
The Impact of HB 1319 on Privacy

An Analysis in Light of New Hampshire Law

Employer Provision

HB 1319 makes it unlawful “for an employer, because of the age, sex, gender identity, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or **in terms, conditions or privileges of employment.**”

While the definition of “employer” excludes a “religious association or corporation”—presumably encompassing churches and religious schools—most other employers are included, such as public schools, daycare centers, fitness centers, and homeless shelters. Under HB 1319, all such employers would be prohibited from denying the “terms, conditions or privileges of employment” based on gender identity.

If an employer had male and female locker rooms, restrooms, or changing areas, access to those facilities would be a “privilege of employment.” As a result, employers would be required to provide access to these facilities consistent with an employee’s gender identity. At public schools, a male teacher who asserts a female identity must be allowed to access the locker rooms and restrooms designated for females. If teachers chaperone overnight trips (such as for field trips or sporting competitions), the male teacher must be allowed to chaperone in a female’s room, because failure to do so would be denying him employment on the same terms

as other female teachers based upon his asserted gender identity.

The impact would be felt at every place of employment. In fitness centers, employees would have the right to access the changing room with which they identified, regardless of the privacy violation it would impose on patrons and other employees. A battered women’s shelter would be required to allow a male employee who claims a female identity to access the sleeping quarters and other areas designated for the women they serve.

Housing Provision

First, it should be noted that the exemptions for housing are narrower than for employment. Under N.H. Rev. Stat. Ann. § 354-A:13, a religious organization is only exempt when it gives preference “to persons of the same religion” as it relates to the sale, rental, or occupancy of dwellings which it owns. In other words, a Jewish college would be allowed to limit occupancy of its dormitories to students of the Jewish faith, but could not otherwise discriminate based on other protected classifications, including sexual orientation and gender identity. So if a Jewish male student asserts a female identity, he must be allowed to stay in the female dormitories; denial of his request to do so would be discrimination based on gender identity.

The same concerns extend to secular institutions. Adding gender identity to the law would mean that at every college in the state, males who claim to be female must have full

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access to female dorms, and females who assert a male identity must be given access to male dorms.

When Title IX, the federal law that bans sex discrimination at all colleges and schools in the country, was being debated, concerns over privacy led Congress to create an exemption in Title IX to allow colleges to maintain separate dormitories for males and females. *See* 20 U.S.C. § 1686 (“[N]othing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes”); 34 C.F.R. § 106.33 (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex”).

Adding gender identity to New Hampshire law completely negates the protections for privacy afforded to girls and boys of all ages at New Hampshire colleges and schools. A college freshman is no longer assured that her roommate will be the same biological sex. Communal showers and changing areas in dorms will no longer be limited to those sharing the same physiological features.

Public Accommodations Provision

The addition of gender identity to the public accommodations law is the most troubling, because it truly impacts nearly every place in the state that is open to the public. The definition of public accommodation is extremely broad, encompassing any place that “offers its services or facilities or goods to the general public.” N.H. Rev. Stat. Ann. §

354-A:2. All public schools and colleges, child care facilities, community sports leagues, and female only fitness centers would be subject to the law. As a result, a male who claims to be female:

- must be given access to female showers, locker rooms and restrooms at a public school,
- must be allowed to play on girls sports teams, and even compete for scholarships set aside for female athletes, and
- must be allowed to join a women’s only fitness center or access other programs designated for females.

Any public school or other place open to the public that wants to continue to maintain communal locker rooms, showers, and restrooms based on biological sex will be sued if this law passes. Rather than have the ability to find compassionate solutions that meet the needs of everyone (such as offering a single-occupancy restroom for anyone uncomfortable using the facilities designated for their sex), they are subjected to the heavy hand of government mandating that true bodily privacy can no longer be expected in such facilities.

It is worthwhile to note that some feminist groups are complaining that the transgender movement is undermining many of the hard fought advances they have made. For example, ensuring that women have equal number of sports teams at New Hampshire schools is of diminished value when men are able to compete for and take coveted spots on the women’s teams.

Finally, the exemption that allows religious organizations to “limit admission to or giv[e] preference to persons of the same religion or denomination” and to “mak[e] such selection as is calculated by such organization to promote the religious principles for which it is established or maintained” is vague, meaning that churches, religious schools, and other religious institutions should be concerned that this law will be enforced against them. For example, the exemption would seemingly allow a church to deny membership

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to a man who asserts a female identity, based on the biblical belief that God created the two sexes. But would the church, as a place of public accommodation, be allowed to maintain separate restrooms based on sex and to deny

a male from accessing female facilities when visiting the church for a wedding ceremony? The law seemingly allows the Commission for Human Rights to determine whether the policies of a religious organization actually “promote the religious principles” of the organization, or whether they are discrimination in violation of state law.

Unfortunately, these concerns are not hyperbole. In both Massachusetts and Iowa, the state civil rights commissions interpreted their laws banning gender identity discrimination to require churches to allow men to use female facilities within the church. Notably, Iowa had a religious exemption similar to New Hampshire’s, exempting “[a]ny bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose.”