



2016 Executive Actions Pertaining to Gender Identity and Sexual Orientation

Memorandum of Opposition

During the past several months, Gov. Andrew Cuomo has taken several controversial executive actions. Two of those actions relate to issues of great concern to New Yorkers for Constitutional Freedoms; in each instance, Gov. Cuomo has bypassed the Legislature to implement certain provisions of bills that have repeatedly failed to pass the New York State Legislature. NYCF supports the legislative reversal of the Governor's executive actions. NYCF also supports broad-based legislative action to curtail gubernatorial efforts to usurp the Legislature's authority.

Gender Identity

On January 20, 2016, the New York State Division of Human Rights (DHR) adopted a new regulation (I.D. No. HRT-44-15-00033-A) relating to "gender identity discrimination."¹ The purpose of the regulation was to implement many provisions of the Gender Expression Non-Discrimination Act (A.4558-B – Gottfried) (also known as the Bathroom Bill), a bill that has died in the New York State Senate for eight (8) consecutive years. The regulation added a new Section 466.13 to Title 9 of the New York Codes, Rules and Regulations (NYCRR); this new section declares that existing laws banning sex discrimination and disability discrimination also ban discrimination based upon the vague and unclear category of "gender identity." Under this novel interpretation of existing law, New York's shopping malls, stores, universities, restaurants, and recreational facilities—along with many other public places—that decline to allow intact males identifying as "transgender" to use opposite-sex restrooms and locker rooms could be held liable for discrimination. Under this regulation, employers that decline to accommodate employees who wish to dress and identify as members of the opposite sex in the workplace could be sued. Thus, the regulation usurps the authority of the Legislature, imposes new regulatory burdens on businesses, and compromises the privacy and safety of women and girls.

While NYCF and others voiced strong objections to the substance of Gov. Cuomo's gender identity regulation and the procedure by which it was implemented, those objections were largely ignored. Sadly, this regulation is now in effect. Legislative action is needed to reverse it.

¹ See <http://docs.dos.ny.gov/info/register/2016/january20/rulemaking.pdf>, last accessed June 5, 2016.

Sexual Orientation Change Efforts

On February 6, 2016, Gov. Cuomo announced that he would take executive action to limit the availability of “conversion therapy” in New York.² “Conversion therapy” is a disparaging term used to describe change therapy, in which a professional counselor assists a client in resolving same-sex (homosexual) attraction. Banning change therapy for clients under the age of 18 has been a priority of LGBT activists in New York for the past two years, during which time New Yorkers for Constitutional Freedoms has lobbied extensively against the proposed Counselor Coercion Bill (S.121-Hoylman/A.4958-Glick). Like the Bathroom Bill, the Counselor Coercion Bill has never passed the New York State Senate. The Governor’s proposed regulations clearly purpose to limit minor clients’ access to change therapy.

In addition to announcing his upcoming regulations, the Governor’s February 6 statement included a Medicaid notice. The Medicaid notice was issued by the Department of Health to clarify that “the Medicaid program does not cover ‘conversion therapy’ under fee-for-service Medicaid or Medicaid Managed Care.” Also, the Governor’s statement included the following language: “Insurers are advised to require behavioral health providers to certify that they will not provide conversion therapy to minors or seek reimbursement from the insurer for such services.”

The proposed regulations relating to change therapy were published on February 24, 2016.³ One proposed regulation (I.D. No. DFS-08-16-00002-P) would amend Part 52 (Regulation 62) of Title 11 NYCRR to ban insurers from covering change therapy for minor clients. The other regulation (I.D. No. OMH-08-16-00003-P), which was adopted effective April 27, 2016, amended Section 527.8 of Title 14 NYCRR to ban facilities under the jurisdiction of the Office of Mental Health (OMH) from providing change therapy to minor clients.⁴ New Yorkers for Constitutional Freedoms submitted comments in opposition to both proposed regulations.

As the American Psychological Association has noted, there is no scientific consensus as to the causes of sexual orientation. What is clear, however, is that sexual orientation is not genetically hardwired. In fact, many people experience some level of sexual orientation change during their lives; some seek out such change, while others experience it spontaneously. In addition, research indicates that sexual orientation change efforts have been effective for some people. When it comes to change therapy, the State of New York should respect the personal liberty, religious beliefs, and parental rights of all New Yorkers, and should follow principles of professional therapy availability, conscience protection, and client autonomy.

Gov. Cuomo’s Medicaid notice and his ban on change therapy in OMH facilities are already in effect. However, as of June 5, 2016, the proposed regulation pertaining to insurance coverage for change therapy has not yet been adopted.

² See <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-banning-coverage-conversion-therapy>, last accessed June 5, 2016.

³ See <http://docs.dos.ny.gov/info/register/2016/feb24/pdf/rulemaking.pdf>, last accessed June 5, 2016.

⁴ See <http://docs.dos.ny.gov/info/register/2016/april27/pdf/rulemaking.pdf>, last accessed June 5, 2016.