Gender Dysphoria: A Clinical and Legal Update

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Faculty Disclosure

We do not have any relevant financial relationships with any commercial interests

Educational Objectives

- Review the DSM-5 diagnostic criteria for gender dysphoria and for disorders that require consideration as alternative explanations for the patient's presentation
- Review the World Professional Association for Transgender Health (WPATH) Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People
- Examine the current state of litigation over gender confirming surgery throughout the United States

Evaluation Process in Correctional Settings

Joel T. Andrade, PhD, LICSW, CCHP-MH

Overview

- Comprehensive policy that details assessment
  - Does not have road blocks to a rapid assessment to inform treatment
- Comprehensive policy that does not exclude types of interventions
  - Once approved, interventions should be provided and detailed in policy
- Individualize assessment and treatment
  - No “one-size fits all” approach

No Road Blocks
No Hurdles

Process Overview

All Healthcare Staff

Select few QMHPs with training and expertise

Treatment Committee

Referral to Specialist

Evaluation Process

- Not all staff have specialized training or experience with transgender population
- Every Department must have a system in place to:
  - Identify
  - Diagnose
  - Treat

Referrals

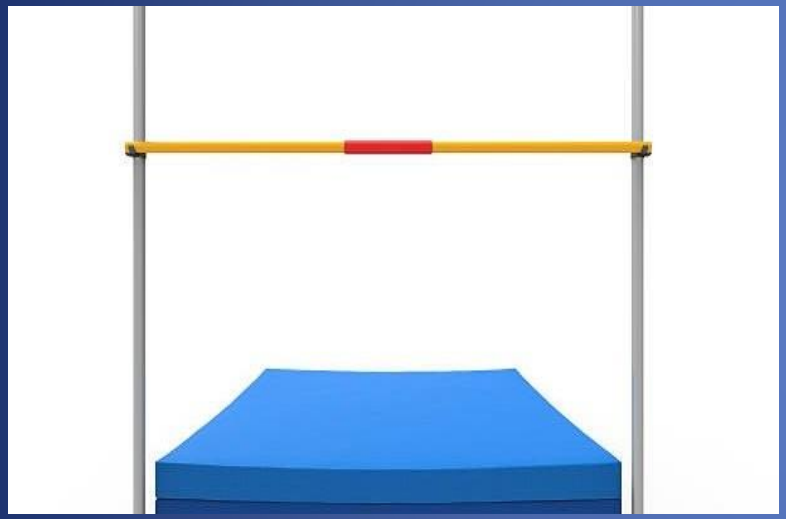
- *Access to Care* is first NCCHC standard
- Everyone is responsible to identify and refer
  - Does NOT require all staff to be expert in transgender health issues, but
  - Requires all staff are familiar with basic symptoms of gender dysphoria and with the referral process

Examples of Potential Referrals

- Patient identifies as transgender or gender non-conforming
- Patient reports issues regarding gender identity
- You review disciplinary reports of ‘destruction of property’ for making changes to state issued clothing to make them more feminine (or masculine)

…..and many more….

Community



Surgery ➔ WPATH requires 2 letters

Hormones ➔ WPATH requires 1 letter

Diagnosis ➔ QMHP

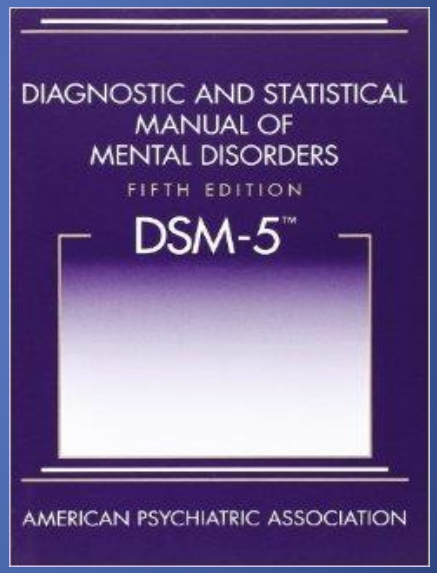
Letters by a qualified mental health professional or a health professional who is appropriately trained in behavioral health and competent in the assessment of gender dysphoria

