

# **‘Gender Identity’: A Complex Battleground for Religious Freedom**

by Joan Frawley Desmond

WASHINGTON — Eleven states have filed a legal challenge to the Obama administration’s directive that called on public-school districts to permit students to use bathrooms based on their gender identity, not their biological sex. According to papers filed on May 25 in a Texas federal district court, the 11 states argue that the administration has "conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights." The lawsuit marked a new front in the culture wars that will likely pose fresh challenges to the religious freedom of public-school students, faculty and parents, as well as Catholic universities and individual believers in the workplace. "Gender ideology is the next tsunami that threatens to sweep away centuries of accepted human wisdom about the complementarity and real differences between men and women," said Archbishop Paul Coakley of Oklahoma City, in a column for the archdiocesan website that was provided to the Register before the 11 states filed suit against the federal government.

"These differences are not merely about self-expression and personal choice. Science, philosophy, theology and the accumulated wisdom of every culture have recognized that these differences are rooted in something real and objective. "They are rooted in biology, and, more fundamentally, they are rooted in the design of the Creator," said Archbishop Coakley. Legal analysts and religious-freedom advocates are still reviewing the broad implications of the May 13 letter issued by the federal Department of Education and the Department of Justice that interpreted Title IX language prohibiting discrimination based on sex to include people who do not identify with the sex noted on their birth certificates. According to this new federal guidance, a student’s gender identity will be considered the student’s sex, and U.S. states and school districts that resist this "guidance" could risk the withdrawal of federal funds for education. The government defines "gender identity" as "an individual’s internal sense of gender," which "may be different from ...the person’s sex assigned at birth."

The directive applies for bathrooms and locker rooms, sports teams, school records and the use of pronouns when addressing an individual who no longer identifies with his or her biological sex. "As is consistently recognized in civil-rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students," read the "Dear Colleague Letter on Transgender Students" issued by the Departments of Justice and Education.

## **‘Uncharted Territory’**

Douglas Laycock, a leading authority on religious-freedom issues at the University of Virginia School of Law, acknowledged that state and federal courts were moving into "uncharted territory." It was not clear, said Laycock, whether resistance to new accommodations for people who refer to themselves as transgender would be treated as a religious matter, and so allow for exemptions in public-school settings, among other locations. But he speculated that religious objections to specific accommodations might win support from the courts. "I do think there is a plausible religious-liberty issue about locker rooms. Religious teachings on sexual modesty may prohibit exposure to a person who is biologically a member of the opposite sex," suggested Laycock.

At present, the Alliance Defending Freedom, a religious-liberty advocacy group, has filed a lawsuit on behalf of a group of Chicago-area public school students and parents that called on the local school district to halt the new accommodations. The ADF lawsuit argued that the federal directive was unconstitutional and posed a threat to student privacy and safety, but the legal challenge did not highlight religious-freedom concerns. Meanwhile, the requirement that people in the school community or workplace adopt pronouns that reflect an individual’s gender identity will likely spark additional debate and litigation. "What pronouns to use should be a matter of free speech," said Laycock. "But free speech cannot be used to harass individuals; there is no right to throw objectionable pronouns in the face of a transgender student." He predicted that "the transgender movement, and the school systems regulating pronouns, will take a very expansive view of what counts as harassment."

## **Implications for Catholic Schools**

When the administration issued its letter providing guidance on gender-identity accommodations, Loretta Lynch, the U.S. attorney general, equated resistance to such practices with the segregationist policies of the Jim Crow South. Kyle Duncan, a lawyer who represents North Carolina's speaker of the house, Rep. Tim Moore, and Philip Berger, president pro tempore of the state senate, in one of several legal challenges to the federal guidance, told the Register that Lynch's strong language should raise a red flag with Catholics. "If I were an administrator of a Catholic school, I would not feel confident that I could maintain" an exemption from this accommodation, "not when the U.S. attorney general equates my school's position with the continuation of Jim Crow laws," said Duncan, who has litigated numerous religious-freedom cases.

After the Department of Education adopted a new interpretation of Title IX in 2014 that prohibited discrimination based on gender identity at institutions of higher education, a growing number of Catholic and Christian colleges and universities have obtained waivers that allow them to adhere to their own policies. However, the American Civil Liberties Union and other advocates have pressured religious institutions to change course, and a slew of "LGBT" (lesbian, gay, bisexual and transgender) organizations have called on the National Collegiate Athletic Association (NCAA) to sever its ties with faith-based schools that have sought exemptions from Title IX.

