
Wisconsin Legislative Council

INFORMATION MEMORANDUM



IM-2021-11

TITLE IX: FEDERAL PROTECTION AGAINST SEX DISCRIMINATION IN EDUCATION

Title IX of the Education Amendments of 1972 protects students and employees from sex discrimination in educational institutions that receive federal funds. Under Title IX:

[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

[[20 U.S.C. s. 1681 \(a\)](#).]

This protection applies to any student or employee of any public or private preschool, elementary, or secondary school, and any vocational, professional, or higher education institution receiving federal funds. [[20 U.S.C. s. 1681 \(c\)](#).]

This information memorandum provides an overview of the protections provided by Title IX, the implementing regulations, and orders issued by the Office for Civil Rights (OCR),¹ and a discussion of recent developments in Title IX, including the new sexual harassment guidelines and the applicability of Title IX to transgender students.

TITLE IX

In 1964, prior to the passage of Title IX, Congress passed federal civil rights laws to increase protections against various forms of discrimination. Title VI of the Civil Rights Act of 1964 protects individuals from discrimination on the basis of race, color, and national origin in any organization that receives federal funds, and Title VII of the same act protects individuals from race, color, religion, sex, or national origin discrimination in employment practices. [42 U.S.C. ss. [2000d, et seq.](#) and [2000e-2, et seq.](#)] Several years later, Congress enacted Title IX to address concerns about discrimination against women in education, in particular. [20 U.S.C. s. 1681.] In enacting Title IX, Congress had two principal objectives: (1) to avoid the use of federal resources to support discriminatory practices; and (2) to provide individual citizens with effective protection against those practices. [*Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (citations omitted).]

Title IX's protections against sex discrimination do not apply to certain entities or circumstances listed in the statute, including:

- Admissions decisions for an educational institution that is not an institution of vocational, professional, or graduate education or a public undergraduate institution.

¹ For purposes of this information memorandum, OCR refers to the office within the U.S. Department of Education that enforces federal civil rights laws.

- Educational institutions that meet one of the following conditions:
 - Are controlled by a religious organization, if fulfillment of Title IX would be inconsistent with their religious tenets.
 - Have a primary purpose of training individuals for U.S. military services or the Merchant Marine.
- Admissions decisions for undergraduate educational institutions that traditionally and continuously admitted only students of one sex.
- Fraternities and sororities as defined in [26 U.S.C. s. 501 \(a\)](#) of the federal Internal Revenue Code that are exempt from federal taxation and whose active membership is mostly undergraduate students.
- YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth organizations whose membership has traditionally been limited to a single sex.
- Boys and Girls Conferences.
- Father-son and mother-daughter activities.
- Beauty pageant higher education scholarships given by higher education institutions.

[\[20 U.S.C. ss. 1861 \(a\) \(1\) - \(9\).\]](#)

TITLE IX REGULATIONS

Under Title IX, each federal department and agency responsible for dispersing federal funds is required to implement Title IX by issuing rules, regulations, or orders of general applicability. [\[20 U.S.C. s. 1682.\]](#) Title IX regulations were first promulgated in 1975 and codified at [34 C.F.R. Part 106](#). Today, OCR and the U.S. Department of Health and Human Services² are responsible for implementing and enforcing Title IX. The U.S. Department of Justice (DOJ), Civil Rights Division, assists with coordinating those agencies' enforcement of Title IX.³ This information memorandum focuses on OCR's implementation and enforcement of Title IX for educational institutions that receive federal education funding. This includes approximately 17,600 local school districts as well as over 5,000 post-secondary institutions, charter schools, for-profit schools, libraries, and museums.⁴

The stated purpose of 34 C.F.R. Part 106 (Title IX regulations) is to “effectuate Title IX...” and eliminate sex discrimination “in any education program or activity receiving Federal financial assistance.” [\[34 C.F.R. s. 106.1.\]](#) After providing guidance for entities exempt from compliance,⁵ as described above, the Title IX regulations clarify what conduct is prohibited for educational institutions subject to Title IX. The regulations provide guidance on conduct in the following areas: (1) admissions and recruitment; (2) programs or activities; (3) employment; and (4) marital and parental status.