WPATH QMHP

- Select few QMHPs with training and experience
  1. A master's degree or its equivalent in a clinical behavioral science field granted by an institution accredited by the appropriate national or regional accrediting board. Documented credentials from a relevant licensing board.
  2. Competence in using the DSM or ICD for diagnostic purposes
  3. Ability to recognize and diagnose co-existing mental health concerns and to distinguish these from gender dysphoria
  4. Documented supervised training and competence in psychotherapy or counseling
  5. Knowledgeable about gender nonconforming identities and expressions, and the assessment and treatment of gender dysphoria
  6. Continuing education in the assessment and treatment of gender dysphoria

Gender Dysphoria in Adolescents and Adults DSM-5

A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least **two** of the following:



Criterion A

1. A **marked incongruence** between one's experienced/expressed gender and primary and/or secondary sex characteristics
2. A **strong desire to be rid** of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender
3. A **strong desire for** the primary and/or secondary sex characteristics of the other gender

Criterion A

4. A **strong desire to be** of the other gender (or some alternative gender different from one's assigned gender)
5. A **strong desire to be treated** as the other gender (or some alternative gender different from one's assigned gender)
6. A **strong conviction that one has** the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender)

Criterion B

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning

Specify if:

- With a disorder of sex development
- Post-transition

Stepwise Evaluation Process

1. **Behavioral Health (with extensive training in working with this population):**
   - Diagnosis of Gender Dysphoria
   - Evaluation of whether a requested intervention will significantly alleviate dysphoria:
     - Hormones
     - Surgery
     - Other….
2. **Physical Health:**
   - Evaluation of whether intervention(s) approved by behavioral health are medically feasible and develop a treatment plan

Corrections

Treatment Committee:

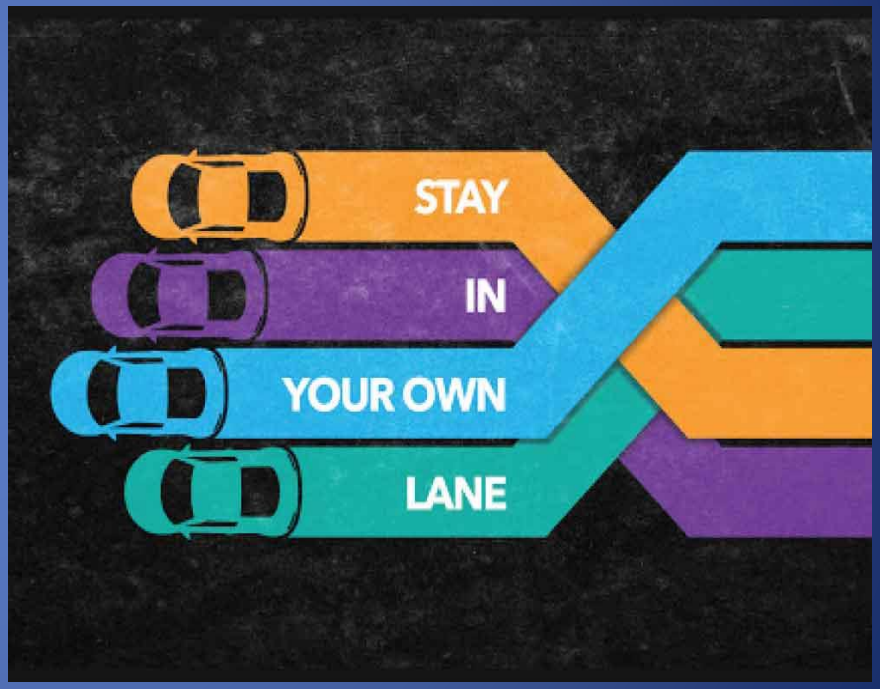
- Behavioral Health Director
- Psychiatric Director
- Medical Director

