



Joint Guidance on Federal Title IX Regulations Discussion of the Effect of *Bostock v. Clayton County, Georgia*

February 25, 2025

Note: This document focuses on a summary analysis of any impact the Supreme Court decision in *Bostock v. Clayton County, Georgia* may have on the application of the 2020 Final Title IX Regulations (the “Final Rule”).¹ For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Title IX Summary Proposed to Final Comparison*, available at https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart_v2.pdf.

Bostock v. Clayton County, Georgia Impact on TIX

On June 15, 2020, the Supreme Court issued its decision in *Bostock v. Clayton County, Georgia*, and the related cases of *Altitude Express, Inc., et al. v. Zarda et al., as Co-Independent Executors of the Estate of Zarda* and *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.* Each of these cases involved the discharge of employees on the basis of sexual orientation or gender identity. The Court held that Title VII’s prohibition against sex discrimination includes prohibiting the discharge of an employee because of their sexual orientation or gender identity.

As noted, *Bostock* and its companion cases before the Court involved the discharge of employees, who are protected from sex discrimination under Title VII. At the time of this decision, the Court’s reasoning also seemed to apply to other adverse employment actions based on sex, as well as to discrimination based on sex under Title IX. For example, the Court stated:

By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.²

However, later in the decision, the Court states: “The employers [in the three cases] worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. ... But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any

¹ The effective date of these Regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

² *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 669 (June 15, 2020).

such question today.”³ Indeed, there may be limitations to the decision even under Title VII:

... [W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.” ... Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases...⁴

Given the limitations and cautions in the Court’s decision, it was initially unclear what impact the decision to include sexual orientation and gender identity in the definition of sex for the purposes of Title VII adverse employment actions would have on Title IX. While courts often look to Title VII for guidance on interpreting Title IX, any application of the ruling would, at the very least, be as a result of further action by the Department of Education’s Office for Civil Rights or further litigation.

U.S. Department of Education’s Office for Civil Rights 2021 Notice of Interpretation and its Withdrawal

On June 22, 2021, the U.S. Department of Education, Office for Civil Rights released a Notice of Interpretation (“NOI”) titled “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*.”⁵

This NOI confirmed that the U.S. Department of Education (“ED”) interpreted Title IX to include barring discrimination based on sexual orientation and gender identity in light of the decision in the *Bostock* case.

Shortly after this, twenty states filed a lawsuit against the ED seeking to enjoin enforcement of the NOI against these states. In this suit, the District Court for the Eastern District of Tennessee preliminarily enjoined and restrained the ED from enforcing and implementing the NOI against the U.S. states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia on July 15, 2022.⁶

Subsequently, in a separate Federal court order, the District Court for the Northern District of Texas vacated the NOI and enjoined the ED from implementing and enforcing the document

³ *Id.* at 681.

⁴ *Id.*

⁵ 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*, U.S. Dept. of Education, <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (June 22, 2021).

⁶ *State of Tenn., et al. v. U.S. Dep’t of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).



against the state of Texas and all of its educational institutions.⁷

Thus, following this order on June 11, 2024, the ED was no longer able to enforce its interpretation that Title IX includes preventing discrimination based on sexual orientation and gender identity.

2024 Title IX Regulations

On July 12, 2022, the ED put forth a Notice of Proposed Rulemaking (“NPRM”) on Title IX.⁸ Among many proposed changes to the 2020 Title IX regulations, the 2022 NPRM proposed to explicitly include sexual orientation and gender identity in the definition of “sex” in the new regulations.

On April 29, 2024, after the public comment period on the NPRM, the ED issued its final regulations on Title IX. The final 2024 Title IX regulations maintained from the 2022 NPRM that Title IX would prohibit discrimination based on sexual orientation and gender identity in all educational programs that receive federal financial assistance.

These regulations went into effect on August 1, 2024, and required all educational institutions to prohibit discrimination based on sexual orientation and gender identity under Title IX.

