

# The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

*Via Email*

November 20, 2023

Richard J. Hipolit  
Acting General Counsel  
U.S. Department of Veterans Affairs  
810 Vermont Avenue NW  
Washington, DC 20420  
richard.hipolit@va.gov

Re: *Forthcoming lawsuit regarding VA delay in responding to rulemaking petition*

Dear Acting General Counsel Hipolit,

We represent the Transgender American Veterans Association (“TAVA”), which is prepared to file suit on behalf of itself and its members challenging the unlawful failure of the Secretary of the Department of Veterans Affairs (“VA”) to respond to its 2016 petition for rulemaking (“PFR”). TAVA intends to file a petition for mandamus under the All Writs Act, 28 U.S.C. § 1651(a), to compel a formal response from VA. We write you in your capacity as Acting VA General Counsel to raise the prospect of pre-litigation resolution of TAVA’s claims.

VA currently excludes gender-confirmation surgery (“GCS”) from the medical benefits package it provides to veterans. 38 C.F.R. § 17.38(c)(4); *see also* VHA Directive 2013-003; VHA Directive 2018-1341(3). On May 9, 2016, TAVA and two individual veterans submitted a formal rulemaking petition requesting that VA amend its medical benefits package to provide GCS (attached as Exhibit 1). The petition requested that VA amend or repeal the rules and regulations, including 38 C.F.R. § 17.38(c)(4), that exclude medically necessary GCS for transgender veterans from the medical benefits package, and that VA instead promulgate regulations expressly including GCS for transgender veterans in that medical benefits package.

Since assuming office in 2021, Secretary McDonough has made multiple public promises that he intends to grant TAVA’s petition and initiate the rulemaking it requested.<sup>1</sup> After earlier litigation regarding this PFR in 2016, VA sought and received public comment on the petition in 2018.<sup>2</sup> VA also submitted four notices of proposed rulemaking (“NPRM”) to the Office of Information & Regulatory Affairs (“OIRA”) for publication in the Unified Agenda, including as

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<sup>1</sup> *See, e.g.*, Leo Shane III, *VA to Offer Gender Surgery to Transgender Veterans for the First Time*, MIL. TIMES (June 19, 2021), <https://www.militarytimes.com/veterans/2021/06/19/va-to-offer-gender-surgery-to-transgender-vets-for-the-first-time>; Rebecca Kheel, *No Timeline for Trans Vet Surgeries, VA Says 2 Years After Announcing Coverage*, MILITARY.COM (June 9, 2023), <https://www.military.com/daily-news/2023/06/09/va-said-it-would-cover-trans-surgery-two-years-later-it-still-doesnt.html>; *Town Hall with VA Secretary Denis McDonough*, VA NEWS (Nov. 8, 2023), <https://news.va.gov/125963/town-hall-with-va-secretary-denis-mcdonough-2>.

<sup>2</sup> 83 Fed. Reg. 31711 (July 9, 2018).

recently as spring 2023,<sup>3</sup> one of which has gone through full OIRA cost-benefit analysis.<sup>4</sup> In all of its submissions to OIRA’s Unified Agenda, VA indicated an intended publication date for the NPRM in the Federal Register—yet failed to adhere to any of them.

Indeed, despite the public assurances and internal preparation that have recurred over the past several years, VA has not yet published a NPRM or a proposed rule in the Federal Register. It has been over seven years since TAVA first submitted the petition and over two years since Secretary McDonough first promised to take action on this matter. This inaction violates VA’s statutory duties under the Administrative Procedure Act (“APA”) to refrain from engaging in unreasonable delay, 5 U.S.C. § 706(1), and to conclude matters presented to it within a reasonable time, 5 U.S.C. § 555(b). TAVA is entitled to a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), compelling VA to formally respond to its rulemaking petition on this basis.

### **I. Members of TAVA are directly harmed by VA’s exclusion of gender-confirmation surgery from the medical benefits package and its delay in addressing the exclusion.**

VA’s failure to respond to TAVA’s petition harms both TAVA and its members. By failing to act on the petition for more than seven years, VA has undermined TAVA’s mission of ensuring that all transgender veterans receive full services and dignified treatment at the hands of the VA, *see* Ex. 1 at 4, and has forced TAVA to divert its scarce resources to address the failure of VA to live up to the public pledge of its Secretary. Additionally, TAVA’s members have been denied medically necessary care—which has been recommended by VA doctors, even though VA refuses to provide this treatment—as a result of VA’s exclusion of “gender alterations” from the medical benefits package. *See* Ex. 1 at 6-7.