- Review all recommendations by identified behavioral health staff

Scope of Practice

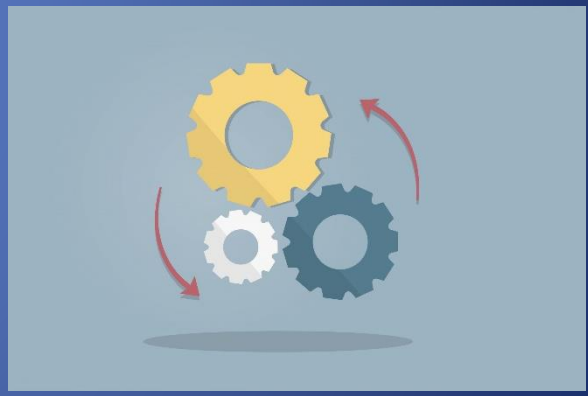
- QMHPs and/or the Treatment Committee are not 'ordering' hormones or surgeries, but rather:

1. Determining that a certain intervention will significantly decrease dysphoria, and
2. Approving evaluation for appropriateness by an identified professional



Approvals by Committee

- Then referral to appropriate professional with expertise
  - Hormones → Endocrinologist
  - Surgery → Surgeon



Medical Necessity?

- An intervention that without its implementation will result in the patient experiencing significant dysphoria?

or

- Implementing a certain intervention will significantly alleviate the patient's dysphoria?

Conclusions

- Know the policy
- Know the referral process
- Refer whenever issues that could be related to gender dysphoria are discovered
- Practice within the scope of your licensure, training and experience
- Seek consultation from a supervisor whenever you are unsure

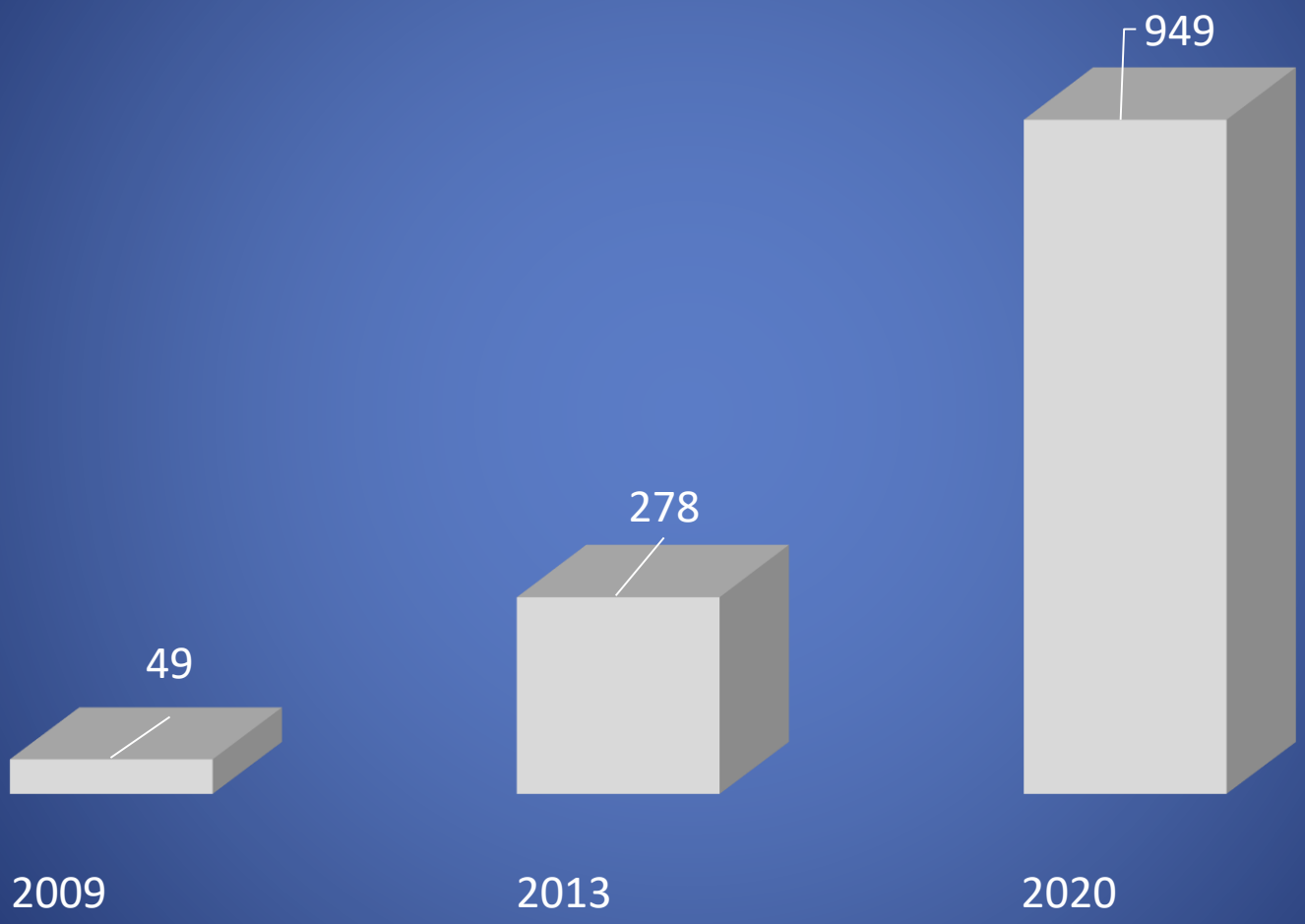
Professional Organizations Supporting All Interventions