² The Department of Health and Human Services' Title IX regulations apply to academic medical centers and programs that receive funding from the department.

³ See [Exec. Order No. 12250](#), s. 1-2, Fed. Reg. 72-995 (Nov. 4, 1980), 28 C.F.R. ss. 0.51 (b) and 42.412 (a), for more information on the DOJ's role relating to Title IX.

⁴ U.S. Department of Education, OCR, [Title IX and Sex Discrimination](#) (Aug. 20, 2021).

⁵ See [34 C.F.R. ss. 106.12 – 106.17](#) for the regulations related to entities excepted from Title IX.

Sex Discrimination Protection in Admission and Recruitment

Title IX regulations prohibit an educational institution from denying an individual admission on the basis of sex. Specifically, “[n]o person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission” [34 C.F.R. s. 106.21 (a).] Prior to Title IX, certain institutions regularly set admission quotas for women or excluded women entirely.⁶ Subject to the exceptions described above, Title IX protects individuals from such discriminatory practices by prohibiting educational institutions from ranking applicants by sex, creating caps, or otherwise treating individuals differently on the basis of sex in admissions processes and decisions. Additionally, institutions are prohibited from using tests or criteria that have a disproportionate impact on persons of one sex unless: (1) use of the test or criteria is shown to validly predict success in the program or activity; and (2) an alternative test or criteria that does not have such an impact is shown to be unavailable. [34 C.F.R. s. 106.21 (b).]

The regulations also provide that educational institutions “shall not discriminate on the basis of sex in recruitment and admission of students” nor shall they “recruit primarily or exclusively” from predominantly single-sex educational institutions if that would cause them to recruit or admit students in a way that discriminates on the basis of sex. [34 C.F.R. s. 106.23.]

Sex Discrimination Protection in Programs and Activities

Historically, in addition to the admissions practices used by educational institutions to exclude women, women often faced stricter rules (e.g., curfews) than their male peers, once admitted. Title IX protections in educational programs and activities prohibit such actions to ensure that admitted students have equal access to programs and activities regardless of their sex. The regulations provide that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any **academic, extracurricular, research, occupational training, or other education program or**

Generally, educational institutions are prohibited from discriminating on the basis of sex in the following programs and activities:

- Housing.
- Facilities such as toilets, locker rooms, and shower facilities.
- Access to classes and schools.
- Admissions to vocational education programs and institutions.
- Counseling or guidance of students.
- Financial assistance.
- Assistance with outside employment.
- Providing health and insurance services and benefits.
- Athletics.
- Textbooks and curricular materials.
- Methods used to measure skill or progress in physical education class.

[34 C.F.R. ss. 106.32 to 106.44.]

⁶ See the DOJ’s document, “[Equal Access to Education: Forty Years of Title IX](#)” for more information on the history, justification, and impact of Title IX.

activity” at an educational institution receiving federal financial assistance. [[34 C.F.R. s. 106.31 \(a\)](#) (emphasis added).]⁷

Although Title IX and its regulations seek to ensure no individual is prevented from participating in, or benefitting from, educational programs and activities on the basis of sex, there are several areas in which institutions may treat individuals differently. These include the following programs or activities:

