



LGBTQIA+ Rights Under Title VII and Title IX
By Brianna Bates, Legal Intern, Student Conduct Institute
August 2021

Through guidance documents issued on June 16, 2021, the Department of Education’s Office for Civil Rights (OCR) has confirmed that Title IX prohibits discrimination based on sexual orientation and gender identity at institutions receiving federal funds.¹

This guidance will impact how university administrators navigate Title IX compliance on many fronts. Officials must redouble their efforts to ensure that LGBTQIA+ students can equally access educational opportunities without discrimination on the basis of their sexual orientation and gender identity. They must examine whether discrimination against these students is occurring in campus athletics, residence hall policies, investigations and adjudications of sexual harassment and violence on the basis of sexual orientation and gender identity, and bathroom use designations. It will also require campuses to consider how they use existing student information systems to collect students’ preferred pronouns and account for both sex *and* gender identity.

This memorandum reviews the state of the law and OCR guidance and suggests best practices for meeting and exceeding these standards.

Legal Backdrop: *Bostock* and its Impact on Title IX

Prior to OCR’s issuance of the June 2021 guidance, LGBTQIA+ rights under Title VII and Title IX, both of which protect against sex discrimination, have not been clear or consistent. Title VII prohibits sex discrimination in employment, and Title IX prohibits sex discrimination in educational programs and activities. While both Title VII and Title IX prohibit discrimination “on the basis of sex,” whether discrimination based on sexual orientation or gender identity is prohibited has been subject to differing interpretations by courts and administrative agencies.

¹ These guidance documents include an OCR “Notice of Interpretation” and a two-page resource guide. See Notice of Interpretation, 86 Fed. Reg. 32637 (June 22, 2021) [hereinafter Notice of Interpretation], <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>; U.S. Dep’t of Just. & U.S. Dep’t of Educ., Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families, <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

On June 15, 2020 the Supreme Court issued its decision in *Bostock v. Clayton County*² holding that discrimination on the basis of sex under Title VII includes discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity “requires an employer to intentionally treat individual employees differently because of their sex.”³ The Court reasoned that when an employer discriminates against a person based on sexual orientation or transgender status, the employer necessarily discriminates against that person for “traits or actions it would not have questioned in members of a different sex.”⁴ Put another way, “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”⁵

Although *Bostock* reshaped how courts will interpret Title VII, it left open whether Title IX also prohibited discrimination against LGBTQIA+ individuals based on their gender identity or sexual orientation. Historically, although they are parts of different federal laws, courts have relied on interpretations of Title VII to inform interpretations of Title IX because both statutes prohibit discrimination “on the basis of sex.”⁶ Since Title VII interpretations inform Title IX interpretations, the *Bostock* Title VII decision left the education community to wonder what impact the decision would have on OCR’s enforcement authority for sexual orientation and gender identity discrimination claims.

Educators, in turn, have looked to OCR for clarity. OCR is responsible for the Department of Education’s enforcement of Title IX. At times, OCR has stated that Title IX’s prohibition on sex discrimination *does not* encompass discrimination based on sexual orientation and gender identity, and at other times, it has confirmed that it does.⁷

After the *Bostock* decision, and before June 16, 2021, it was clear that Title VII prohibited sexual orientation and gender identity discrimination in employment, but it was unsettled if that

² *Bostock v. Clayton County*, 140 S. Ct. 1731, 1731 (2020).

³ *Id.* at 1742.

⁴ *Id.* at 1737.

⁵ *Id.* at 1747.

⁶ *E.g.*, *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

⁷ In 2016, OCR issued a Dear Colleague Letter on Transgender Students clarifying that it would treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. U.S. Dep’t of Just. & U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. In 2017, OCR issued a Dear Colleague Letter on Transgender Students that withdrew and rescinded the previous guidance requiring access to sex-segregated facilities based on gender identity. U.S. Dep’t of Just. & U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

interpretation applied to sex-based discrimination in education under Title IX, as illustrated by this chart:

Title VII and Title IX Before *Bostock*

	<u>Title VII</u>	<u>Title IX</u>
• Sex assigned at birth based on biological characteristics	✓	✓
• Sexual identity	✓	?
• gender orientation	✓	?