- American Academy of Family Physicians
- American College of Obstetricians and Gynecologists
- American Medical Association
- American Psychiatric Association
- American Psychological Association
- American Public Health Association
- American Society of Plastic Surgeons
- Endocrine Society
- National Association of Social Workers
- World Professional Association for Transgender Health

Human Rights Campaign Foundation

- Corporate Equality Index (CEI) survey: Evaluate whether the corporation removed transgender exclusions from their health insurance contracts and modified clinical guidelines to provide health insurance coverage for mental health counseling, hormone therapy, medical visits, surgical procedures and other treatments related to gender transition or sex reassignment.

U.S. Companies Providing Full Coverage



https://www.thehrcfoundation.org/professional-resources/corporate-equality-index-list-of-businesses-with-transgender-inclusive-health-insurance-benefits

Treatment of Gender Dysphoria in Corrections: A Legal Review

Ingrid Renberg, MD, MPH, MSL
Pennsylvania Statewide Psychiatric Medical Director

Cuoco v. Moritsugu (2000)

- A transfemale brought suit against a prison psychiatrist who refused to diagnose her or prescribe her estrogen
- The court dismissed the case citing that the physician had qualified immunity
- The qualified immunity defense held that as long as there was a “good faith effort” in seeing to need, correctional staff were immune from lawsuits directed at care and treatment barring precedent that could clearly show their actions might be unconstitutional

Eighth Amendment

- The “cruel and unusual punishment” prohibition
- These cases were initially largely unsuccessful, as for an inmate to prove cruel and unusual punishment, they must prove a two-prong argument: that the deprivation of care was objectively serious, and that the correctional staff were deliberately indifferent towards that risk
- With treatments for gender dysphoria highly controversial, it was easy for correctional facilities to continue with blanket policies against any treatment, and face little repercussion

Maggert v. Hanks (1997)

- Tasha Maggert, a transgender inmate,
- The court dismissed the case stating that the Eighth Amendment did not entitle an inmate to curative treatment for gender dysphoria

Williams v. Kelly (2018)

- Fourteenth Amendment, equal protection clause
- A transfemale inmate brought an equal protection claim stating that there was no “penological reasoning” for denying her gender surgery request, and that she was being treated differently from non-transgender women
- The court held that while treatment protections are designed to be equal, when inmates change their gender identity such protections become a grey area and may cause some loss in those protections

The Supreme Court

- Has largely deferred cases back to prison authorities due to security concerns
- Has never made a decision as to whether an inmate has a right to surgery or to identity-corresponding housing

