

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

MILITARY SERVICES HAVE FAILED TO COMPLY WITH NEW DEFENSE DEPARTMENT RULES ON TRANSGENDER PERSONNEL

By Diane H. Mazur

November, 2014

Introduction*

On August 5, 2014, the Department of Defense (DOD) issued a new regulation that weakens the prohibition against transgender personnel in military service and requires reassessment of the policy, even though the ban remains in effect.¹ DOD Instruction (DODI) 1332.18, *Disability Evaluation System (DES)*, eliminates a component of the regulatory architecture of the transgender ban, as DOD no longer requires the services (Army, Air Force, Navy/Marines) to separate or discharge transgender personnel. As a result of DOD's regulatory revision, service-level regulations are now out of compliance with DOD rules and must be revised.

Regulatory framework

The prohibition against military service by transgender people is articulated in two distinct sets of military medical rules: enlistment standards and retention standards. Enlistment (or accession) standards govern who is allowed to join the military, and a single DOD regulation establishes medical enlistment standards for all the services. It contains two prohibitions that specifically prevent transgender individuals from joining the armed forces. Any potential enlistees with a "history of major abnormalities or defects of the genitalia including but not limited to change of sex" and/or a "history of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias" are ineligible for service.² Notwithstanding the military's medically obsolete terminology, which is decades out of date, these DOD enlistment prohibitions include both a physical component ("change of sex") and a psychological component ("transsexualism" or "transvestism"). That is why transgender individuals cannot join the military if recruiters learn of their gender identity.

Retention standards, on the other hand, govern who is allowed to remain in the armed forces, and medical retention regulations enable commanders and doctors to manage personnel who are injured or who are diagnosed with a wide range of physical and psychological conditions during their military careers. Before August 5, 2014, the now-cancelled DODI 1332.38, *Physical Disability Evaluation*, established baseline medical standards for retention in military service on a department-wide level.³ Enclosure 4 of DODI 1332.38 contained a list of medical conditions that required referral to a medical board for evaluation of fitness for continued service. Enclosure 5 of the same regulation, however, contained a separate list of "conditions, circumstances and defects of a developmental nature designated by the Secretary of Defense" that "should be referred for appropriate administrative action" or, in other words, administrative separation outside the medical system.⁴ Among those "conditions, circumstances and defects" were "sexual gender and identity disorders, including sexual dysfunctions and paraphilias."⁵

* Diane H. Mazur is Palm Center Legal Co-Director; Professor of Law Emeritus, University of Florida College of Law; former U.S. Air Force officer (aircraft and munitions maintenance); and author of *A More Perfect Military: How the Constitution Can Make Our Military Stronger* (Oxford University Press 2010); and *Arbitrary and Capricious: Six Inconsistencies Distinguishing Military Medical Policies for Transgender and Non-Transgender Personnel* (Palm Center, 2014), <http://bit.ly/1ss7j3V>.

Unlike the regulation governing entry into the military, the now-cancelled DOD retention regulation divided potentially disqualifying conditions into two tracks. Individuals with conditions deemed “physical disabilities” (both physical and psychological, under Enclosure 4) were tracked into a medical system of treatment and evaluation, leading to a determination of fitness for duty or entitlement to benefits for medical separation or retirement. However, service members with conditions defined as “not constituting a physical disability” (Enclosure 5) were subject to mandatory administrative separation from military service “for the convenience of the government,”⁶ without medical treatment and without an opportunity to demonstrate medical fitness for duty. DOD’s designation of transgender identity as an “Enclosure 5” condition meant that transgender personnel would be diverted out of a system based on medical expertise and into a system that required commanders to discharge them, and it made transgender personnel ineligible for either medical or fitness evaluation.

Identical or similar prohibitions against retention of transgender service members appear in additional medical regulations issued by each of the individual services.⁷ DOD retention policy gave the services authority to “modify these guidelines to fit their particular needs,” but only if the modification was “consistent” with DOD guidance.⁸ In the case of transgender personnel, the services have essentially copied the language of DOD’s categorical exclusion for use in their own regulations. The services similarly divert transgender service members outside the medical evaluation process and track them for administrative separation without an opportunity to demonstrate fitness or obtain medical care. As a result of these retention disqualifications, both DOD and service-specific, any transgender personnel serving in the armed forces, either because they failed to disclose their transgender identity to recruiters or they did not know that they were transgender at the time of enlistment, would be subject to administrative separation.

