

U.S. Department of Education Issues New Interpretation Providing Protection Against Discrimination Based on Sexual Orientation and/or Gender Identity Under Title IX

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On Wednesday, June 16, the United States Department of Education issued a [Notice of Interpretation](#) (“Interpretation”) “to make clear that the Department interprets Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity....” The Interpretation confirms guidance issued earlier this year by the Biden-Harris Administration via Executive Orders issued on: (1) “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation” (issued January 20, 2021); and (2) “Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity” (issued March 8, 2021).

The Interpretation relies heavily upon last year’s United States Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ____ (2020), in which the Court held that the termination of an employee based on gender identity and/or sexual orientation violates Title VII, which prohibits discrimination based on, among other items, sex, in the workplace. In *Bostock*, the Court held that an employer who terminates an individual for being gay or transgender is terminating that person “for traits or actions it would not have questioned in members of a different sex,” and that sex “plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” *Id.* at 1737.

The Interpretation also explains that, while *Bostock* dealt with discrimination under Title VII, the analysis by the Court serves to guide the Department in its interpretation of discrimination based on sex under Title IX, and leads to the conclusion that Title IX also prohibits discrimination based on gender identity and/or sexual orientation. The Department cites to three reasons for this application: (1) the textual similarities between Title IX and Title VII; (2) other federal case law analyzing Title IX claims under *Bostock*; and (3) the conclusion from the Civil Rights Division of the Department of Justice that *Bostock* applies to Title IX.

The Interpretation states that OCR will “fully enforce” these prohibitions under Title IX as it does with other Title IX complaints received, provided that any complaint received meets the jurisdictional requirements in Title IX and its regulations, “other applicable legal requirements,” and the standards contained in OCR’s [Case Processing Manual](#). In such a case, OCR will open an investigation into allegations that an individual has been discriminated against on the basis of sexual orientation and/or gender identity in educational programs or activities. The Interpretation describes such potential allegations as including, but not limited to, “allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity.”

The Interpretation further explains that, though OCR has long recognized the rights of LGBTQ students to be free from harassment and sex discrimination, including discrimination based on gender stereotypes, there has been inconsistency from the Department on these issues at times (such as the Dear Colleague Letter issued on February 22, 2017 by the Trump administration, rescinding previous protections for sexual orientation and gender identity-based discrimination under Title IX) and the Interpretation seeks to bring

clarity to the Department's stance on the issue by making clear that the newly issued interpretation "supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction based on sexual orientation and gender identity."

One notable omission in the Interpretation is any discussion of what is now required of school districts in terms of its Title IX policies and/or the employee training requirement contained in the 2020 amendments to Title IX. Nonetheless, districts would be well served to review their current policies and training materials for any content contradictory to the Interpretation and confer with legal counsel to determine what other steps are required or advisable to comply with the principles of the Interpretation.

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