Historical Review

- Prior to 1998, cases involving transsexuals or those with gender identity disorder in prisons were not common, which left room for ambiguity in jurisprudence
- Federal prisons were the first to address the idea of offering a level of treatment for transgender inmates
- Freeze-frame policies were introduced, which allowed for the continuation of treatment a transgender inmate was receiving prior to entering prison, but did not make a requirement that any further improvement was necessary
- While the federal system was the first to make a sweeping declaration regarding treatment, the state systems have been largely individualized in their progression towards defining acceptable treatment

Adams v. Bureau of Prisons (2010)

- Vanessa Adams, a transfemale refused care for gender dysphoria in federal prison, challenged her lack of care
- The court agreed that she had a right to treatment, and in May 2011, the Bureau of Prisons provided a new policy which allowed for an individualized approach to medical and mental health evaluations
- Established that care given would “not be precluded solely due to level of services received or lack of services, prior to incarceration”

Merriwether v. Faulkner (1987)

- Lavarita Merriwether, a transfemale incarcerated in Indiana, filed suit claiming that the prison psychiatrist would not continue her estrogen treatment
- She also brought an equal protection claim since she was being held in segregation for her protection, which she said was discriminatory
- The court held that she had a valid claim to receive treatment for her gender dysphoria, but dismissed the equal protection claim, stating that prisons had an obligation to protect inmates, and having a transfemale in general population could be a security concern
- They found that holding transgender inmates in solitary confinement was acceptable to provide safety

Tate v. Blanas (2002)

- A transfemale in California being held in solitary confinement for her protection claimed her constitutional rights were being violated, that her basic human needs were being deprived and that she was being needlessly subjected to harsh conditions
- The court found that transgender inmates were entitled to be treated with the same respect as other inmates, and that automatically classifying all transgender inmates as needing total separation violated their rights
- They held that the jail needed to adopt a more appropriate system for evaluating housing options, and that segregation of transgender inmates is not always required, and should only be utilized when absolutely necessary

Diamond v. Owens, 2015

- Ashley Diamond, a transfemale, was denied continuation of the hormones she had been prescribed for 17 years, and placed in population settings where she was sexually assaulted
- She filed suit in 2015 alleging her Eighth Amendment right against cruel and unusual punishment had been violated
- The court found that prison staff were not entitled to qualified immunity, and that Ms. Diamond had sufficiently shown blatant disregard for her safety, as well as failure to provide adequate medical care for her gender dysphoria
- She was awarded an undisclosed monetary settlement, and the Georgia Department of Corrections changed their policies. They no longer allow freeze frame policies but provide care based on need.

Soneeya v. Spencer (2012)

- The US District Court for the District of Massachusetts invalidated the prison's gender identity policy, which restricted surgery and laser hair removal as treatments that would never be medically necessary for inmates in custody
- The court held that blanket prohibition of methods of treatment for gender dysphoria must be individualized, and must be given in accordance with community standards for adequate care

Kosilek v. Spencer

- In 2002, she filed her first lawsuit against the Massachusetts Department of Corrections and won the right to hormone therapy, electrolysis, and mental health treatment.
- In 2012, she became the first inmate to win her case and be approved for gender surgery.
- The Department of Corrections appealed, and in 2014 the decision was overturned, with the appeals court stating that denying the surgery did not amount to violation of the Eighth Amendment, as her diagnosis was being addressed, and there had been improvement
- They felt that there had not been deliberate indifference, and that while gender surgery was a treatment option, it was not the only option

Norsworthy v. Beard, 2014

- Michelle Norsworthy, was ordered gender-affirming surgery, which her psychologist at the prison deemed as medically-necessary to treat her gender dysphoria.
- The California Department of Corrections appealed the decision, and while the appeal was pending, Norsworthy was released on parole, rendering the case moot
- The concept of paroling inmates to circumvent the possibility of being ordered to provide the surgery took hold, and in 2014, the Virginia Department of Corrections released Ophelia De'lonta (*De'Lonta v. Johnson*, 2013) after a judge had ordered an examination by a gender specialist to review for surgery

