

## Recommendations for Permitting Transgender Veterans to Correct Military Release and Discharge Documentation to Account for a Change in Name and Gender

October 2013\*

It is estimated that as many as 140,000 of the nation's approximately 26 million veterans may be transgender.<sup>1</sup> Notwithstanding their honorable service in the military, these veterans can encounter substantial burdens in obtaining post-service benefits because their names and genders memorialized on their military service discharge documents no longer match their names and genders following release from service.

The principal document evidencing military service, the "DD Form 214 Certificate of Release or Discharge from Active Duty" (generally referred to as DD 214), is issued by the United States Department of Defense ("DoD") to all servicemembers upon retirement, separation or discharge from active duty status from all branches of the United States military. One's DD 214 represents the complete, verified record of one's active military service, awards and medals, and other pertinent service information.<sup>2</sup> The DD 214 is commonly required by Federal Government agencies, including the United States Department of Veterans Affairs, to provide various veterans' benefits. The DD 214 is also crucial for veterans to prove their record of service in connection with, among other things, applying for secondary educational opportunities or for employment in positions which have a preference for veteran candidates, applying for benefits for their dependents, and for accessing the same benefits they had while on active duty status (including shopping on military installations).

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<sup>1</sup> Dr. Gary Gates of the Williams Institute estimates that there are roughly 700,000 transgender people in the United States and a recent National Transgender Discrimination Survey showed that 20% of them have been a part of the military at some point. Colin Daileida, "*For Transgendered Soldiers, Don't Ask Don't Tell Carries On*," *The Atlantic* (Oct 29 2012), available at <http://www.theatlantic.com/sexes/archive/2012/10/for-transgendered-soldiers-dont-ask-dont-tell-carries-on/264225/>; Jack Harrison-Quintana and Jody L. Herman, "*Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey*," *LGBTQ Policy Journal* at the Harvard Kennedy School, Vol. 3 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Harrison-Quintana-Herman-LGBTQ-Policy-Journal-2013.pdf>. There are some estimates that there may be as many as 300,000 transgender U.S. veterans. See, e.g., Press Release, Transgender Americans Veterans Association, The Employment Non-Discrimination Act (ENDA) (Oct. 13, 2007), available at [http://www.tavausa.org/PressReleases/TAVA %20Press%20Release%20on%20ENDA.html](http://www.tavausa.org/PressReleases/TAVA%20Press%20Release%20on%20ENDA.html).

<sup>2</sup> While the DD 214 is the most commonly accepted record of military service, other documents may, in certain cases, be accepted as authorized replacements for the DD 214. These include the Transcript of Military Service (DA Form 1569) and Statement of Service (AHRC Form 2496-E).

Nevertheless, it is our understanding that transgender veterans may be systematically denied access to such benefits and services due to the incongruities between the names and genders that appear on their DD 214s and their current and correct names and genders otherwise reflected accurately in court orders, state identification cards, and revised birth certificates.<sup>3</sup> Alternatively, even in the event that a transgender veteran is eventually allowed access to these benefits, this access may have been delayed or obtained only after the veteran was subjected to difficult and embarrassing administrative burdens requiring an explanation of these discrepancies.

Moreover, as discussed more fully below, the procedures in place to request amending applicable discharge documents to reflect changes in name and gender generally have either been non-existent or inconsistently applied.<sup>4</sup> In light of the substantial burden borne by transgender servicemembers who are unable to use fully their DD 214s despite having served honorably in the military and earned the right to an “accurate and complete summation of active military service,”<sup>5</sup> we believe that it is imperative that DoD provide additional written guidance to the administrative bodies charged with correction of military records. Such guidance would advise those boards to utilize their broad authority in an effective, streamlined and uniform manner to allow transgender former servicemembers to amend their DD 214s to reflect the servicemembers’ current names and genders.

