

Judge Blocks Gender Transition, Abortion Provisions of ACA Nondiscrimination Rule

By [David Slaughter](#), JD, Senior Legal Editor

Provisions of an Affordable Care Act (ACA) nondiscrimination rule that relate to gender transition and abortion were blocked by a federal district court on December 31, the day before they were scheduled to take effect.



The 8 states and three religious medical organizations that challenged these requirements had shown they were likely to succeed on the merits and, absent an injunction, would be compelled to violate their own state laws or religious beliefs or face federal enforcement consequences, according to the U.S. District Court in Wichita Falls, Texas (*Franciscan Alliance v. Burwell*, No. 7:16-cv-00108-O (N.D. Tex. Dec. 31, 2016)).

Background

The U.S. Department of Health and Human Services (HHS) finalized the ACA Section 1557 rule in May 2016. It applies generally to any “health program or activity,” such as a health plan or provider, that receives HHS funding. In the employee benefits context, this includes group health plans of HHS-funded healthcare providers, plans that receive Medicare retiree drug subsidies and insurers that participate in the ACA Marketplace (all of their activities, including self-funded plan administration).

ACA Section 1557 itself prohibits such entities from discriminating on the basis of race, color, national origin, sex, age, or disability. In the final rule, HHS defined sex discrimination to include “discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.” For example, the rule prohibits blanket exclusions of gender transition-related services.



Plaintiffs' Challenge

The 8 states and three private healthcare providers challenged the rule's inclusion of "gender identity," as well as "termination of pregnancy," in the definition of sex discrimination. Their major argument was that while Section 1557 simply adopted the sex discrimination prohibitions in Title IX of the Education Amendments Act of 1972, the rule exceeded the statute's scope because Title IX defines "sex" biologically and includes religious and abortion-related exemptions.

By defining sex discrimination to include failing to provide or cover abortion- or transition-related services, the plaintiffs argued, the rule "pressures doctors to deliver healthcare in a manner that violates their religious freedom and thwarts their independent medical judgment and will require burdensome changes to their health insurance plans on January 1, 2017," according to the court's opinion. HHS responded that the rule does not require any particular procedure to be performed or covered.

The plaintiffs sued HHS, arguing that the rule was contrary to law and "arbitrary and capricious," in violation of the Administrative Procedure Act. They also alleged that it contravened the Religious Freedom Restoration Act, the First Amendment, and the U.S. Constitution's "spending clause." (The court did not reach the constitutional claims because of the expedited briefing schedule.)

Jurisdictional Issues

In response, HHS first argued that the court lacked jurisdiction because the plaintiffs lacked legal "standing" to sue, their claims were not ripe for review, and they had not exhausted their administrative appeals. The plaintiffs lack standing because their injuries are "conjectural and hypothetical," HHS stated, but the court disagreed.

"Plaintiffs' fear of being subjected to penalties under the challenged Rule is reasonable given they are all covered entities whose insurance plans include a categorical exclusion of transition-related procedures that is forbidden by the Rule," Judge Reed O'Connor wrote in the court's opinion. "Further, the likelihood that Plaintiffs will suffer further harm from the Rule is strengthened by the current HHS investigation into some of the Plaintiffs' potential noncompliance."

The lawsuit is ripe for review because "what little value a more developed factual record would provide is strongly outweighed by the significant hardship Plaintiffs face in the absence of immediate judicial review," the court added. "Plaintiffs should not be forced to choose between forgoing conduct they believe is protected or risking substantial sanctions and liability."

HHS also argued that "Section 1557's 'comprehensive scheme of administrative and judicial review' indicates Congress intended to preclude initial judicial review." But the court found no explicit or implicit bar to judicial review in Section 1557, so it decided the APA's basic presumption of reviewability applied.



Defining Sex Discrimination

Turning to the case's merits, the court found that HHS' interpretation of Section 1557 was not entitled to deference because the underlying statute is unambiguous. "Section 1557 clearly incorporates Title IX's prohibition of sex discrimination," which courts have found to refer strictly to biological, anatomical attributes determined at birth, O'Connor wrote. "In promulgating the Rule, HHS revised the core of Title IX sex discrimination under the guise of simply incorporating it."