On June 16, 2021, in light of the Supreme Court’s decision in *Bostock*, OCR issued a Notice of Interpretation to clarify the Department’s enforcement authority over discrimination based on sexual orientation or gender identity under Title IX.⁸ OCR determined that the phrase “because of . . . sex” in Title IX does encompass discrimination based on sexual orientation and gender identity. After the June 16th guidance was issued, OCR’s interpretation of the meaning of Title VII and Title IX looks like this:

Title VII and Title IX After *Bostock*

	<u>Title VII</u>	<u>Title IX</u>
• Sex assigned at birth based on biological characteristics	✓	✓
• Sexual identity	✓	✓
• gender orientation	✓	✓

⁸ Notice of Interpretation, *supra* note 1.

Understanding OCR's Notice of Interpretation

OCR based its June 2021 Notice of Interpretation on U.S. Supreme Court precedent interpreting those laws, along with lower court decisions applying *Bostock* to Title IX cases. The U.S. Supreme Court's landmark ruling in *Bostock* extended protections against employment discrimination to people who identify as LGBTQIA+ and has implications for how colleges define sex and enforce gender equality on campus.

OCR's interpretative guidance expressly noted that both the Title VII and Title IX statutes:

- Prohibit sex discrimination. Title VII uses the phrase “because of” sex and Title IX uses the phrase “on the basis of sex.” The Supreme Court has used these two phrases interchangeably.⁹
- Specifically protect individuals against discrimination.¹⁰
- Contain text that have no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity.¹¹

⁹ In *Bostock*, for example, the Court described Title VII in this way: “[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin [I]ntentional discrimination based on sex violates Title VII.” 140 S. Ct. at 1737, 1742; *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005) (“[W]hen a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.”); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]hen a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

¹⁰ In *Bostock*, the Court observed that Title VII “tells us three times—including immediately after the words ‘discriminate against’—that our focus should be on individuals.” 140 S. Ct. at 1740-41. The Court made a similar observation about Title IX, which uses the term “person,” in *Cannon v. University of Chicago*, stating that “Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens effective protection against those practices.” 441 U.S. 677, 704 (1979).

¹¹ As the Court stated in *Bostock*, “when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.” 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: “[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.” *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX’s prohibition on sex discrimination, the Supreme Court and lower Federal courts have often relied on the Supreme Court’s interpretations of Title VII. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

OCR supported their interpretative guidance with citations to Title IX cases that relied on *Bostock* to hold that differential treatment of students based on gender identity or sexual orientation is a Title IX violation. These cases included:

- *Grimm v. Gloucester County School Board* (August 2020)¹²: Where a Virginia student who was assigned at birth the sex of female and identified as male while in high school sued the local school board for being forced to use restrooms based on his assigned gender under their policy. The Fourth Circuit Court of Appeals relied on *Bostock* to recognize that Title IX’s prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. The court noted that a school’s policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm.¹³ On June 28, 2021 the U.S. Supreme Court, without comment, let the Fourth Circuit’s ruling stand.¹⁴
- *Adams v. School Board of Saint Johns County* (August 2020)¹⁵: Where a Florida student who was assigned at birth the sex of female and identified as male while in high school sued the school board for being forced to use restrooms based on his assigned gender under their policy. The Eleventh Circuit opinion relied on *Bostock* in holding that excluding the plaintiff from the boys’ bathroom amounted to sex discrimination in violation of Title IX. Notably, the court rejected the school board’s claim that Title IX was only intended to address discrimination against so-called “biological women”; it determined that even if Congress never considered the rights of transgender people in enacting Title IX, the broad terms of the statute would “require nothing less.”¹⁶
- *Koenke v. Saint Joseph’s University* (January 2021)¹⁷: Where a former Director of Music for Campus Ministry at St. Joseph’s University, who openly identified as gay, encountered employment conditions so intolerable that she felt compelled to resign and then sued the university for harassment based on her sexual orientation. A federal district court in Pennsylvania (a court of the Third Circuit) dismissed the university’s claim that sexual orientation is not a protected class under Title IX and relied on *Bostock*, holding that Title VII prohibits employment discrimination on the basis of sexual orientation

¹² *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021).

¹³ *Grimm*, 972 F.3d at 617-18 (describing injuries to a transgender boy’s physical and emotional health as a result of denial of equal treatment).

¹⁴ John Fritze, *Supreme Court Declines to Hear Virginia School Board's Transgender Bathroom Case*, USA TODAY (July 20, 2021, 5:08 PM), <https://www.usatoday.com/story/news/politics/2021/06/28/supreme-court-wont-decide-trans-bathroom-case-involving-gavin-grimm/5318886001/>.