Shortly thereafter, twenty-six states filed seven different lawsuits against the ED seeking to enjoin enforcement of the new regulations against their state educational programs. These lawsuits primarily focused on claiming that protecting individuals based on sexual orientation and gender identity under Title IX was impermissible. Based on these lawsuits, the ED was enjoined from enforcing the 2024 Title IX regulations against 26 states as well as over 500 institutions across the country based on membership in Plaintiff organizations. For a full list of states and these institutions, as well as details on these lawsuits, please see the Title IX Joint Guidance litigation tracker linked [here](#).

Tennessee v. Cardona

On January 9, 2025, in a court decision by the District Court for the Eastern District of Kentucky, the 2024 Title IX regulations were vacated nationally.⁹ This decision states that the ED exceeded its authority in implementing the final rule and that the rule violates the First Amendment of the U.S Constitution. As of the date of that court decision, the 2024 Title IX regulations were no longer in effect and campuses had to revert back to the 2020 Title IX regulations.

The 2020 Title IX Regulations do not include a definition of sex. However, in the preamble to

⁷ State of Texas v. Cardona, No. 4:23-cv-604 (N.D. Tex.) (June 11, 2024).

⁸ Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022), <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

⁹ State of Tenn. v. Cardona, No. 2: 24-072-DCR (E.D. Ky.) (Jan. 9, 2025).



the regulations, the Department responds to comments asserting that sex should include sexual orientation and gender identity. In part, ED stated:

“some of the cases the commenter cited are cases under Title VII and are on appeal before the Supreme Court of the United States. The most recent position of the United States in these cases is (1) that the ordinary public meaning of ‘sex’ at the time of Title VII’s passage was biological sex and thus the appropriate construction of the word “sex” does not extend to a person’s sexual orientation or transgender status, and (2) that discrimination based on transgender status does not constitute sex stereotyping but a transgender plaintiff may use sex stereotyping as evidence to prove a sex discrimination claim if members of one sex (*e.g.*, males) are treated less favorably than members of the other sex (*e.g.*, females).”¹⁰

ED further states in the preamble that the final regulations under the 2020 rule focus on prohibited conduct, irrespective of someone’s sexual orientation or gender identity.¹¹ ED also states that Title IX does not prohibit discrimination based on sexual orientation, but that sexual harassment directed at someone who identifies as gay or lesbian may constitute sexual harassment under Title IX.¹²

Donald Trump Executive Order – January 20, 2025

On January 20, 2024, President Donald Trump issued an executive order entitled “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”¹³ This Executive Order made it the interpretation of all federal law that “‘sex’ shall refer to an individual’s immutable biological classification as either male or female. ‘Sex’ is not a synonym for and does not include the concept of ‘gender identity.’”

This Executive Order also states that the prior Presidential Administration’s interpretation that *Bostock v. Clayton County* applies to all sex-based distinctions under agency activities is incorrect, and orders the Attorney General to issue updated guidance to correct this misapplication. This Executive Order also repeals a number of guidance documents including the above-mentioned ““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*” (June 22, 2021).”

2025 Department of Education Dear Colleague Letter

On February 4, 2025, the U.S. Department of Education issued a Dear Colleague Letter which

¹⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 85 Fed. Reg. 30026, 30178 (May 19, 2020) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2020 Title IX Final Rule”).

¹¹ 2020 Title IX Final Rule, 85 Fed. Reg. 30178.

¹² *Id.* at 30179.

¹³ Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Executive Order (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>



confirmed that in light of the federal court decision vacating the 2024 Title IX regulations as well as President Trump’s Executive Order discussed above, that the Department of Education would enforce the 2020 Title IX regulations and that “open Title IX investigations initiated under the 2024 Title IX Rule should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule...”¹⁴

Impact of State Law

Of course, many states, localities, and individual schools already prohibit harassment (and other forms of discrimination) based on sexual orientation and gender identity, and nothing in the Final Rule would prevent that. Additionally, complaints of harassment outside of Title IX’s jurisdiction may be addressed through a school’s code of conduct or HR procedures rather than its Title IX procedures.

¹⁴ Dear Colleague Letter (Feb. 4, 2025), <https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf>



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