In this harsh political environment, conscience protections are often framed as a license to discriminate. Thus, when Catholic educators act to defend the religious mission of their institutions, they risk provoking retaliatory actions from activist groups that can damage a school's reputation. "We have not filed for an exemption" to Title IX, said John Garvey, the president of The Catholic University of America. He noted the existence of a "shaming campaign," organized by groups like the Human Rights Campaign, to target institutions that seek the religious exemption included by Congress in Title IX. "A natural consequence [of the new Title IX guidance] is that organizations like us may find themselves seeking an exemption now," Garvey told the Register. Given the swiftly changing political and legal landscape, Laycock was cautious about assessing the future ability of Catholic and Christian universities and colleges to secure religious exemptions. "The resistance to allowing any such right is fierce," agreed Laycock.

### **Federal Overreach?**

For now, states that challenge the Title IX directive in court have targeted the administration's failure to follow the formal rulemaking process. "They are trying to insert a definition of sex in federal anti-discrimination law with no mandate from Congress and without going through the normal regulatory process," argued Kyle Duncan, who has filled multiple lawsuits on behalf of Speaker Moore and Sen. Berger. "They are doing it by letter and then going to court to force that on sovereign states."

The North Carolina Republicans' legal argument has received a boost from some legal specialists. In a May 18 op-ed in The New York Times, Yale law professor Peter Schuck underscored the need for protections for people who identify as a member of the opposite sex, but criticized the administration's decision to circumvent the rulemaking process. Further, he challenged the adoption of an absolutist legal argument that ignored the rights of others. "A legal right trumps any other non-right claim, and those who disobey may suffer serious sanctions," read Schuck's critique of the federal guidance. "This absolutist rigor is precisely why we accord the status of 'right' only to those claims that are essential to individuals' well-being.

Do identity-based bathrooms meet this demanding test?" asked Schuck. Maya Dillard Smith, the interim director of the ACLU's chapter in Georgia, raised similar concerns when she resigned from her post in late May, linking her decision to the organization's strong support for the new bathroom accommodations. In a statement that marked her departure from the ACLU, Smith said her own daughters were "frightened" when they visited a women's bathroom and encountered "three transgender young adults, over six feet [tall] with deep voices." She argued that civil-rights advocates should look for solutions that respect the rights of all groups.

### **CUA's Garvey Stands Firm**

If the federal government prevails in these lawsuits, Catholic universities like CUA will face mounting pressure to adopt the accommodations or obtain an exemption — and bear the brunt of partisan attacks in the public square. But John Garvey signaled that he would not yield to the latest skirmish in the culture wars. Not only is he committed to defending the religious freedom of a storied Catholic institution of higher education, he is even more concerned about protecting "the legitimate privacy concerns of our students. If a biological male who is transitioning to female applies to our freshman class, we must assign that person housing with women, and a single-room option may not

be a solution" that fully adheres to the new guidelines, he noted. "So a young woman who comes to Catholic University and finds she is rooming with a biological male is asked to dress and bathe and brush her teeth with someone who is biologically male," he explained, outlining a possible scenario if CUA adopted the new guidelines. Garvey contended that university personnel must be free to engage and work with students dealing with gender-identity issues, just as faculty and staff offer a range of services to other members of the student body.

The decision to adopt a different gender identity, he noted, is "loaded with moral implications. We know our students better than anyone else. I don't think it is the government's place to legislate our students' passage through moral maturity. If we have students struggling with gender-identity issues, we would naturally want to talk with them," while encouraging discussions with "the parents, campus ministry and others," he said, noting that individuals often reverse course after exploring the "transitioning" option. Strongly opposing any attempt to prevent his institution from forming students in the faith, Garvey takes inspiration from Pope Francis' encyclical *Laudato Si*. "Pope Francis says that we need to 'accept our bodies as God's gift' and show them the respect we show the rest of creation. This is 'an essential element of any genuine human ecology.'"

Copyright © 2016 [National Catholic Register](#)

Joan Frawley Desmond is the Register's senior editor

Posted on StayCatholic.com