¹⁵ *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), petition for reh’g en banc pending, No. 18-13592 (Aug. 28, 2020).

¹⁶ *Id.*

¹⁷ *Koenke v. Saint Joseph’s Univ.*, No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021).

through its prohibition of discrimination on the basis of “sex” and noted that, by extension, Title IX’s prohibition on sex discrimination constitutes a prohibition on sexual orientation discrimination.¹⁸

- *Doe v. University of Scranton* (October 2020)¹⁹: Where a university student allegedly suffered peer-on-peer harassment based on sexual orientation, gender stereotyping and/or sex. A federal district court in Pennsylvania (a court of the Third Circuit) cited a collection of cases where courts applied *Bostock* to Title IX sexual orientation discrimination claims to explain that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²⁰

Applying OCR’s Notice of Interpretation

Campuses must continue to monitor whether their policies and practices may deny LGBTQIA+ students equal access to education programs and activities. Items that might be considered discriminatory “on the basis of sex” (including on the basis of sexual orientation and gender identity) will likely involve things that we already consider under Title IX on the basis of gender, such as unequal pay, or unequal admissions and financial aid practices. Special consideration should also be paid to the ability of LGBTQIA+ students to access housing, campus facilities, restrooms, and campus medical services on equal terms, and to ensure that they are addressed by their chosen names and pronouns.²¹

Additionally, Title IX-covered “sexual harassment” (including sexual violence) involving LGBTQIA+ students must be investigated and adjudicated according to the Title IX grievance procedures outlined in the 2020 Title IX Final Rules.²²

¹⁸ *Id.* at *4-5.

¹⁹ *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

²⁰ *Id.* at *2 n.1 (The Defendant noted that the United States Court of Appeals for the Third Circuit had not yet expressly held that discrimination based on sexual orientation is actionable under Title IX) (internal citations omitted).

²¹ The U.S. Equal Employment Opportunity Commission (EEOC) has recently issued guidance under its authority to interpret Title VII that “although accidental misuse of a transgender employee’s preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.” EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, (Jun. 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender/>. Case law arising from Title VII also appears to support the authority of a school to require an employee to refer to transgender students by their preferred pronouns. *Kluge v. Brownsburg Comm. Sch. Corp.*, No. 1:19-CV-2462-JMS-DLP, 2021 WL 2915023, at *21 (S.D. Ind. July 12, 2021). It is unclear whether these precedents will hold in the Title IX context; the U.S. Court of Appeals for the Sixth Circuit, for example, recently held that a public university may violate a professor’s First Amendment rights in requiring him to identify a student by their preferred pronouns as a remedy in a Title IX complaint. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

²² *See*, 34 C.F.R. § 106.45 (2020).

Notably, OCR’s Notice of Interpretation did not expressly address how Title IX governs access to athletic opportunities, but its companion resource, [Confronting Anti-LGBTQI+ Harassment in Schools A Resource for Students and Families](#), identifies the following scenario as one that the Department could investigate as a Title IX violation:

On her way to the girls’ restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys’ restroom or nurse’s office because her school records identify her as “male.” **Later, the student joins her friends to try out for the girls’ cheerleading team and the coach turns her away from tryouts solely because she is transgender.** When the student complains, the principal tells her “those are the district’s policies.”²³

In identifying the denial of athletic opportunities on the basis of transgender status as a Title IX violation, OCR’s guidance here appears to follow recent Title IX case law. Prior to this guidance, a case concerning discrimination based on gender identity or expression in schools was brought in a federal district court in Connecticut challenging the Connecticut Interscholastic Athletic Conference and multiple school boards who have transgender-inclusive policies.²⁴ While the case was ruled moot in an April 2021 decision, the court looked at the case law and the history of OCR guidance and concluded: “Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity.”²⁵

For instance, in March 2020, an Idaho law (the so-called “Fairness in Women’s Sports Act”) attempted to categorically prohibit transgender women and girls in Idaho from sports teams corresponding to their gender identity.²⁶ In August 2020 a federal judge granted a motion for a preliminary injunction against the act, finding that Idaho did not provide sufficient reasons for the law to exist.²⁷ While the preliminary injunction is not the final say in the matter, the order stated that “plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written.”²⁸

Further, the National Collegiate Athletic Association (NCAA) last updated their Transgender Participation Policy in 2011.²⁹ It addresses the fact that testosterone is a banned substance and requires all athletes to apply for an exception if taking testosterone. If the athlete is taking

²³ U.S. Dep’t of Just. & U.S. Dep’t of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families*, <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf> (emphasis added).