- Housing, so long as it is: (1) proportionate in quantity; and (2) comparable in quality and cost. [[34 C.F.R. s. 106.32 \(b\) and \(c\)](#).]
- Facilities such as toilets, locker rooms, and shower facilities, if the facilities are comparable between the sexes. [[34 C.F.R. s. 106.33](#).]
- Physical education and human sexuality classes and choruses. [[34 C.F.R. s. 106.34 \(a\) \(1\) – \(4\)](#).]
- If the school is a nonvocational, co-educational elementary or secondary school, nonvocational, single-sex classes are permitted if all of the following apply:
 - The class or activity is based on an important objective of the institution.⁸
 - Such objective is implemented in an evenhanded manner, such as providing a substantially equal,⁹ single-sex class for the excluded sex.
 - Student enrollment in the class or activity is voluntary.
 - The school provides a substantially equal co-educational class or activity.¹⁰ [[34 C.F.R. s. 106.34 \(b\) \(1\) \(i\) to \(iv\)](#).]
- Counseling services and materials that treat students differently by sex, if: (1) the institution can show the materials cover the same occupations and interest areas; and (2) the use of different materials is essential to eliminate sex bias. [[34 C.F.R. s. 106.36 \(b\) and \(c\)](#).]
- Financial aid, if the award is established with a legal instrument or by an act of foreign government and the overall effect of awarding such sex-restricted financial assistance does not discriminate on the basis of sex. [[34 C.F.R. s. 106.37 \(b\)](#).]
- Athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams, which must be proportionate for members of each sex. [[34 C.F.R. s. 106.37 \(c\)](#).]
- Health and insurance benefits and services that may be used by a different proportion of students of one sex than another, including family planning; however, any educational institution that receives federal funding must include gynecological care if it provides full coverage health service. [[34 C.F.R. s. 106.39](#).]
- Separate teams for members of each sex when selection is based on competitive skill or the activity is a “contact sport,” defined to include boxing, wrestling, rugby, ice hockey, football,

⁷ See [34 C.F.R. s. 106.31 \(b\) \(1\) to \(7\)](#) for the entire list of prohibited actions related to aid, benefits, and services an educational institution provides.

⁸ An “important objective” includes: (a) the goal of improving educational achievement of its students; or (b) meeting the particular, identified needs of its students. The single-sex nature of the class or activity must be substantially related to achieving the goal. [[34 C.F.R. s. 106.34 \(b\) \(1\) \(i\) \(A\) and \(B\)](#).]

⁹ For the full list of the factors the U.S. Department of Education considers in determining whether classes are “substantially equal,” see [34 C.F.R. s. 106.34 \(b\) \(3\)](#).

¹⁰ These requirements do not apply to interscholastic, club, or intramural athletics. [[34 C.F.R. s. 106.34 \(b\) \(5\)](#).]

basketball, and other sports where bodily contact is the purpose or a major activity of the sport. [[34 C.F.R. s. 106.41 \(b\).](#)]

Sex Discrimination Protection for Employment in Educational Programs or Activities

Specific protections are provided for individuals employed by an educational institution subject to Title IX. Generally, “[n]o person shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection...whether full-time or part-time.” [[34 C.F.R. s. 106.51 \(a\) \(1\).](#)] Additionally, applicants and employees may not be limited, segregated, or classified by sex in any way that could adversely affect employment opportunities directly or indirectly through contracts or relationships with an employment or referral agency, labor union, or an organization that provides fringe benefits. [[34 C.F.R. s. 106.51 \(a\).](#)]

These protections apply to a broad range of employment activities, including advertising, promotion, and job assignment.¹¹ When sex is a “bona-fide occupation qualification,”¹² though, an educational institution may indicate a preference, limitation, specification, or discriminate based on sex in that job. For example, an educational institution may limit employment to a specific sex for jobs such as locker room or toilet facility maintenance, if members of one sex use the facilities. [[34 C.F.R. ss. 106.51 to 106.61.](#)]

Marital and Parental Status

Finally, Title IX prohibits certain actions related to a student or employee’s marital or parental status. When determining whether a person satisfies criteria for admission, an educational institution may not:

- Apply a rule concerning the actual or potential parental, family, or marital status of a student.
- Exclude an individual on the basis of pregnancy, childbirth, pregnancy termination, or recovery therefrom.
- Treat disability from a pregnancy condition differently than other temporary disabilities.
- Make a pre-admission inquiry of marital status.

