



Foundations of Sand: Health Policy and the LGBTQ Communities in the Trump Era

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Federal Law on Healthcare Equality



Rumble v. Fairview et al., 14-cv-2037
(D. Minn.)



Tovar v. Essentia Health et al.
(D. Minn. & 8th Cir.)



Franciscan Alliance v. Burwell, 7:16-cv-00108
(N.D. Tex.)

Section 1557 of the Affordable Care Act

[A]n individual shall not, on the ground prohibited under

- title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*)
[race, color, national origin],
- title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)
[sex],
- the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*)
[age], or
- [the Rehabilitation Act] section 794 of title 29
[disability],

be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity,

any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

Title IX – Obama Administration

- May 13, 2016, Dear Colleague Letter
 - “This prohibition encompasses discrimination based on a student’s gender identity including discrimination based on a student’s transgender status.”
 - “This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about . . . legal obligations.”



U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights



Title IX – Trump Administration

- February 22, 2017, Dear Colleague Letter
 - Says that the Obama Administration DCL “has given rise to significant litigation regarding school restrooms and locker rooms.”
 - DOE and DOJ “withdraw and rescind” the guidance “to further and more completely consider the legal issues involved.”



U.S. Department of Justice
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Title IX - Fourth Circuit

- Gloucester Cnty. Sch. Bd. v. GG
 - Fourth Circuit ruled that it would follow the Obama Administration guidance
 - School Board appealed to the Supreme Court
 - Trump Administration rescinded guidance
 - In March of 2017, Supreme Court sent back to the Fourth Circuit to decide if the rescinded guidance changed the outcome
 - Still pending



Title IX - Northern District of Texas

- Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016)
 - AKA “Texas I”
 - “the plain meaning of the term sex . . . meant the biological and anatomical differences between male and female students as determined at their birth.”
 - Stops DOJ and DOE from enforcing any Title IX action based on an interpretation of sex that includes gender identity.



Section 1557 – D. Minn.

- Rumble v. Fairview et al.
- “Section 1557 protects patients, like Rumble, who allege discrimination based on ‘gender identity.’”
- D. Minn. May 6, 2015



Section 1557 Regulations – Obama Admin

- Discrimination “[o]n the basis of sex,” includes “discrimination on the basis of . . . gender identity.” 45 C.F.R. § 92.4.
- May 2016



Section 1557 Regulations – Obama Admin

- Insurance plans may not “[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition.” 45 CFR § 92.207 (b) (2)
- Problems with binary gender billing codes
- Providing services to transgender patients
- What about sexual orientation?



Section 1557 – Eighth Circuit & D. Minn.



- Tovar & Olson v. Essentia Health, et al
- Essentia: “the plain language of Section 1557 does not include discrimination on the basis of ‘gender identity.’”
- Tovar: “Section 1557 prohibits discriminatory exclusions of health care for transgender patients.”
- TBD: Hearing was March 23, 2018

Section 1557 - N.D. Tex.

- Franciscan Alliance v. Burwell
- “Section 1557 clearly incorporates Title IX’s prohibition of sex discrimination”
- The same court “previously concluded [that] the meaning of sex in Title IX unambiguously refers to the ‘biological and anatomical differences between male and female students as determined at their birth.’”
- Nationwide injunction against DHHS and DOJ stopping them from enforcing Section 1557 regulations



Section 1557 - Trump Administration

- Appointed Roger Severino as head of DHHS' Office for Civil Rights (OCR)
- Severino: "gender identity and sexual orientation ... are changeable, self-reported, and entirely self-defined characteristics" that don't deserve protected-class status.
- Trump Administration asked ND Texas to stay the Franciscan Alliance case "pending further rulemaking proceedings."



State law and religious refusals

- How are hospitals, clinics, etc. addressed in the Minnesota Human Rights Act?
- Public accommodations:
 - “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.”
 - Minn. Stat. 363A.03, subd.34



Places of public accommodation may not discriminate:

- “It is an unfair discriminatory practice:
- (1) to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, **sexual orientation**, or sex, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability
 - Minn. Stat. 363A.11, subd.1(a) (emphasis added)



“Sexual orientation” includes “gender identity/expression”:

- “‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or **having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.**”
 - Minn. Stat. 363A.03, subd.44



There are exceptions to the “public accommodations” section:

- “The provisions of section [363A.11](#) relating to sex, shall not apply to such facilities as restrooms, locker rooms, and other similar places. The provisions of section [363A.11](#) do not apply to **employees or volunteers** of a nonpublic service organization whose primary function is providing occasional services to minors [...] with respect to qualifications based on sexual orientation.”
 - Minn. Stat. 363A.24, subd.1 (emphasis added)



The MHRA exempts religious institutions, to some degree:

- “Nothing in this chapter prohibits any religious association, ... corporation, or ... society that is not organized for private profit, ... from:
- (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. **This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized ...**
 - Minn. Stat. 363A.26 (emphasis added)



How might this apply to a hospital/clinic?

- “It is evident from the legislative history that, when a nonprofit religious association is engaged in ordinary commerce, such as operating a hospital or printing press, the exemption will not cover these secular activities.”
 - *Thorson v Billy Graham Evangelistic Association*, 687 N.W.2d 652 (Minn. App. 2004)



How might this apply to a hospital/clinic?

- A woman visits a clinic for mammography services. During her intake, she mentions that her next of kin is her wife. The individual performing the mammogram has sincere religious beliefs under which they believe homosexuality is a sin. May the individual refuse the woman the mammogram?



How might this apply to a hospital/clinic?

- Hospital, run by a religious order, provides inpatient mental-health treatment. In general, patients share rooms (two people per room). Hospital's policy is that the people sharing a room must be of the same sex. Hospital admits a transgender woman for its standard treatment.
- May Hospital segregate patients based on sex?



How might this apply to a hospital/clinic?

- May Hospital prohibit the transgender woman from sharing a room with a cisgender woman?
- “Nothing in this chapter requires an entity to permit an individual to participate in and benefit from the goods, services, facilities, privileges, advantages, and accommodations of the entity if the individual poses a direct threat to the health or safety of others. ‘Direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”
 - Minn. Stat. 363A.11, subd.4



How might this apply to a hospital/clinic?

- May Hospital allow the transgender woman to share a room with a cisgender woman, contingent on the transgender woman agreeing to submit to an examination to prove she has had gender-confirmation surgery?
 - *Goins v. West Group* (635 N.W.2d 717 (Minn. 2001)) (employer could legally assign restrooms based on an employee's physical anatomy)
 - Can Hospital require such an examination only of transgender patients, but not cisgender patients?



Possible Minnesota legislation

- Amending 363A.11 (public accommodations):
 - “(c) In addition to the unfair discriminatory practices provided in this section, it is an unfair discriminatory practice to deny any person seeking to access the assistance of a provider or health care provider as defined by section 62J.03, subdivision 8, full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations because of a person's sex or sexual orientation.”
 - Rep. Erin Maye Quayde



Possible Minnesota legislation

- Amending 363A.26 (religious exemption):
 - “(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities, including medical services by a provider or health care provider defined by 62J.03, engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized ...”
 - Rep. Erin Maye Quayde



What about residential facilities?

- Consider *Wetzel v. Glen St. Andrew Living Community*
- Marsha's story:
<https://www.youtube.com/watch?v=d8qd7-pq0E8&feature=youtu.be>
- Case pending at the 7th Circuit on claims based on the federal Fair Housing Act, which bars discrimination based on sex (the 7th Circuit has interpreted "sex" to effectively include "sexual orientation")
- Can we do better than this?