## **I. Procedure for Requesting Corrections to Military Records**

Under federal law, the Secretary of each branch of the United States Armed Forces is empowered with broad authority to correct any military record if necessary to “correct an error” or to “remove an injustice.”<sup>6</sup> This law also allows each Secretary to establish a Board for Correction of Military Records (“BCMR”), and the applicable DoD instruction states that correction of DD Forms 214 is to be made by the applicable BCMR.<sup>7</sup> These administrative bodies review applications for amendment of military records and each BCMR is governed by its

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<sup>3</sup> In a 2008 survey of transgender veterans, the most common form of discrimination outside the workplace was difficulty obtaining identification documents; 21% of the survey participants reported that they had experienced difficulty obtaining identification documents. KARL BRYANT AND KRISTEN SCHILT, *TRANSGENER PEOPLE IN THE U.S. MILITARY: SUMMARY AND ANALYSIS OF THE 2008 TRANSGENER AMERICAN VETERANS ASSOCIATION SURVEY 6* (2008), available at <http://www.palmcenter.org/system/files/TGPeopleUSMilitary.pdf>.

<sup>4</sup> The issue of inconsistent application appears to be supported by the National Transgender Discrimination Survey, which was conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force (the Task Force) in 2008. The survey found that two-thirds of the respondents who had served in the military and attempted to update their military discharge documents to match their current name and gender marker were unsuccessful in doing so. Harrison-Quintana & Herman, *supra* note 1, at 8.

<sup>5</sup> United States Department of Defense Instruction No. 1336.01, Aug. 20, 2009 (hereinafter, DODI 1336.01).

<sup>6</sup> 10 U.S.C. § 1552(a)(1) (2006). An “error” is considered a “legal or factual error,” whereas an “injustice” is (when not also an error) “treatment by the military authorities which shocks the sense of justice, but is not technically illegal” that may lead to “a harsh, unfair, or inequitable result.” *See, e.g., Peoples v. United States*, 87 Fed. Cl. 553, 569 (2009).

<sup>7</sup> DODI 1336.01, Enc. 3 (Procedures) Section 5. For purposes of this report, the term BCMR is also used to refer to the Board for Correction of Naval Records

service branch's own internal guidance.<sup>8</sup> The statute excludes from the Secretaries' and BCMRs' authority only certain records of courts-martial and related administrative records.<sup>9</sup>

An applicant's request to amend a DD 214 must be made in writing by use of a "DD Form 149 Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552." Each veteran requesting correction of a DD 214 is required to submit a request for correction within three years after the applicant discovers the error or injustice.<sup>10</sup> However, the BCMRs have the authority in the interest of justice to waive the untimeliness of a request made after the three-year time period.<sup>11</sup> The applicant must supply evidence and records to support the request for correction of the military record because the BCMR does not conduct an independent investigation.<sup>12</sup> The applicant's evidence must prove, by a preponderance of the evidence, that an error or injustice exists.<sup>13</sup>

Following review by an analyst, who prepares a recommended decision that may be subject to additional staff-level review, the BCMR reviews the applicant's official military personnel file. The BCMR may request an outside agency's advisory opinion, which, if received, is shared with the applicant for any response to the opinion's conclusions.<sup>14</sup> In certain cases, some BCMRs obtain advisory opinions prepared by the BCMR staff before issuing final decisions.<sup>15</sup> Many applicants are not represented by counsel in these proceedings. The BCMR will typically issue a written decision supporting its final determination, which is subject to judicial review pursuant to the Administrative Procedure Act. The BCMR decision may be subject to challenge if the veteran can demonstrate that the applicable BCMR acted arbitrarily, capriciously or contrary to law, or otherwise, that the BCMR's decision was unsupported by substantial evidence. Courts have previously held that agency adjudications which produce an unexplained departure from precedent (including prior decisions and interpretations of statutes and regulations) may be held to be arbitrary and capricious.<sup>16</sup> Specifically, courts have stated that BCMR decisions must provide an "adequate explanation to justify treating similarly situated parties differently," especially when similarly situated applicants are treated in a disparate

