



## New executive order aligns Title IX with Bostock decision

January 22, 2021

After months of speculation as to how a new administration may enforce Title IX, newly inaugurated President Biden wasted no time in addressing the matter. On his first day in office, he issued seventeen executive orders, including the [“Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”](#)

The executive order addresses the U.S. Supreme Court’s decision last summer in [Bostock v. Clayton County](#), in which the Court held that Title VII prohibited employers from discriminating on the basis of sexual orientation and gender identity. A close read of the decision [suggested](#) that the Court might favor a similar interpretation of Title IX, but the U.S. Department of Education (ED) did not appear to adopt that reading. In fact, in the months that followed, ED issued [several documents](#) suggesting that it [would not apply the reasoning of Bostock in the Title IX context](#). The question for school districts and institutions of higher education was whether courts would agree with ED’s reasoning, or whether they would be enforcing a completely separate standard.

With the change in administration, the executive order made the issue much clearer, stating:

Under Bostock’s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary. (Section 1)

The executive order further instructs the head of each agency administering statutes or regulations that prohibit sex

discrimination—which would include ED’s administration of Title IX—to consider in the next 100 days whether to issue new guidance documents “as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section of this order.” The order also directs agencies to consider whether regulations need to be revised. It expressly acknowledges that agency heads must comply with the Administrative Procedure Act (5 U.S.C. 551 et seq.) when making changes.

Based on this new order, it is expected that ED will need to revise its current guidance. The order states, “[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.” This suggests that [prior guidance](#) on transgender students and its accompanying [Q&A document](#), issued in May 2016 under the Obama administration but withdrawn under the Trump administration, may give some indication as to what ED may do next in this area while we wait for new guidance to be released.

In the meantime, courts across the country continue to address the application of Bostock to Title IX in situations involving practical issues such as bathroom/locker room usage and transgender student athletes. See, e.g., [Adams v. Sch. Bd.](#), (11th Cir. 2020) (applying Bostock’s holding to Title IX restroom case, holding Bostock’s “reasoning applies with the same force to Title IX’s equally broad prohibition on sex discrimination.”); [Grimm v. Gloucester County Sch. Bd.](#), (4<sup>th</sup> Cir. 2020) (same).

School districts, colleges and universities are advised to review the order, keep abreast of new case law, and consult with legal counsel regarding matters involving discrimination on the basis of sexual orientation or gender identity while we wait for ED to provide more information in the next 100 days. Institutions can expect the need to implement policies differently or make policy revisions in the coming year as new guidance is released, including but not limited to, policies covering Title IX, facility use and athletics.

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