Quine v. Beard (2017)

- Shiloh Quine was serving a life sentence for first-degree murder in California
- She requested gender surgery, as well as access to commissary items available to female inmates
- She became the first transgender inmate to receive gender surgery while incarcerated
- There was significant resistance to this decision

Edmo v. Corizon (2019)

- Adree Edmo, a transfemale incarcerated in Idaho, won her case for gender surgery
- The governor of Idaho stated that he would take the case all the way to the Supreme Court if necessary to prevent tax payers from having to pay for an unnecessary surgery
- The Supreme Court refused to hear the case, and Edmo received surgery in July 2020

Gibson v. Collier, 2019

- Not all recent requests have been so successful
- In 2019, a transgender inmate in Texas requested surgery on an Eighth Amendment claim
- The court opined that declining to provide sex reassignment surgery to a transgender inmate does not inflict cruel and unusual punishment, as there is no consensus in the medical community about the necessity and efficacy of it as a treatment for gender dysphoria

Farmer v. Brennan, 1994

- Established that placing a transfemale with male inmates without seeing to her safety violated the cruel and unusual clause of the Eighth Amendment, as staff should be aware of the risks involved, and to ignore them constituted deliberate indifference

Due Process Clause

- Inmates who have challenged segregation policies or individual decisions to place them in administrative segregation have had limited success doing so under the Due Process Clause
- Courts generally hold that such claims do not rise to the level of constitutional violations
- The Constitution forbids inhumane prison conditions, but it does not require that prisons provide comfortable conditions to prisoners
- The wide gap between inhumane and permissible allows even further discretion to be allowed prison officials

Recent State Laws

- Connecticut became the first state to allow a transgender prisoner the legal right to be housed according to their gender identity when in May 2018 they passed SB-13
- Massachusetts followed in 2019
- In September 2020, California followed suit in allowing choice based on gender identity by passing SB-132
- New Jersey created a similar policy which went into effect July 1, 2021

The Prison Rape Elimination Act

- Added standards in 2012 that directly affected transgender inmates
- They acknowledged the perception of vulnerability for these inmates and mandated bi-yearly meetings with identified inmates to discuss safety concerns, like providing chaperones for searches
- In *Brown v. Patuxent* (2015), a transfemale inmate who was sexually harassed and held in segregation successfully argued that prison officials had failed to train their employees in appropriate treatment of transgender inmates, per PREA, which led to her inhumane treatment

Fourth Amendment

- Prohibition against unreasonable searches
- Has been used to challenge cross-gender supervision policies which cause humiliation that is experienced by being forcibly exposed to members of the opposite gender
- In general, courts have found the need for bodily searches crucial to maintaining security in the prison setting, thereby limiting Fourth Amendment claims

Campbell v. Kallas (2019)

- Another concern in considering surgery is the difficulty inmates have in meeting certain criteria, including “real life” experience in their self-identified gender before having irreversible surgery
- For inmates who have only begun their transition within a correctional facility, they are unable to experience the social aspect of their gender identity
- An inmate requested consideration of gender surgery, which was denied due to an outside mental health expert who determined the inmate had not met the criteria of real-life experience, but could meet criteria if the Department of Corrections could develop a solution to that
- Officials determined they could not provide that experience, and the court ultimately determined that they had provided sufficient and adequate care and denied that surgery was necessary

Stevens v. Williams (2006)

- A preoperative transgender woman brought a claim against the Oregon Department of Corrections claiming that her rights as a female inmate were violated by housing her in a male facility
- The court refused to recognize transgender women as a suspect class, and found that assigning prisoners to facilities based on anatomical sex was related to their interest in achieving prison security, that “preventing heterosexual crime is a legitimate penological interest”

Conclusion

- Many cases, little precedent
- Different judgments, different opinions
- Courts have largely favored security
- Individualized assessments and plans