New DOD guidance

On August 5, however, the Pentagon eliminated its default lists of medically disqualifying and administratively disqualifying conditions with the release of DODI 1332.18, *Disability Evaluation System (DES)*, and it now takes no position on which specific conditions should be disqualifying for continued military service. As a result, DOD no longer requires the services to designate transgender identity as grounds for separation. Instead of designating specific conditions that should lead to either medical referral or administrative separation, DOD now largely defers to the judgment of individual services. The new regulation retains the two-track system of medically and administratively disqualifying conditions but allows the services to decide which conditions should fall in either category.

This grant of authority to the individual services, however, comes with explicit limitations on when personnel should be subject to either medical referral or administrative separation. Military personnel may be referred for medical evaluation and possible medical separation only if they have conditions (those deemed “physical disabilities,” like the former Enclosure 4) that prevent reasonable performance of duty for

more than a year, present obvious medical risks to the service member or others, or impose unreasonable requirements on the military.⁹ These general guidelines on medical referrals are similar to the ones they replaced, and they are sensible in that they ensure service members will not be referred for possible medical separation unless their medical condition cannot be treated effectively and prevents reasonable performance of duty for a significant period of time. Moreover, there is no reason that the services would want to dismiss an individual who is still capable of performing duty without significant burden on the military medical system, and the guidelines on medical referral are consistent with that understanding.

With respect to administrative separations based on conditions deemed “not physical disabilities,” however, the August 5 regulation adds new and important limits to the use of this authority. Although the services now have discretion to choose which “congenital or developmental defects,” if any, should be administratively disqualifying and ineligible for medical fitness evaluation (like the former Enclosure 5), they can do so only if those conditions are in fact “defects” and actually “interfere with assignment to or performance of duty.”¹⁰ Under the old DOD regulation, certain conditions were simply “designated” by the Secretary of Defense as disqualifying and the services followed suit, without any explicit finding that the conditions impaired performance or limited assignment. Now that the regulation has been revised, services have the obligation to determine whether their own regulations, legacies of that obsolete framework, do in fact comply with the updated DODI 1332.18, *Disability Evaluation System (DES)*.

Service-level regulations are inconsistent with new DOD rules

Service-specific rules must be consistent with DOD-wide rules, and service-specific retention prohibitions are inconsistent with the new DOD-wide retention regulation. The previous DOD-wide retention prohibition was categorical and said that commanders “should” separate personnel with “sexual gender and identity disorders, including sexual dysfunctions and paraphilias.”¹¹ By contrast, the new DOD-wide retention regulation makes no mention of gender identity and requires that the now-unspecified category of disqualifying “congenital or developmental defects” be used only in situations affecting assignment to or performance of duty. This suggests that the categorical retention prohibitions contained in current service-specific regulations are too sweeping in that they fail to distinguish between conditions that impair fitness for assignment or duty from those that do not. In particular, there are two reasons why prohibitions against transgender personnel in military service must be removed from service-level retention regulations.

First, transgender identity is not a “defect” within the guidance of DODI 1332.18. The current edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* concludes that transgender identity is not itself a mental disorder or “defect,” and any distress that may result from gender incongruity (gender dysphoria) can be treated safely and effectively.¹² Military regulations, however, mistakenly associate transgender identity with mental disorders and sexual paraphilias, and they are decades out of date with modern medical understanding. The old DOD guidance directed the services to

administratively separate personnel with “sexual gender and identity disorders, including sexual dysfunctions and paraphilias.” However, transgender identity is not considered a paraphilia under the *DSM*, and it has no connection to paraphilic disorders that cause harm to others, such as exhibitionism or voyeurism.¹³ The current edition of the *DSM* uses the term “gender dysphoria” in an effort to remove any suggestion that transgender identity itself is a mental disorder.¹⁴ The military, however, continues to confuse and conflate transgender identity with dysfunctional and harmful sexual disorders. Its enlistment rules associate being transgender with being a voyeur or an exhibitionist, designating all as “psychosexual” reasons for exclusion from the military. Both the Pentagon and the services normally require reliance on the current edition of the *DSM* when evaluating military fitness,¹⁵ but gender identity appears to be an exception to that general principle.

