prohibiting discrimination in Washington public schools based on sex); and WAC 392-190 (codifying OSPI's rules for eliminating discrimination in public school employment, counseling and guidance services for students, recreational and athletic activities, access to course offerings, and in textbooks and instruction materials). OSPI Guidelines, at 6.

³³ OSPI Guidelines, at 30.

³⁴ Id. at 30

³⁵ RCW 28A.642.010-; RCW 28A.642.020.

³⁶ The OSPI Guidelines state that school districts "should not require proof of medical treatments in order to respect a student's gender identity or expression." OSPI Guidelines, at 30.

³⁷ For more information, see OSPI Guidelines, *supra* note 32; Washington Interscholastic Activities Association, Washington Interscholastic Activities Association Handbook 2016-2017 (2016) (available at [http://www.wiaa.com/ConDocs/Con1629/2016-17%20Handbook%20Final%20\(8-11\).pdf](http://www.wiaa.com/ConDocs/Con1629/2016-17%20Handbook%20Final%20(8-11).pdf)).

³⁸ Id.

³⁹ See Northwest Justice Project, Name Change (2012) (available at <https://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/392DF2A7-D062-2F32-194A-DF77898A9812/3400en.pdf>).

⁴⁰ See Wash. Cts., Name Changes, COURTS.WA.GOV, <https://www.courts.wa.gov/forms/?fa=forms.static&staticID=13> (last visited Sept. 26, 2017).

⁴¹ Wash. State Dep't of Health, Court-Ordered Name Change, DOH.WA.GOV, <http://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/CourtOrderedNameChange> (last visited Sept. 28, 2017).

⁴²See Wash. State Dep't of Health, Rule-Making Activities, DOH.WA.GOV, <https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/RuleMaking> (last visited January 14, 2018).

⁴³Id.

⁴⁴WAC 246-490-075, <https://www.doh.wa.gov/Portals/1/Documents/5600/WAC246-490-075.pdf> (last visited Jan. 14, 2018).

⁴⁵For more information about name and gender marker changes to birth certificates, see Wash. State Dep't of Health, Correcting Birth Certificates, DOH.WA.GOV, www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/CertificateCorrection/Birth (last visited Sept. 28, 2017). See also RCW 34.05.542(3) (time for filing petition for review of agency action).

⁴⁶For more information, see Soc. Sec. Admin. Program Operations Manual Sys., RM 10212.200 Changing Numident Data for Reasons other than Name Change, SSA.GOV (SEPT. 30, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0110212200>. See also Nat'l Ctr. for Transgender Equal., Transgender People and the Social Security Administration (2013) (available at http://www.transequality.org/Resources/SSAResource_June2013.pdf).

⁴⁷Bureau of Consular Affairs, Change or Correct a Passport, U.S. DEP'T OF STATE, <http://travel.state.gov/content/passports/english/passports/services/correction.html> (last visited Sept. 28, 2017).

⁴⁸U.S. Dep't of State: U.S. Passports & Int'l Travel, Gender Designation Change, U.S. DEP'T OF STATE, <https://travel.state.gov/content/passports/en/passports/information/gender.html> (last visited Oct. 23, 2017). For more information about name and gender marker changes on U.S. passports, including a model certification letter, see Nat'l Ctr. for Transgender Equal., Understanding The New Passport Gender Change Policy (2014) (available at http://www.transequality.org/sites/default/files/docs/kyr/passports_2014.pdf).

⁴⁹See Wash. State Dep't of Licensing, Change Your Name: Driver Licenses and ID Cards, DOL.WA.GOV, <http://www.dol.wa.gov/driverslicense/namechange.html> (last visited Oct. 23, 2017).

⁵⁰Wash. State Dep't of Licensing, Driver Licensing Fees, DOL.WA.GOV, <http://www.dol.wa.gov/driverslicense/fees.html> (last visited Oct. 23, 2017).

⁵¹See Wash. State Dep't of Licensing, Change Your Gender Designation, DOL.WA.GOV, <http://www.dol.wa.gov/driverslicense/genderchange.html> (last visited Oct. 23, 2017).

⁵²"Medical or social service provider" includes: "licensed physician, psychiatrist, psychologist, naturopath, advanced registered nurse practitioner, physician assistant, certified osteopathic physician assistant, or social service worker." See Id.

⁵³U.S. v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013).

⁵⁴Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015).

⁵⁵Magnuson v. Magnuson, 141 Wash. App. 347, 350 (2007); see also In re Marriage of Balashov, 154 Wash. App. 1027 (2010). For more information, see Leslie Cooper and the American Civil Liberties Union, Protecting the Rights of Transgender Parents: A Guide for Parents and Lawyers (2013) (available at https://www.aclu.org/files/assets/aclu-tg_parenting_guide.pdf).

⁵⁶On January 2020, a new state law will come into effect which will prohibit automatic initial denials of coverage for reproductive health care services on the basis of gender identity.

⁵⁷ On May 24, 2019 HHS issued proposed rules that would eliminate the definition section in the Section 1557 regulations. The proposed rule would result in gender identity not being explicitly included under the nondiscrimination provision. The rule has not been finalized and so is not in effect.

⁵⁸ *Prescott v. Rady Children's Hosp.-San Diego*, 2017 WL 4310756, 9 (S.D. Cal. 2017).

⁵⁹ See Wash. State Health Care Auth., Transgender Health Program, HCA.WA.GOV, <https://www.hca.wa.gov/free-or-low-cost-health-care/apple-health-medicaid-coverage/transgender-health-program> (last visited Nov. 21, 2017).

⁶⁰ Press Release, Coalition for Inclusive Healthcare, Public Employees Benefits Board Implements Transgender Inclusive Healthcare (July, 31, 2014) (available at <https://www.pridefoundation.org/wp-content/uploads/2014/07/7.31.14-Coalition-for-Inclusive-Health-care-PEBB-statement-FINAL.pdf>).

⁶¹ TRICARE Manuals Online, TP08 Change No 169 List of Affected Pages (2008) (available at <http://manuals.tricare.osd.mil/pages/PageList.aspx?Manual=TP08&Change=169>).

⁶² Wash. Office of the Ins. Comm'r, Transgender Medical Coverage Rights, INSURANCE.WA.GOV, <https://www.insurance.wa.gov/transgender-medical-coverage-rights> (last visited Sept. 28, 2017).

⁶³ Transgender Law Center and The Asylum Project, Applying for Asylum Based on Gender Identity Persecution (available at <https://transgenderlawcenter.org/resources/immigration/asylumfactsheet>).

⁶⁴ *Id.*

The American Civil Liberties Union of Washington Foundation is the legal, research, and educational arm of the American Civil Liberties Union of Washington, a nonprofit, nonpartisan membership organization devoted to protecting the civil liberties of all people in Washington and extending rights to groups that historically have been denied equal treatment.

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