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<sup>8</sup> See Army Regulation 15-185, May 1, 2006, available at [www.armypubs.army.mil/epubs/pdf/r15\\_185.pdf](http://www.armypubs.army.mil/epubs/pdf/r15_185.pdf) (Department of the Army policy and guidance on changing military records); SECNAV Instruction 5420.193, Nov. 19, 1997, available at [www.donhq.navy.mil/bcncr/bcncr.htm](http://www.donhq.navy.mil/bcncr/bcncr.htm) (Department of the Navy); Air Force Instruction 36-2603, Mar. 5, 2012, available at [www.e-publishing.af.mil/shared/media/epubs/AFI36-2603.pdf](http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2603.pdf) (Department of the Air Force); 33 C.F.R. part 52 (2012) (Coast Guard).

<sup>9</sup> 10 U.S.C. § 1552(f).

<sup>10</sup> 10 U.S.C. § 1552(b).

<sup>11</sup> *Id.*

<sup>12</sup> See Jan W. Serene, *Army Review Boards and Military Personnel Law Practice and Procedure*, 2010 Army Law. 4, \*5

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (discussing the Army Board for the Correction of Military Records ("ABCMR") procedures). The advisory decision does not bind the ABCMR's determination, either in rationale or final result. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *E.g., Thomas v. United States*, 47 Fed. Cl. 560 (2000); see *e.g., Kreis v. Sec'y of Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005) (quoting *Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996)).

manner.<sup>17</sup> The United States District Court for the District of Columbia has previously stated that “nothing could be more arbitrary or capricious” than this scenario.<sup>18</sup>

## **II. Incongruous BCMR Positions on Legal Authority to Correct Military Records to Account for Gender Changes**

In the face of numerous BCMR decisions concluding otherwise, the Air Force Board for Correction of Military Records (“AFBCMR”) issued a decision in 2004 that provided transgender veterans the relief requested with regard to name and gender changes to DD 214s.<sup>19</sup> In doing so, the AFBCMR struck an appropriate balance between its interests in preserving the accuracy of military records and remedying injustices to these applicants. The AFBCMR concluded that the application presented sufficient evidence demonstrating the existence of an injustice warranting relief.<sup>20</sup> Although the AFBCMR recognized its existing practice rejecting changes to “the applicant’s original DD Form 214,” the AFBCMR concluded that the applicant’s original DD 214 was “a hindrance to the applicant should she be required to provide documents to a servicing facility for her needs, such as insurance companies, hospitals, places of employment, etc.”<sup>21</sup> Moreover, the AFBCMR concluded that providing the applicant with an alternative document such as a Statement of Service (“SOS”) would be insufficient because that form “would not serve to officially verify military service.”<sup>22</sup> The AFBCMR concluded that it had the legal authority to issue an additional DD 214, reflecting the changes in name and gender.<sup>23</sup> The AFBCMR directed that the applicant’s original DD 214 be maintained in the applicant’s military records.<sup>24</sup> Thus, in the AFBCMR’s view, the only way to fully address these burdens, including the administrative barriers to accessing benefits, experienced by transgender veterans on account of discrepancies in present identification and the name and gender as documented in the veterans’ DD 214 is to issue a new DD 214 reflecting these changes. As importantly, the AFBCMR’s decision recognized and accommodated the United States military’s interest to maintain the accuracy of its historical records. The applicant’s military record file still includes the original DD 214, along with a newly issued revised DD 214.

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<sup>17</sup> *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011).

<sup>18</sup> *Id.* (citing *Etelson v. Office of Personnel Management*, 684 F.2d 918, 926 (D.C. Cir. 1982); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dept. of Health and Human Serv.*, 300 F. Supp. 2d 32, 42 (D.D.C. 2004)).