Second, transgender identity does not interfere with assignment to or performance of duty, the new standard imposed by DODI 1332.18. According to a recent Medical Commission that included a former US Surgeon General and retired General and Flag Officers, the vast majority of the estimated 15,500 transgender personnel currently serving are fit for duty and for deployment, there is no medically valid reason for firing transgender service members, and meeting the health care needs of transgender service members is no more difficult than meeting the needs of non-transgender personnel.¹⁶ Eighteen foreign nations, including the United Kingdom, Australia, Canada, and Israel, allow transgender personnel to serve, and peer-reviewed research has confirmed that inclusive policy has not compromised operational effectiveness.¹⁷

There is a risk, however, that the military services may interpret their obligation to review and revise under DODI 1332.18, *Disability Evaluation System (DES)*, in a superficial rather than substantive way. A “review” may focus only on updating the decades-old terminology still in use instead of meeting the regulatory standard DOD requires the services to apply. The result could be new service-specific regulations that use modern terms like gender dysphoria and disassociate transgender identity from paraphilias like exhibitionism and voyeurism, but still categorically disqualify transgender personnel from continued service without determining fitness for duty. This approach would fail to recognize the substance of modern medical understanding and also fail to comply with specific DOD direction that limits abuses of administrative separation authority.

A recent precedent for a solely semantic change in which terminology is updated while restrictive policy is left in place is the March 8, 2014 revision of Army Regulation 135-178, *Army National Guard and Army Reserve Enlisted Administrative Separations*. The regulation is apparently the first US military regulation to use the correct *DSM-5* terminology, gender dysphoria, but it nonetheless designates dysphoria as grounds for administrative separation, calling it one of the “disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the Soldier’s ability to perform military duties effectively is significantly impaired.”¹⁸ To comply with new DOD rules, the services must go beyond semantic revision and affirm that conditions that are neither “defective” nor compromising of fitness cannot be grounds for administrative separation. The Appendix contains a checklist of required revisions.

APPENDIX

SERVICE REGULATIONS ON TRANSGENDER IDENTITY THAT MUST BE REVIEWED AND REVISED UNDER DODI 1332.18

Given the findings of medical and military experts that transgender identity and related medical treatments do not typically interfere with assignment to or performance of duty, each of the military services should review and revise its regulations as follows in order to comply with new Department of Defense guidance in DODI 1332.18:

Army Regulations

AR 40-501, *Standards of Medical Fitness*:

Delete “transsexual” and “gender identity” from the title of paragraph 3-35; delete “transvestism,” “transsexual,” and “gender identity disorder to include major abnormalities or defects of the genitalia such as change of sex or a current attempt to change sex” from the list of conditions that “render an individual administratively unfit” for service in paragraph 3-35.

AR 635-200, *Active Duty Enlisted Administrative Separations*:

Delete “transsexualism/gender transformation” from the list of administratively disqualifying conditions in paragraph 5-17.

Air Force Regulations

AF *Medical Standards Directory*:

Delete all references to the now-cancelled DODI 1332.38 as a source for administratively “unsuiting” or “unsuitable” conditions; delete “change of sex” as a disqualifying condition in section J57.

AFI 36-3208, *Administrative Separation of Airmen*:

Delete “Transsexualism or Gender Identity Disorder” from the list of “mental disorders” justifying administrative separation in paragraph 5.11.9.5.

AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers*:

Delete “gender identity disorder” and “transsexualism” from the list of “mental disorders” justifying administrative separation in paragraph 2.3.7.5.

AFI 48-123, *Medical Examinations and Standards*:

Delete all references to the now-cancelled DODI 1332.38 as a source for administratively “unsuiting” or “unsuited” conditions.

Navy/Marine Corps Regulations

NAVMED P-117, *U.S. Navy Manual of the Medical Department*:

Delete “sexual gender and identity disorders paraphilias” from the list of disqualifying “conditions and defects of a developmental nature” in Chapter 18, paragraph 18-5(3).

SECNAVINST 1850.4E, *Department of the Navy Disability Evaluation Manual*:

Delete “sexual gender and identity disorders and paraphilias” from the list of disqualifying “developmental defects” in Attachment (b) to Enclosure 8, paragraph 3.

MILPERSMAN 1910-120, *Separation by Reason of Convenience of the Government—Physical or Mental Conditions*:

Delete “sexual gender and identity disorders paraphilias” from the list of administratively disqualifying conditions in paragraph 2.

MARCORSEPMAN, *Marine Corps Separation and Retirement Manual*:

Delete “sexual gender and identity disorders and paraphilias” from the list of “conditions and defects of a developmental nature” in paragraph 6203(2)(b).