VA’s failure to provide GCS subjects transgender veterans, including TAVA members, to increased risk of physical harm, psychological distress, and suicide. *See* Ex. 1 at 11-12, 21. GCS is effective and often essential treatment for gender dysphoria, which is the medical diagnosis for the distress caused by the incongruence between one’s gender identity and one’s sex assigned at birth.<sup>5</sup> As major medical associations have long recognized, *see* Ex. 1 at 9,<sup>6</sup> GCS is associated with significantly lower levels of psychological distress and suicidal ideation among transgender people. *See also* Ex. 1 at 11-12.<sup>7</sup> This treatment is particularly important for the veteran

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<sup>3</sup> *See* RIN 2900-AR34, OFF. INFO. & REGUL. AFFS. (Fall 2021), <https://rb.gy/ldslfb>, RIN 2900-AR34, OFF. INFO. & REGUL. AFFS. (Spring 2022), <https://rb.gy/kpldjc>, RIN 2900-AR34, OFF. INFO. & REGUL. AFFS. (Fall 2022), <https://rb.gy/6a0ozs>, RIN 2900-AR34, OFF. INFO. & REGUL. AFFS. (Spring 2023), <https://rb.gy/eai51e>.

<sup>4</sup> *See* OIRA Conclusion of EO 12866 Regulatory Review – RIN: 2900-AR34, OFF. INFO. & REGUL. AFFS. (Sept. 7, 2022), <https://rb.gy/74ug6z> [hereinafter “OIRA Review”].

<sup>5</sup> *See* AM. PSYCHIATRIC ASS’N, *Gender Dysphoria*, in DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

<sup>6</sup> *See also, e.g.*, Am. Med. Ass’n, Resolution 122 (A-08) (2008); William Byne et al., *Report of the APA Task Force on Treatment of Gender Identity Disorder*, 169 AM. J. PSYCHIATRY 1, 9 (2012); Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3875 (2017); *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOL. ASS’N 832, 846 (2015).

<sup>7</sup> *See also, e.g.*, Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 J. AM. MED. ASS’N 611, 617 (2021).

community, which is already at disproportionately high risk of depression and suicide.<sup>8</sup> Moreover, forcing veterans to seek GCS outside of VA facilities disrupts their continuity of care, resulting in financial, physical, and emotional harm. Transgender veterans are more likely than cisgender veterans to rely on VA healthcare, since they are more likely to be uninsured and to face cost barriers to care even when they have insurance.<sup>9</sup> Disruptions in the continuity of care, especially transition-related care otherwise received through VA, can have a multitude of negative effects on transgender patients. For instance, one transgender veteran who could not afford privately provided GCS in the United States had to travel out of the country to receive a cheaper operation—which was so mishandled that she has had to spend two years receiving additional procedures to correct for the harm done.<sup>10</sup>

In addition to the harms perpetrated by VA's outright exclusion, VA's delay itself has also harmed TAVA and its members. VA has placed TAVA and its members in an unstable state of limbo, wherein they are repeatedly assured by the Secretary that VA-provided GCS will be available, but are given no indication of when nor which procedures will be covered. Transgender veterans have delayed medically necessary GCS, in reliance on the Secretary's public statements and in the expectation that they could use VA healthcare instead of expensive private treatments. But absent action from the Secretary, this waiting period may only exacerbate the mental health risks detailed above. TAVA and its members deserve an answer from VA as to when and how it plans to provide GCS to transgender veterans. At the very least, after 7.5 years, they deserve an answer from VA to their petition on the question of whether VA will provide GCS at all.

## **II. TAVA will challenge VA's unreasonable delay as unlawful in the Federal Circuit.**

Unless prompt action is taken by VA to formally grant or deny TAVA's PFR, TAVA will file a petition for mandamus under the All Writs Act, 28 U.S.C. § 1651(a), in the United States Court of Appeals for the Federal Circuit to require VA to issue a response.

VA's nearly eight-year delay is a violation of both § 706(1) and § 555(b) of the APA, which respectively mandate that VA must not engage in unreasonable delay and that VA must resolve matters presented to it within a reasonable time. Based on application of multi-factor test set out in *Telecomms. Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984), which governs analysis of mandamus claims based on unreasonable delay, TAVA is entitled to a writ of mandamus compelling a response from VA. First, no "rule of reason" governs VA's nearly eight-year delay on this matter. VA prepared all necessary materials, including multiple NPRMs for OIRA's Unified

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<sup>8</sup> See, e.g., VA OFF. MENTAL HEALTH & SUICIDE PREVENTION, NAT'L VETERAN SUICIDE PREVENTION ANNUAL REPORT 7 (2022), <https://www.mentalhealth.va.gov/docs/data-sheets/2022/2022-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-508.pdf> (finding suicide rate for veterans is 57.3% higher than for non-veterans); *Depression*, U.S. DEP'T VETERANS AFFS., <https://www.research.va.gov/topics/depression.cfm> (reporting that 33.3% of veterans have some symptoms of depression, 20% have serious symptoms, and between 12.5% to 10% have major depression, while only 6.7% of all US adults have ever had at least one major depressive episode).

