

THE NATIONAL CATHOLIC BIOETHICS CENTER



TRANSGENDERISM: LEGAL ISSUES AND MANDATES

PREPARED BY THE ETHICISTS OF THE NCBC
FEBRUARY 2017

“Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence.’ . . . In the case of an intrinsically unjust law . . . it is therefore never licit to obey it.”
—Pope St. John Paul II, *Evangelium vitae*, nn. 72–73

SUMMARY

Regulatory Mandates in 2016

- *DOJ/DOE OCR Dear Colleague letter* to schools interprets Title IX prohibition against sex discrimination to include discrimination based on “gender identity.” Schools receiving government funding must accommodate a child’s “internal sense of gender” without any medical documentation.
- *HHS Rule* on section 1557 of the ACA, which incorporates the Title IX prohibition on sex discrimination, interprets “sex” to include “gender identity.” Insurance cannot exclude transition interventions categorically; recipients of government funding cannot deny these interventions, services specific to the preferred sex, or access to preferred sex facilities. Title IX religious exemption is omitted.
- *DOL OFCCP Rule*, applying EEOC decision on Title VII (2012), prohibits federal contractors from discriminating on the basis of “gender identity” or “transgender status.”
- *HUD Rule* requires making accommodations to allow housing and shelter, including shared sleeping and bathing areas, in accordance with one’s “gender identity.”
- *TRICARE Policy* mandates the provision of gender transitioning medications and counseling for the military but excludes surgical procedures.
- *CMS Proposed Decision Memo* against universal coverage for gender reassignment surgery concludes that there is insufficient and conflicting data about outcomes.

Recent Court Cases

- *Macy v. Holder* (2012)—EEOC decision that discrimination based on gender identity or expression is a violation of Title VII of the Civil Rights Act of 1964.
- *Texas v. United States* (2016)—US District Court nationwide injunction against Dear Colleague letter, based on likely success of the claim that the interpretation of “sex” conflicts with law.
- *Franciscan Alliance v. Burwell* (2016)—US District Court nationwide preliminary injunction against HHS rule on section 1557 of ACA; ACLU request for express ruling and stay of injunction submitted January 9, 2017.
- *G. G. v. Gloucester County School Board* (2016) —US Supreme Court temporary stay of US Court of Appeals Fourth Circuit mandate for Virginia public school to allow preferred sex bathroom access, pending further review.

For further information, visit the NCBC website at www.ncbcenter.org.
To request a consultation, e-mail consults@ncbcenter.org or call 215-877-2660.

FAQs

Question 1. I don't understand what's wrong with ensuring protections against unjust discrimination for transgender persons. Everyone must be treated with equal dignity and respect, and it is good to have this reflected in law. What is the moral issue?

Reply: All persons have equal dignity and deserve full respect, and any violence or unjust discrimination on the basis of a person's gender misperception or diagnosable dysphoria is immoral. Proper respect, however, does not require acceptance of the notion that one can be in the wrong body. In fact, blurring the binary male–female distinction entails a falsification that is harmful to people experiencing gender confusion as well as to the whole society. Legal interpretations of “sex” as inclusive of “gender identity” undermine both science and human anthropology and will end up, by way of purported “nondiscrimination” mandates and penalties, forcing acceptance of a damaging narrative about human identity. For the Catholic Church, it could also result in shutting down ministries in health care, education, and social services as it becomes difficult to maintain clarity of witness.

Question 2. The government appears set on promoting gender ideology through its recent regulations. In order to continue Catholic ministries such as health care and education, is the most prudent course of action to find a way to accommodate these regulations as quickly as possible?

Reply: No. While the exact course of action may not be the same for all Catholic organizations and will be based on prudential considerations unique to each situation, it can be said universally that accommodation without effort to resist or overturn an unjust law would not be legitimate. The foundations of personal identity, the family, and our society are at stake, including the ability of the Catholic Church and her ministries to function freely in full witness to the Gospel. Due diligence must be exercised to find ways of securing relief against immoral mandates and ultimately ensuring just laws in service to the common good. On the practical side, there are grounds for expecting success if appropriate legal efforts are exerted. The change in government leadership resulting from the recent elections in the United States also opens up new possibilities.

Question 3. How can a Catholic organization hope to secure protection for its religious identity in the current regulatory climate? Resources are not unlimited and legal battles are expensive.

Reply: An organization called the Catholic Benefits Association is currently involved in litigation against the latest regulatory requirements imposing gender ideology. It has hundreds of Catholic member organizations and is able to include all its members in any protections it secures. While the NCBC does not give legal advice, joining such an organization could be an option to consider.

RESOURCES

Ryan T. Anderson, “Government Shouldn't Impose Transgender Ideology on Nation,” Heritage Foundation, June 7, 2016, <http://www.heritage.org/>.

Catholic Benefits Association, “Catholic Benefits Association Challenges New Rules for Transgender Surgery and Abortion,” press release, December 28, 2016, <http://www.catholicbenefitsassociation.org/>.