What is the "Standard of Care" (and Who Should Define It?) of GD Evaluation and Treatment of Juveniles and Adults in Correctional and Other Detention Settings: New Developments in Texas

Joseph Penn MD, CCHP-MH

Disclosures

- No pharma sponsorship or investments in GD medications or other treatment modalities
- NCCHC Board (AAPL Representative)
- Full time State of Texas Employee (UTMB CMC)
- Expert witness/correctional and forensic psychiatry consultation to attorneys and the courts and also to various state health care entities as a second opinion consultant
- Named defendant in two cases (state prisoners seeking gender affirming surgery)

Introduction

- How did I become involved in GD evaluation, diagnosis, and treatment?
- DSM Change in nomenclature
- Freeze frame/Federal BOP Policy Revisions
- Texas Medical Board issues
- Advocacy Groups
- Joint Gender Dysphoria Work Group
- Policy and Procedure (a work in progress)
- Current litigation
- “Hot potato” issues/the blame game
- Legislature/Governor’s Office

How Did Texas (TDCJ) Respond?

- TDCJ Correctional Managed Care created a multidisciplinary working group comprised of physicians, nurses, pharmacists, and administrators
- Previous policy was edited/modified to more accurately reflect community standards
- World renowned gender dysphoria expert at UTMB increased access for this population
- New GD Policy approved in August 2015
- Specialty referral process was created to improve primary care physicians' understanding of their role at the units
- In person versus telepsychiatry GD evaluations and consultation by a multidisciplinary team of GD specialists

Gender Dysphoria in Corrections: Themes in Case Law

- “Serious medical need”
- Cannot have a “blanket prohibition” against hormone treatment
- Physician must have ability to “exercise professional medical judgment”
- Inmate medical care must be based upon an individual professional evaluation, not a blanket rule

“Real Life” Experience in Prison

- Clothing
- Grooming
- Cosmetics
- Jobs
- Use of preferred names and pronouns
- Cellmate
- Correctional staff
- Significant others
- Family/visitors/outside supports
- Advocacy groups
- Choice of living in male or female prison***

Treatment Issues

What about informed consent/risks involved of hormone treatment?

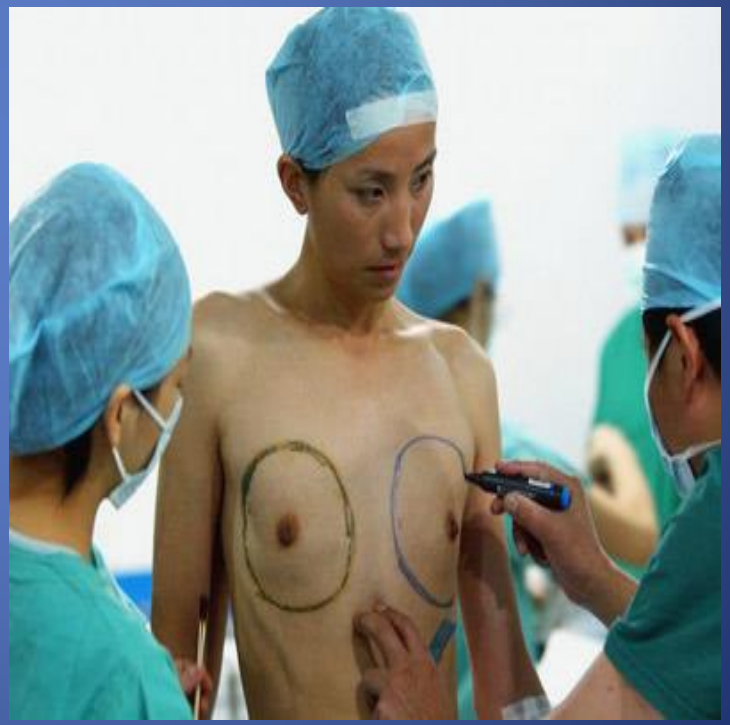
Rec: Hormones should be continued*** without interruption

1)Pending evaluation by the health care professional

- 2) Unless there's an urgent medical reason to discontinue
- 3) Is it "dangerous" to abruptly discontinue? "withdrawal"
- 4) How much should be prescribed? By whom (medical, psychiatry or endocrinology) For how long?
- 5) Is a referral to a GD specialist the standard of care?
- 6) Who qualifies as a GD specialist?