<sup>19</sup> AFBCMR, No. BC-2003-04051 (Apr. 21, 2004). This decision is especially enlightening because just eighteen months prior, the AFBCMR concluded that no procedures or guidelines existed to change gender in military records and that no law or precedent existed authorizing the AFBCMR to take such action. The AFBCMR had noted that transsexuals are not a “protected class” under the Civil Rights Act of 1964, and that the Air Force “was not legally required to recognize a transsexual’s gender change.” AFBCMR, No. 02-00989 (Oct. 16, 2002).

<sup>20</sup> AFBCMR, No. BC-2003-04051 (Apr. 21, 2004).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

This AFBCMR decision presented a legally viable path for transgender veterans, as well as a just one. However, a review of the universe of BCMR determinations regarding transgender applicants seeking name and gender changes reveals dissimilar outcomes from the AFBCMR decision (and within each BCMR) and crystallizes why deviation from the logic of the AFBCMR's 2004 decision leads to inequitable results for applicants. The inconsistencies include whether any relief at all is granted as well as the types of relief granted by each BCMR. The BCMRs claim the inconsistencies are based upon the facts and circumstances surrounding each application and each BCMR's particular application and interpretation of its legal authority for granting or denying such relief. The inconsistent decisions on this issue summarized below evidence a critical need for BCMRs to put in place effective, streamlined and uniform guidelines to allow transgender former servicemembers to amend their DD 214s to reflect the servicemembers' current names and genders.

Significantly, most BCMR decisions denying requests to correct military records to account for a change in gender do not differentiate between a BCMR's authority to "correct" factual and legal errors and "remove" injustices. As such, in an overwhelming majority of cases, BCMRs have concluded that because the applicant's DD 214 correctly reflects the name and gender of the applicant "during the period of the applicant's service," no amendment of the form to correct an "error" is warranted.<sup>25</sup> This application of the law appears untenable. The statute's distinction between correction of errors and removal of injustice should preclude the BCMRs from collapsing the inquiry into a single correction of errors test.

BCMRs have also claimed that neither individual military branches, nor the DoD itself, have established policies to amend military records accounting for a change in gender occurring after discharge or retirement,<sup>26</sup> and, in some cases, that internal guidance restricts their authority to amend DD 214s in the absence of any "error."<sup>27</sup> The first rationale seems beside the point. Nothing in the statute or guidance limits the BCMRs' power to amend records only in those circumstances specifically and affirmatively delineated in the written guidance. As to the second rationale, the BCMRs have based their determinations on the military's interest in "preserving the accuracy of military records" is the principal basis cited by BCMRs in denying such relief.<sup>28</sup> While this rationale is applicable in cases of amending records where factual errors do not exist, this interest is tempered in cases of injustice. For these cases, preservation of historical accuracy

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<sup>25</sup> The BCMRs' logic for denying such requests is that the record was factually correct. *See, e.g.*, AFBCMR No. 97-02282 (Sept. 24, 1996); ABCMR No. AR20040007301 (June 30, 2005) (denying name/gender change because the information was "correct at the time the applicant performed military service").

<sup>26</sup> *E.g.*, AFBCMR No. BC-2003-04051 (Apr. 21, 2004) (claiming that neither the Air Force nor the DoD had procedures in place to allow for a post-service change in gender to be acknowledged in DD 214).

<sup>27</sup> *See, e.g.*, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS, APPLICANT'S GUIDE TO APPLYING TO THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS 4 (2008), *available at* [http://arba.army.pentagon.mil/documents/ABCMR\\_Applications\\_Guide\\_29\\_January\\_2008\\_edition.doc](http://arba.army.pentagon.mil/documents/ABCMR_Applications_Guide_29_January_2008_edition.doc) (stating that military records (*e.g.*, DD 214s) are "historical" and record facts *during the time* that an applicant served).

