



To: Catholic school, college, and diocesan leaders
From: Patrick J. Reilly, President
Re: New threats to religious freedom under Biden administration

The Cardinal Newman Society hosted a webinar on February 17, 2021, for diocesan and Catholic education leaders, in which Eric Kniffen, legal counsel to the Newman Society and a former attorney for the Becket Fund and the U.S. Department of Justice, assessed early and proposed actions of the Biden administration that could affect Catholic schools. On February 15, 2021, the Newman Society hosted a similar webinar for Catholic college leaders, featuring Gregory Baylor, senior counsel and director of the Center for Religious Schools at Alliance Defending Freedom.

The following summarizes the Newman Society’s understanding of what we learned from those webinars and other sources. Educators should consult their attorneys for professional legal advice.

Executive Order 13988 on Sexual Orientation, Gender Identity

On his first day in office, Jan. 20, 2021, President Biden issued an “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” The order applies the “reasoning” of the Supreme Court’s *Bostock* ruling—finding that Title VII of the Civil Rights Act of 1964 includes “transgender” and homosexual within the scope of sex discrimination—to Title IX of the Education Amendments of 1972, the Fair Housing Act, and other laws concerned with sex discrimination. The Order specifically raises concerns about children being “denied access to the restroom, the locker room, or school sports” because of gender identity.

While the Order signals the Biden administration’s intention to press gender ideology under Title IX and other laws, it does not change the laws. Courts still need to work out whether the *Bostock* ruling’s reasoning regarding employment discrimination applies to education and other areas. The Order does not diminish existing religious exemptions in Title IX and Title VII.

Fair Housing Act

On Feb. 11, 2021, the Department of Housing and Urban Development issued a directive interpreting the Fair Housing Act to include “sexual orientation” and “gender identity” within the scope of sex discrimination. This may allow the Act to be construed to require allowing biological males access to women’s campus residences.

Equality Act

President Biden strongly supports the Equality Act, which was introduced in the House on Feb. 18, 2021 (H.R.5, 223 cosponsors). The House approved a version in the last session. The bill would:

- amend several civil rights laws including Title IX, Title VII, the Fair Housing Act, and others to include protection for “sexual orientation” and “gender identity;”

- expand the federal definition of “public accommodations” under Title II of the Civil Rights Act to include schools and colleges;
- effectively bypass the strong religious exemption in Title IX by allowing students and employees to file lawsuits against Catholic schools and colleges under Title VI, which regulates all recipients of federal funding and has no religious exemption; and
- prevent any appeal to the Religious Freedom Restoration Act (RFRA) with regard to discrimination suits based on “sexual orientation” or “gender identity.”

The Equality Act is likely to pass the House. Senate majority support is also likely. The fate of the bill may depend on whether the Senate retains the filibuster, effectively requiring 60 votes.

Do No Harm Act

Sen. Kamala Harris introduced the Do No Harm Act in the last session of the Senate (S.593, 33 cosponsors), and it was also introduced in the House (H.R.1450, 215 cosponsors). If reintroduced this session, the bill would prohibit application of the Religious Freedom Restoration Act to any provision of the Civil Rights Act or sex discrimination under the Fair Housing Act, as well as employment decisions and benefits, health plans and services, and government funds and services.

Affordable Care Act

The Biden administration may interpret the Affordable Care Act to require doctors to perform “gender reassignment” procedures and force insurers to cover such procedures. However, on Jan. 19, 2021, a federal district court in North Dakota issued an injunction preventing such a mandate for the University of Mary and others, including members of the Catholic Benefits Association.

National Labor Relations Board

Last year, the National Labor Relations Board finally agreed to abide by the Supreme Court’s 1979 ruling that prohibits the NLRB from interfering with Catholic education. In January 2020, the D.C. Circuit Appeals Court blocked NLRB oversight of Duquesne University. Nevertheless, Biden appointees are reversing NLRB policies and may reassert authority over collective bargaining.

Recommendations:

- **Strengthen Catholic identity:** Firmly ground policies in Catholic teaching and explain in writing why they are necessary according to Catholic teaching. Clearly state expectations for employees and what will happen if violated. This allows a strong appeal to religious freedom.
- **Nondiscrimination policies:** Avoid listing “sexual orientation,” “gender identity,” or religion in protected categories. Declare your legal right to base decisions on religion.
- **Employee benefits:** No benefits for “gender reassignment” or same-sex unions.
- **Lobby Congress:** Urge Congress to protect religious education, preserve the filibuster, and oppose the dangerous Equality Act and Do No Harm Act.

Catholic Identity Standards Project: The Newman Society is working on policy standards to help Catholic schools and colleges stay firmly grounded in Catholic identity while establishing the best protection against legal threats. This work depends on the assistance of a large number of expert reviewers. If you would like to assist, please contact the Newman Society.