²⁴ *Soule v. Conn. Ass’n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206, at *3 (D. Conn. Apr. 25, 2021).

²⁵ *Id.* at *29.

²⁶ Andy Rose & Hollie Silverman, *Idaho Governor Signs Two Bills that Limit the Rights of Transgender People*, CNN (Mar. 31, 2020), <https://www.cnn.com/2020/03/31/us/idaho-transgender-bills/index.html>.

²⁷ *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

²⁸ *Id.* at 988.

²⁹ NCAA OFFICE OF INCLUSION, *NCAA INCLUSION OF STUDENT ATHLETES 13* (2011), https://web.archive.org/web/20140501232340/https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

testosterone and is under the care of a physician, the exception will be granted and the athlete will be allowed to participate within the following guidelines:

- A trans male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men's team but is no longer eligible to compete on a women's team without changing the team status to a mixed team. A mixed team is eligible only for men's championships.
- A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment.

If the policy guidelines are not followed, the team will become a mixed team and there are implications for whether that mixed team can participate in respective championships. At the recent SPECTRUM conference, the NCAA's Managing Director for its Office of Inclusion announced that the policy is under review.³⁰

A final note: it remains unclear whether OCR or courts applying Title IX would consider sex-segregated housing, bathrooms, and locker rooms as potentially violative of the statute (assuming that such sex-segregated facilities were not already covered by an exemption, such as for religion, under Title IX). In *Grimm*, which considered discriminatory bathroom usage policies by schools against transgender students, the court found that transgender students who are prohibited from using the restroom consistent with their gender identity will avoid bathroom use, which can lead to medical problems. The court also found that using the restroom consistent with a transgender child's identity did not infringe on other students' privacy, since use only requires the student to enter into the restroom, enter a stall, relieve themselves, come out of the stall, wash their hands, and leave. The court held that the restroom policy, which prohibited a student from using the restroom consistent with his gender identity, violated Title IX and the Equal Protection Clause and unlawfully discriminated against him in violation of Title IX. The *Grimm* decision and OCR's guidance can be interpreted to mean that there is nothing wrong with sex-segregated bathrooms for Title IX purposes as long as a student can reasonably access the bathroom that conforms with their gender identity. Please note, however, that New York law requires that single-occupant restrooms be designated gender neutral.³¹

Takeaways

Based on the above applications of *Bostock*, the guidance from OCR, and the Supreme Court denying certiorari for the *Grimm v. Gloucester County School Board* case on June 28, 2021, the

³⁰ SUNY ARRIVE, *Trans Students and Athletics*, YOUTUBE (July 6, 2021), <https://www.youtube.com/watch?v=BoXVB2Dl94c&list=PLWeOq4wGRVDjjk9gBiGW8CkrUE-KcubD2&index=17>

³¹ N.Y. Civ. Rights Law § 79-p (McKinney).

state of law and agency guidance is that Title IX's prohibition of discrimination on the basis of sex includes discrimination based on sexual orientation and gender identity. Institutions should examine their nondiscrimination policies to make sure that sexual orientation and gender identity are expressly included in relevant policies.

Although guidance about the rights of transgender athletes under Title IX continues to develop, recent OCR guidance on student athletes, court decisions, and the fact that the NCAA is reviewing a relevant policy signal that we are likely to see more activity related to the rights of transgender students in collegiate athletics.

Federal action in this space, however, is likely to lead to further conflicts with state laws. This year alone in the U.S. there have been more than 110 anti-trans bills proposed in over 37 states, and 13 anti-trans bills passed.³² We can anticipate legal challenges at the intersection of Title VII, Title IX, and these state laws.

Administrators will need to be engaged to ensure that all students are protected and that relevant policies and procedures are updated to reflect fair treatment for LGBTQIA+ students and employees institution-wide.

³² Sam Levin. *Mapping the Anti-trans Laws Sweeping America: 'A war on 100 fronts,'* GUARDIAN (July 17, 2021, 12:16 PM), <https://www.theguardian.com/society/2021/jun/14/anti-trans-laws-us-map>.