<sup>28</sup> *E.g.*, ABCMR No. AR20040007301 (June 30, 2005) ("The Army has an interest in maintaining the accuracy of its records. The data and information contained in those records should reflect the conditions and circumstances that existed at the time the records were created."); ABCMR No. AR20090008061 (Nov. 3, 2009) (same).

is secured simply by keeping a copy of the corrective action with the original DD 214 in the personnel file.<sup>29</sup> Furthermore, as noted above, this justification impermissibly collapses the two statutory standards into one.

Thus, while a discrepancy in name and gender may not be a factual “error,” these determinations usually do not analyze an applicant’s case independently in order to determine if a record could be amended to remove an “injustice” specifically. Nevertheless, at least one BCMR decision expressly denied a transgender applicant relief under its “injustice” power, concluding that the discrepancy between the applicant’s name and gender in her military records and as presented in her application did not constitute an injustice because the hardship she faced when interacting with third parties, such as prospective employers, was caused by “prejudice in society,” and not by the Coast Guard’s treatment of the applicant.<sup>30</sup> Thus, her application was denied.<sup>31</sup> In other cases, however, BCMRs have appeared correctly to separate the concepts of “error” and “injustice” in order to consider taking corrective action for the applicant “as a matter of compassion”<sup>32</sup> where a factual error does not exist.

These discrepancies are not limited to each BCMR’s interpretation of its own legal authority to grant relief. Indeed, BCMRs vary greatly in the type and extent of relief they grant to transgender applicants. Varying decisions by the Army Board for Correction of Military Records (“ABCMR”) are particularly instructive. In one case, where an applicant had provided evidence of a change in name, but had not produced medical records (or any other evidence) demonstrating a change of gender, the ABCMR concluded that it would not amend the DD 214.<sup>33</sup> Instead, the ABCMR recognized the “unique” nature of the situation and directed another administrative body (the Army Review Boards Agency Case Management Support Division) to issue “documentation” recognizing the applicant’s change in name (yet failed to offer any relief regarding correction of records to reflect a change in gender). In a similar matter, the ABCMR declined to amend any military records (or, alternatively, to issue any supplemental records) so as to account for the applicant’s change in name or gender.<sup>34</sup>

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<sup>29</sup> See *infra* note 32 (discussing an ABCMR decision that granted a name and gender change application with the process noted above).

<sup>30</sup> DoTBCMR Docket No. 2000-151 (May 17, 2001). This BCMR, currently the “Department of Homeland Security Board for Correction of Military Records” (“DHSBCMR”) and formerly the Department of Transportation Board for Correction of Military Records (“DoTBCMR”), has the authority to correct records of members of the United States Coast Guard.

<sup>31</sup> *But see* DHSBCMR, Docket No. 2008-181 (Feb. 26, 2009) (granting applicant’s request to change pay records and Coast Guard identification card to reflect a change in gender and name after finding that the applicant’s denial of retirement pay and benefits due to this discrepancy was “unjust”).

<sup>32</sup> *E.g.*, ABCMR No. AR20040006388 (Sept. 29, 2005).

<sup>33</sup> *E.g.*, ABCMR No. AR2003088316 (Mar. 11, 2004) (denying an applicant’s request for a change in gender on the DD 214). *But see* DoTBCMR Docket No. 2000-151 (May 17, 2001) (concluding that whether an applicant has undergone “a sex-change operation,” while relevant to the permanence of a change in gender identity, should not necessarily determine the ultimate outcome).

<sup>34</sup> ABCMR No. AR20070003431 (Aug. 21, 2007) (concluding that the Board “underst[ood] the applicant’s desire to have the military records changed, [but found] no basis for compromising the integrity of the Army’s records that reflect the correct name and sex under which military service was performed”).

