
“On the Basis of Sex” Interpreted: Sexual Orientation and Gender Identity Protected Under Title IX

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On June 16, 2021, the United States Department of Education’s Office for Civil Rights (OCR) issued a Notice of Interpretation¹ explaining that discrimination “on the basis of sex” under Title IX of the Education Amendments of 1972 (Title IX) encompasses both sexual orientation and gender identity. This interpretation clarifies how OCR will enforce Title IX moving forward, in light of the Supreme Court’s decision in *Bostock v. Clayton County Georgia* (2020) 590 U.S. __ [140 S.Ct. 1731]. Last year, the *Bostock* decision clarified that Title VII of the Civil Rights Act of 1965 (Title VII), and its prohibition against employment discrimination based on sex, applies to both homosexual and transgender persons in the workplace. (See [2020 Client News Brief No. 50](#).) Although OCR has previously opined in a Letter of Notification that the *Bostock* ruling would guide its interpretation of Title IX (See [2020 Client News Brief No. 86](#)), OCR has also stated that Title IX’s prohibition on discrimination does not encompass sexual orientation and gender identity. The June Notice of Interpretation clarifies these contradictory assertions.

Department of Education Interpretation

Title IX prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. This prohibition applies to nearly every public school district, and OCR is charged with enforcing the provisions of Title IX. However, Title IX does not explicitly mention if discrimination based on an individual’s sexual orientation or gender identity constitutes discrimination “on the basis of sex.” The Department of Education’s June Notice of Interpretation makes it clear that OCR understands Title IX’s prohibition against sex discrimination to encompass discrimination on the basis of sexual orientation and gender identity, consistent with the *Bostock* holding.

The Department’s interpretation explains that the *Bostock* conclusion—that discrimination “because of” sex under Title VII encompasses discrimination based on sexual orientation and gender identity—properly guides its interpretation of the “on the basis of sex” language of Title IX. First, the Notice of Interpretation explains that

¹ Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*.

the textual similarities between Title VII and Title IX supports this understanding. Title VII and Title IX ban sex discrimination “because of” sex and “on the basis of” sex, respectively, and these terms have been used by the Supreme Court interchangeably. Also, neither Title VII nor Title IX lists any exception to their broad rules against sex discrimination. Generally, when Congress chooses not to include any exception to a broad rule, courts apply the rule to the maximum extent possible. Finally, Title VII is often relied upon by the courts in interpreting the scope of Title IX.

Worth noting, Other Cabinet-level departments have reached the same conclusion as the Department of Education. For example, the Department of Justice’s Civil Rights Division has similarly determined that the most consistent reading of Title IX’s prohibition on discrimination “on the basis of sex” is that it includes discrimination on the basis of gender identity and sexual orientation.²

Takeaways

Consistent with the above, OCR will view discrimination based on sexual orientation and gender identity as encompassed within Title IX’s prohibition against discrimination on the basis of sex in schools. For more information, see the Department of Education’s [press release regarding the Notice of Interpretation](#).

Related Resources

Title IX Toolkit: Lozano Smith’s Title IX Practice Area recently published a Title IX Toolkit that breaks down the new Title IX regulations with a focus on implementation and processing employee and student Title IX complaints at the K-12 level. [Download here](#).

Title IX Workshop: Reserved for school district or public agency employees, an upcoming Lozano Smith Title IX online training helps meet significant requirements and provides a step-by-step investigative process. [More information here](#).

If you have any questions regarding OCR’s Notice of Interpretation or Title IX issues in general, please contact one of the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

² Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021).