Gender Affirming Surgery: FKA Sex Reassignment Surgery

- Hysterectomy
- Mastectomy or breast implants
- Reshaping of genitals
- Facial plastic surgery
- Electrolysis (hair removal)
- Childbearing may become possible with donor uterus



Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden

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1 Department of Clinical Neuroscience, Division of Psychiatry, Karolinska Institutet, Stockholm, Sweden, 2 Department of Medical Epidemiology and Biostatistics, Karolinska Institutet, Stockholm, Sweden, 3 Centre for Violence Prevention, Karolinska Institutet, Stockholm, Sweden, 4 Institute of Neuroscience and Physiology, The Sahlgrenska Academy at Gothenburg University, Gothenburg, Sweden

- Context: The treatment for transsexualism is sex reassignment, including hormonal treatment and surgery aimed at making the person's body as congruent with the opposite sex as possible. There is a dearth of long term, follow-up studies after sex reassignment.
- Objective: To estimate mortality, morbidity, and criminal rate after surgical sex reassignment of transsexual persons.
- Design: A population-based matched cohort study.
- Setting: Sweden, 1973-2003.
- Participants: All 324 sex-reassigned persons (191 male-to-females, 133 female-to-males) in Sweden, 1973–2003. Random population controls (10:1) were matched by birth year and birth sex or reassigned (final) sex, respectively.

- Conclusions: Persons with transsexualism, after sex reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population. Our findings suggest that sex reassignment, although alleviating gender dysphoria, may not suffice as treatment for transsexualism, and should inspire improved psychiatric and somatic care after sex reassignment for this patient group.

Limited Studies/Articles and Empirical Literature

1)“Malingering/Secondary gain” of GD in correctional settings/populations

2) Transgender “free world” and incarcerated individuals who have histories or/engage in sex offending behaviors

“Issues in Working with Transgender Individuals Who Sexually Harm”

Author: Shan Jumper

Current Psychiatry Reports (2021) 23: 42

Inmate Sex Change Prevention Act

- Wisconsin statute
- Prevented state or federal resources from being used to provide hormone therapy or SRS to Wisconsin inmates
- Challenged by ACLU
- 2012 – U.S. Court of Appeals

Texas “Developments”

- “Certain procedures done on minors such as castration, fabrication of a ‘penis’ using tissue from other body parts, fabrication of a ‘vagina’ involving the removal of male sex organs, prescription of puberty-suppressors and infertility-inducers, and the like are all ‘abuse’” under section 261.001 of the Texas Family Code

Clinical “Pearls”

- Who should make the diagnosis? And how?
- When should the diagnosis be made within jail and prison settings (outpatient setting/duration of anticipated confinement and mandated treatment)
- New intake reports hormonal treatment in the community, should one continue this treatment? R/B/A of holding/continuing
- How to verify past treatment efforts? (conundrum)
- Who should prescribe meds?
- Issues of genital mutilation/penectomy/auto-orchiectomy
- Aggressive/assaultive transmale patients (issues of testosterone use)

Future Directions

- *AAPL Resource Document Prescribing in Corrections* (JAAPL 2018, and in press)
- GD Evaluation and Treatment (Special Edition of Journal of Correctional Health Care)
- Possible Correctional Studies/Publications
  - Descriptive/Phenomenology
  - Comorbidity (medical and psychiatric)
  - Sex offenders with GD
  - Secondary gain/malingering and other reasons to seek GD diagnosis and treatment***
  - Best practices and “standard of care”
  - Who prescribes hormones: Medical/primary care vs. endocrinology vs. psychiatry versus both?
  - Quality improvement
  - Should GD treatment be conceptualized as a chronic disease/disease management (e.g., mammograms, bone density, etc)?

Thank you!

Questions?