Similarly, in certain cases where an applicant provided evidence of a new birth certificate reflecting change in name and gender, as well as evidence proving gender reassignment surgery, the ABCMR (while refusing to change the military records of the applicant's gender at the time of initial discharge) has recognized the "significant difficulties" for servicemembers who have undergone gender reassignment surgery, and has concluded that it would be appropriate to issue a Transcript of Military Record (DA Form 1569) under the applicant's current legal name and gender.<sup>35</sup> However, the ABCMR has also recognized that its DA Form 1569 remedy may be ineffective in that it will not necessarily cure the difficulties faced by transgender veterans, especially when civilian entities refuse to accept such documentation.<sup>36</sup>

The ABCMR is not alone in fashioning an alternative remedy for transgender applicants. Similarly, the Board for Correction of Naval Records ("BCNR"), while concluding that a correction of a DD 214 would be "inappropriate," given the absence of factual "error" as to name and gender during time of service, has previously found that the applicant had suffered an injustice, warranting "partial relief" in the form of creating a "Statement of Service" ("SOS"). This SOS was to reflect the applicant's current name, gender and periods of service. However, just as with the ABCMR's use of the DA Form 1569 in cases of transgender applicants, the BCNR's provision of an SOS does not always remedy the administrative difficulties (and potential ultimate delay in or denial of benefits, services, and preferences) experienced by these veterans. Specifically, since some government agencies and employers may only accept a DD 214 from an applicant, these SOS and DA Forms 1569 may not serve as valid substitutes a revised DD 214. Thus, in spite of alternative relief which may or may not be provided in the form of amended SOS and Transcripts of Military Records, transgender veterans may continue to be systematically denied access to such benefits, services, and preferences.

### **III. Evidence Required to Be Submitted in Support of a Change in Gender – Lessons to Be Learned from Other Federal Agencies**

To date, the few BCMRs that have adjudicated requests for revisions to DD 214s under their "injustice" authority have largely refused to grant full relief to transgender veterans in the form of a new or corrected DD 214. Even for those BCMRs inclined to recognize the "unique" nature of transgender veterans' requests, the standard of proof required for a gender change on the DD 214 may be significant, and, in many cases, insurmountable.<sup>37</sup> For one ABCMR, even evidence of gender reassignment surgery did not suffice.<sup>38</sup> This high burden on the applicant is

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<sup>35</sup> ABCMR No. AR20040006388 (Sept. 29, 2005). *See also* ABCMR No. AR20060005325 (Oct. 19, 2006) (deciding the same and stating that the DA Form 1569 to be issued was "intended solely for the purpose of identifying [the applicant] to agencies who [would] not accept [the applicant's] DD 214").

<sup>36</sup> ABCMR No. AR20070016208 (Mar. 20, 2008) (concluding that the Board did not have the ability to change the applicant's record in order to resolve the difficulties the applicant faced as a result of how the DA Form 1569 is viewed by the civilian sector).

<sup>37</sup> *See, e.g.*, ABCMR No. AR20070003431 (Aug. 21, 2007) (concluding that the Board "underst[ood] the applicant's desire to have the military records changed, [but found] no basis for compromising the integrity of the Army's records that reflect the correct name and sex under which military service was performed"), ABCMR No. 2003088316 (Mar. 11, 2004).

<sup>38</sup> ABCMR No. AR20040006388 (Sept. 29, 2005) (denying the DD-214 change based on the "historical accuracy" rationale, but providing a Transcript of Military Record (DA Form 1569) with the new name and

not only onerous, but is also inconsistent with other Federal government agencies' standards for changing gender designations on official documents. Two Federal agencies—the United States Department of State (“DOS”) and United States Citizenship and Immigration Services (“USCIS”)—have crafted more manageable (and more equitable) standards for amending gender markers on official documents. BCMRs should utilize their broad authority to adopt similar standards in their guidelines.