ENDNOTES

-
- ¹ Department of Defense Instruction (DODI) 1332.18, *Disability Evaluation System (DES)*, August 5, 2014.
- ² DODI 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, April 28, 2010, Incorporating Change 1, September 13, 2011, Enclosure 4, ¶¶ 14f, 15r, 29r.
- ³ DODI 1332.38, *Physical Disability Evaluation*, November 14, 1996, Incorporating Change 2, April 10, 2013 (cancelled August 5, 2014).
- ⁴ DODI 1332.38, *Physical Disability Evaluation*, Enclosure 5, ¶ 1.2 (cancelled August 5, 2014).
- ⁵ DODI 1332.38, *Physical Disability Evaluation*, Enclosure 5, ¶ 1.3.9.6 (cancelled August 5, 2014).
- ⁶ DODI 1332.14, *Enlisted Administrative Separations*, January 27, 2014, Enclosure 3, ¶ 3(a)(8)(a)(1).
- ⁷ Army Regulation (AR) 40-501, *Standards of Medical Fitness*, December 14, 2007, Revised August 4, 2011, ¶ 3-35; Secretary of the Navy (SECNAV) Instruction 1850.4E, *Department of the Navy Disability Evaluation Manual*, April 30, 2002, Enclosure 8, Attachment (b), ¶ 3(i)(7); Navy Medicine (NAVMED) P-117, *U.S. Navy Manual of the Medical Department*, January 10, 2005, Chapter 18, ¶ 18-5(3); Air Force (AF) *Medical Standards Directory*, February 6, 2014, Page 66, Note 1 (incorporating by reference the disqualifying conditions listed in DODI 1332.38 Enclosure 5). The only exceptions are inconsistencies within Navy regulations. In special guidelines that apply only to nuclear field duty and submarine duty, Navy regulations state that transgender status is disqualifying only if it "interfere[s] with safety and reliability or foster[s] a perception of impairment." These sections appear to permit transgender personnel to serve openly provided their gender identity does not interfere with duty performance. NAVMED P-117, Chapter 15, ¶¶ 15-103(4)(d)(4) (Nuclear Field Duty), 15-106(4)(k)(4) (Submarine Duty) (most recently updated April 4, 2014). These sections, however, are inconsistent with general Navy guidance that categorically disqualifies transgender individuals without consideration of duty performance, as do the policies of the other services.
- ⁸ DODI 1332.38, *Physical Disability Evaluation*, Enclosure 4, ¶ E4.1.2 (cancelled August 5, 2014).
- ⁹ DODI 1332.18, *Disability Evaluation System (DES)*, Appendix 1 to Enclosure 3, ¶ 2.
- ¹⁰ DODI 1332.18, *Disability Evaluation System (DES)*, ¶ 3(i); Appendix 1 to Enclosure 3, ¶ 4(a)(1).
- ¹¹ DODI 1332.38, *Physical Disability Evaluation*, Enclosure 5 (cancelled August 5, 2014).
- ¹² American Psychiatric Association, Gender Dysphoria Fact Sheet (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.
- ¹³ Paraphilia is sexual arousal to an atypical object. American Psychiatric Association, Paraphilic Disorders Fact Sheet (2013), <http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf>.
- ¹⁴ American Psychiatric Association, Gender Dysphoria Fact Sheet (2013).
- ¹⁵ DODI 1332.14, *Enlisted Administrative Separations*, Enclosure 1, ¶ (l) and Enclosure 3, ¶ 3(a)(8)(c)(1); AR 40-501, *Standards of Medical Fitness*, note preceding ¶ 3-31; NAVMED P-117, *U.S. Navy Manual of the Medical Department*, Chapter 18, ¶ 18-12(3)(v)(7)(d); Air Force Instruction (AFI) 48-123, *Medical Examinations and Standards*, Attachment 1, page 71 (Glossary of References and Supporting Information).
- ¹⁶ Joycelyn Elders, Alan M. Steinman, George R. Brown, Eli Coleman, and Thomas A. Kolditz (2014). Medical Aspects of Transgender Military Service, *Armed Forces and Society*. Advance online publication. doi: 10.1177/0095327X14545625.
- ¹⁷ See, for example, Alan Okros and Denise Scott (2014), Gender Identity in the Canadian Forces: A Review of Possible Impacts on Operational Effectiveness, *Armed Forces & Society*, 1-14, doi:10.1177/0095327X14535371.
- ¹⁸ Army Regulation 135-178, *Army National Guard and Army Reserve Enlisted Administrative Separations*, March 8, 2014, ¶ 6-7(a).