Moreover, if Congress had wanted to delegate such a significant policy decision to HHS, "it surely would have done so expressly," the court added. It therefore proceeded to weigh the plaintiffs' likelihood of success on the merits without deferring to the agency's reading of Section 1557.

"The text of Title IX indicates Congress's binary definition of 'sex,'" O'Connor wrote. "If Congress had intended to enact a new, different, or expansive definition of prohibited sex discrimination in Section 1557, it knew how to do so and would not have chosen to explicitly incorporate its meaning from Title IX."

"That Congress did not understand 'sex' to include 'gender identity' when it passed the ACA is evidenced by the employment of the phrase 'gender identity' by the same Congress to include protections against crimes motivated by gender identity," and the use of "sex" and "gender identity" as separate terms in subsequent laws, O'Connor continued. "Accordingly, HHS's expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557."

Religious Exemptions

The plaintiffs also argued that HHS' failure to incorporate Title IX's religious exemptions was arbitrary, capricious, and contrary to law under the APA. "Title IX does not apply to covered entities controlled by a religious organization if its application would be inconsistent with the religious tenets of such organization," and by its terms cannot require providing or paying for an abortion, the court noted. However, HHS did not include these exemptions even though it did adopt the exemptions from the other three federal nondiscrimination laws.

HHS argued that this didn't matter because other religious and abortion exemptions were available. Looking at the text of Section 1557, however, the court found that Congress meant to bring over Title IX in its entirety, including the exemptions. "Therefore, a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX," O'Connor wrote. "Failure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX. That is not permitted."

Religious Freedom Restoration Act

The court also ruled that the private plaintiffs were likely to succeed on their claims under the Religious Freedom Restoration Act (RFRA), which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest.



“The Rule’s prohibition of categorical exclusions of transitions and abortions forces Plaintiffs to make an individualized assessment of every request for performance of such procedures or coverage of the same,” O’Connor wrote. “The Rule therefore places substantial pressure on Plaintiffs to perform and cover transition and abortion procedures” despite their religious objections.

The court also questioned the government’s compelling interest in covering transition surgeries, given that its own health plans—Medicare, Medicaid, and TRICARE—do not do so. “Therefore, it appears the government has failed to adequately carry its burden and show the Rule advances a compelling interest.”

Other Injunction Factors

Finally, the court found that the other factors favoring an injunction weighed in the plaintiffs’ favor, such as the threat of irreparable harm. HHS argued that the plaintiffs’ asserted injuries were merely speculative because they had misunderstood the rule’s scope, but the states countered that they were already under HHS investigation, and the private plaintiffs cited ongoing HHS lawsuits against similar entities. And all plaintiffs said they would be compelled to alter their coverage on January 1.

“On the other hand, HHS will suffer no harm from delaying implementation of the challenged portion of the Rule,” the court concluded. “The injunction would merely maintain the status quo—allowing HHS to prohibit sex discrimination in healthcare services as defined by Title IX and incorporated by Section 1557.”

The court therefore issued a nationwide injunction against HHS enforcement of the rule’s prohibitions on discrimination based on “gender identity” or “termination of pregnancy.” However, because the rule includes a severability provision, the rest of its requirements remain in effect.

HHS Response

HHS is “disappointed by the court’s decision to preliminarily enjoin certain important protections against unlawful sex discrimination in our health care system,” said Rachel Seeger, a spokesperson for HHS’ Office for Civil Rights (OCR), in a statement provided to BLR®. “Section 1557 of the Affordable Care Act is critical to ensuring that individuals, including some of our most vulnerable populations, do not suffer discrimination in the health care and health coverage they receive.”

However, OCR will continue enforcing the remainder of the rule “to the full extent consistent with the court’s order,” Seeger added. This includes “its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions.”



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