On June 10, 2010, DOS amended its Foreign Affairs Manual’s (“FAM”) rules concerning gender marker changes on passports and other consular documents. The amended guidelines explicitly note that gender reassignment surgery is not a prerequisite to change an applicant’s gender marker. Assuming all other requirements for a passport have been satisfied (e.g., proof of citizenship, photographs, payment of fees), the only documentation necessary to change the gender marker on the consular document is a signed original statement under oath from the applicant’s medical physician<sup>39</sup> attesting that the applicant has had “appropriate clinical treatment for gender transition to the new gender.”<sup>40</sup> If the applicant has had his or her name changed, satisfactory evidence of a legal name change, such as a court order, other official record, or affidavit must be presented.<sup>41</sup> Furthermore, if gender transition is not complete (or cannot be certified as complete) an applicant can still apply for a two year limited passport with the new gender marker while the gender transition process progresses.<sup>42</sup>

On April 13, 2012, USCIS issued a policy memorandum revising the Adjudicator’s Field Manual (“AFM”) regarding gender marker designations on official immigration documents (e.g., Permanent Resident Cards, Employment Authorization documents, and Refugee Travel documents). According to the AFM, proof of gender reassignment surgery is not required, and the memorandum advises that USCIS officials should not request such evidence. An applicant can receive an initial (or amended) document by presenting either (1) an amended birth certificate, passport,<sup>43</sup> or court order recognizing the new gender, or (2) medical certification of the change of gender from a licensed physician.<sup>44</sup> The certification must include the physician’s

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gender as a “matter of compassion”). *But see* DoTBCMR Docket No. 2000-151 (May 17, 2001) (noting that whether an applicant underwent a sex-change operation, while relevant, “should not necessarily determine the outcome of a case”).

<sup>39</sup> The medical physician must be an internist, endocrinologist, gynecologist, urologist or psychiatrist. 7 FAM 1320(b)(1).

<sup>40</sup> 7 FAM 1320(b)(1)(g)-(h). The letter must also state the physician’s medical license number and the issuing jurisdiction, the Drug Enforcement Administration registration number assigned to the physician, the address/telephone number, and language stating that there is a doctor/patient relationship with the applicant. 7 FAM 1320(b)-(f).

<sup>41</sup> 7 FAM 1320(a)(5). *See also* 7 FAM 1320 Appendix C and 7 FAM 1330 Appendix C for further guidance on the appropriate methods of proving a name change.

<sup>42</sup> 7 FAM 1320(b)(2). Also, for an applicant born abroad seeking a gender marker change on the Consular Report of Birth Abroad, Form FS-240, the same documentation is required. 7 FAM 1340.

<sup>43</sup> Thus it is not as difficult to change USCIS-issued documents after receiving a new passport with the correct gender marker, using the amended guidelines issued by the State Department, as described above.

<sup>44</sup> Unlike the stricter DOS rules, USCIS requires that the physician be a Doctor of Medicine (M.D.) or a Doctor of Osteopathy (D.O.), but without regard to specialization. Thus, non-licensed physicians such as psychologists, social workers or nurse practitioners are not sufficient.

medical license number and issuing jurisdiction, among other items,<sup>45</sup> and language stating that the applicant has “had appropriate clinical treatment for gender transition to the new gender.”<sup>46</sup> The physician’s certification of gender transition is “sufficient documentation, alone, of gender change,”<sup>47</sup> and his or her written determination of what constitutes “appropriate clinical treatment” is accepted without need for additional review.

On June 13, 2013, the Social Security Administration (“SSA”) is implemented a policy change for transgender individuals seeking to update their gender designation in records kept by the agency. Transgender individuals can make the modification by submitting government-issued documents reflecting the new gender, or by presenting the SSA with “a medical certification of appropriate clinical treatment for gender transition.”<sup>48</sup> Previously, the SSA required documentation of specific surgeries.

It is important to note that DOS, USCIS, and SSA do not require proof of sex-reassignment surgery or a specific program of hormone therapy when applying for changes in gender marker. Rather, the only requirement is “appropriate clinical treatment,” which should not be construed to require either surgery or hormone therapy. Many transgender individuals transition to their new genders without surgery or specific hormone therapies.<sup>49</sup> Moreover, medical professionals recommend a broad range of treatments after taking into account the individual patient’s pre-existing medical conditions, including mental health, and other factors.<sup>50</sup>

Finally, individual state departments of motor vehicles have also adopted minimum standards for changing gender markers on driver’s licenses and state identification cards. While the process varies, changing the gender marker may be as simple as completing a form including

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<sup>45</sup> The certification must also include the licensed physician’s Drug Enforcement Administration registration number, address, and telephone number. AFM § 10.22.