<sup>9</sup> See Matthew Rae et al., *Demographics, Insurance Coverage, and Access to Individuals Among Transgender Adults*, KFF (Oct. 21, 2020), <https://www.kff.org/health-reform/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults>.

<sup>10</sup> See, e.g., Nicole Comstock, *California Veteran Shares Story of Gender Transition*, FOX40 (May 11, 2015), <http://fox40.com/2015/05/11/california-veteran-shares-story-of-gender-transition>.

Agenda, as early as spring 2016<sup>11</sup> (shortly after TAVA filed its petition) and as recently as spring 2023.<sup>12</sup> VA's delay is plainly unreasonable. Second, VA's failure to respond has directly impacted human health and welfare by subjecting transgender veterans, including TAVA members, to increased risks of depression, suicide, and financial harm while denying them essential medical care. *See supra* Part I. VA's delay prejudices important interests of transgender veterans in access to the medically necessary care to which they are entitled by virtue of their service. VA provides these surgeries to cisgender veterans seeking treatment for conditions other than gender dysphoria, *see* Ex. 1 at 14, but not to transgender veterans with gender dysphoria for whom the procedures in question may be the difference between life and death. Third, responding to TAVA's petition would not delay VA actions of a higher or competing priority. The cost of publishing an already-drafted NPRM is negligible, in terms of both financial and administrative resources. And—by VA's own admission in its submissions to OIRA's Unified Agenda—the costs of the actual rule requested by TAVA are not economically significant,<sup>13</sup> meaning it does not represent a tangible tradeoff with other agency priorities. That VA has publicly indicated its support for providing GCS is immaterial to this analysis, as no bad-faith finding is required for mandamus to issue.

Absent a judicially reviewable decision by VA on TAVA's petition, mandamus is the only form of relief available to TAVA. The unreasonableness of VA's delay has only sharpened the clarity and indisputability of TAVA's right to an issuance of mandamus, which is appropriate given the high stakes of these circumstances. TAVA is entitled to a writ of mandamus from the Federal Circuit compelling VA to respond to its PFR.

### **III. VA must respond to TAVA's petition.**

VA's failure to respond for more than seven years constitutes an unreasonable delay prohibited by the APA. This silence consigns transgender veterans who rely on VA healthcare for transition care to a liminal state wherein VA's official actions are entirely discordant with its public statements and internal preparations. VA's refusal to make these statements and preparations official is an insult to the transgender veterans who have made enormous sacrifices to serve their country and who are entitled to medically necessary healthcare, including GCS, as a result. We urge VA to issue a publication in the Federal Register constituting a formal grant or denial of TAVA's PFR. Specifically, we urge VA to grant TAVA's PFR by issuing a NPRM or proposed rule that will repeal 38 C.F.R. § 17.38(c)(4) and any implementing directives and include GCS for transgender veterans in the medical benefits package.

Please confirm your receipt of this correspondence and provide a response within 30 days, or our client will have no choice but to proceed with an enforcement action. If this matter proceeds

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<sup>11</sup> *See RIN 2900-A69*, OFF. REGUL. & INFO. AFFS. (Fall 2016), <https://rb.gy/7n9vxx>; *RIN 2900-A69*, OFF. REGUL. & INFO. AFFS. (Spring 2016), <https://rb.gy/cgmlvz>.

<sup>12</sup> *See* sources cited *supra* note 3.

<sup>13</sup> The fall 2022, spring 2022, and spring 2023 OIRA Unified Agenda submissions are classified as "Other Significant" priority, which means the rulemaking is not 'economically significant' but is considered significant by the agency." Similarly, the fall 2021, spring 2022, and spring 2023 OIRA Unified Agenda submissions are all classified as non-major, which means they are unlikely to have an economic effect of \$100 million or more. *See* sources cited *supra* note 3; *Unified Agenda: How Are The Terms on the Unified Agenda Tab Defined?*, REGULATIONS.GOV, <https://www.regulations.gov/faq>; *see also* OIRA Review, *supra* note 4 (clarifying that the rule is not economically significant under the definitions provided).

this litigation, TAVA reserves the right to seek additional relief and to recover attorneys' fees and costs.

We look forward to hearing from you and working towards a resolution.

Sincerely,

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