<sup>46</sup> AFM § 10.22. USCIS bases this standard on the recommendations of the World Professional Association for Transgender Health (“WPATH”). In order to certify this statement, the physician must include language that he or she has a doctor/patient relationship with the applicant and has either treated the applicant or reviewed and evaluated the applicant’s medical history in relation to the change in gender.

<sup>47</sup> AFM § 10.22.

<sup>48</sup> *See* Social Security Administration, Program Operations Manual System (POMS), RM 10212.200 “Changing Numident Data for Reasons other than Name Change” (June 13, 2013).

<sup>49</sup> *See* WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version (2011), at 54.

<sup>50</sup> Possible treatments (aside from surgery and hormone therapies) include voice surgery, facial implants, psychotherapy, hysterectomy, and orchiectomy. *See* Report and Recommendation of the New York County Lawyers’ Association Committee on Lesbian Gay, Bisexual and Transgender Issues Regarding Revision of Policies with Respect to a Change of Sex Designation on New York State and New York City Birth Certificates for Transgender Individuals, Feb. 23, 2012, at 2-3.

certification by a licensed physician, social worker or psychologist<sup>51</sup> that the applicant underwent appropriate clinical treatment and selecting the correct gender identification mark.<sup>52</sup>

#### **IV. Recommendations for Consistent Relief for Transgender Veterans Seeking Corrected Discharge Documents**

At present, the AFBCMR's decision in case No. BC-2003-04051 demonstrates that BCMRs have the authority to issue relief to transgender veterans in the form of a new DD 214 reflecting changes in names and genders, assuming the applicants set forth sufficient evidence of these changes. Nevertheless, as demonstrated above, BCMR decisions appear to hold little precedential value and BCMRs act inconsistently. Accordingly, the AFBCMR's decision in case No. BC-2003-04051, while helpful, is not sufficient to address the problems discussed in the memorandum. To ensure equal application of each BCMR's valid authority to issue relief to transgender applicants in the form of a revised DD 214, additional written DOD guidance is necessary from the appropriate Assistant Secretary for each service branch responsible for supervision of each BCMR.<sup>53</sup> This proposed guidance should utilize the AFBCMR's decision in BC-2003-04051 as instructive precedent to illustrate the authority to grant this type of relief to transgender applicants. Furthermore, this guidance should also set forth the threshold of documentation required to be submitted by an applicant in requesting a revised DD 214. Particularly, we recommend that this guidance should utilize the standard required by DOS and USCIS, which require a demonstration of "appropriate clinical treatment." We believe that this standard of documentation serves the correct balance to protect the interest of the BCMRs and the military branches they represent in ensuring the accuracy of military records, while not requiring applicants to produce an unfairly onerous amount of supporting documentation. Finally, we believe that a uniform solution should be implemented throughout DoD (either at the DoD level or through uniform guidelines adopted by the BCMRs) as we see no justification to distinguish between services with regard to the treatment of former servicemembers on this issue.

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<sup>51</sup> The professionals authorized to certify gender change vary from state to state, and some restrict certification only to licensed physicians and psychologists.

<sup>52</sup> See, e.g., Alaska Division of Motor Vehicles Form 427, California Department of Motor Vehicles Driver's License Form 329, Maine Bureau of Motor Vehicles Gender Designation Form., and Nebraska Department of Motor Vehicles Certification of Sex Reassignment Form.

<sup>53</sup> By way of example, the Assistant Secretary for the Navy for Manpower and Reserve Affairs ASN supervises the BCNR.