[[34 C.F.R. s. 106.21 \(c\) \(1\) to \(4\).](#)]

Regarding programs and activities, an educational institution may not apply a rule regarding parental, family, or marital status that treats individuals differently based on sex. [[34 C.F.R. s. 106.40.](#)] Finally, an educational institution is prohibited from applying a policy that treats people differently based upon the potential marital, parental, or family status of an employee or applicant or based upon whether an employee or applicant is head of the household or principal wage earner. [[34 C.F.R. s. 106.57 \(a\) to \(c\).](#)]

¹¹ See [34 C.F.R. s. 106.51 \(b\)](#) for the full list of employment conduct subject to regulation.

¹² See [34 C.F.R. s. 106.61](#) for specifics on when sex is a bona-fide occupational qualification.

TITLE IX ENFORCEMENT

An institution that violates Title IX or its regulations may lose all federal funding.¹³ OCR is responsible for administrative enforcement of Title IX compliance by educational institutions. Before OCR may withhold funding, an educational institution must have an opportunity to come into compliance voluntarily. To assist with voluntary compliance, every educational institution subject to Title IX must designate a Title IX coordinator¹⁴ to coordinate the educational institution's compliance efforts. The Title IX coordinators' responsibilities include receiving reports of sex discrimination, contacting a sexual harassment complainant to discuss available supportive measures, implementing those supportive measures, and sometimes facilitating the grievance process for a sexual harassment complaint. [20 U.S.C. s. 1682; [34 C.F.R. ss. 106.8 \(a\), 106.30 \(a\) \(3\), 106.44 \(a\), and 106.45 \(b\).](#)]

Enforcement Through OCR Administrative Mechanisms

Complaint investigations, compliance reviews, and technical assistance are the administrative mechanisms through which OCR enforces Title IX. Anyone who believes a person or group has been discriminated against on the basis of sex may file a Title IX complaint with the Title IX coordinator of the educational institution or directly with OCR. After making some initial determinations, such as subject matter jurisdiction and timeliness,¹⁵ OCR may open an investigation, refer the complaint to another agency, or dismiss the complaint. In addition, OCR must "from time to time" initiate "periodic compliance reviews" in order to assess an educational institution's practices and determine whether those practices comply with Title IX. [[34 C.F.R. s. 100.7 \(a\).](#)] OCR has broad discretion in determining the substantive issues for investigation in a compliance review as well as the number of reviews needed. [[34 C.F.R. ss. 100.6 to 100.11, 101, and 106.81.](#)] Finally, OCR's technical assistance supports compliance efforts by educational institutions and informs individuals of their rights before and during a complaint resolution or compliance review. Technical assistance includes information and guidance documents such as notices of interpretation, "Dear Colleague Letters," webinars, on-site consultations, and other materials that clarify the position of the agency and assist educational institutions with compliance. [[5 U.S.C. s. 552 \(a\) \(1\) \(D\).](#)]

Should OCR find noncompliance with Title IX following a complaint or compliance review, OCR has the authority to terminate or refuse funding or may refer the case to the DOJ.¹⁶ Additionally, educational institutions are permitted to take remedial or affirmative action to address discrimination. Remedial action may be required by the Assistant Secretary of the U.S. Department of Education when he or she finds an educational institution discriminated against a person on the basis of sex in a way that violates Title IX. Affirmative action may be taken absent a finding of discrimination to remedy effects of conditions that resulted in limited participation by persons of a particular sex. [[34 C.F.R. s. 106.3.](#)] The regulations provide a specific example of this in acknowledging that an educational institution may be required to

¹³ Title IX's enforcement mechanism has been compared to that of a contract, because Title IX was enacted under the authority of the Spending Clause, U.S. Const. art. I, s. 8, cl. 1, and "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." [*Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).]

¹⁴ See Wisconsin Department of Public Instruction, [Title IX Coordinator Rules and Responsibilities Local School Districts](#), for more information about the role of a Title IX coordinator.

¹⁵ A complaint must be filed within 180 days of the last act of discrimination; however, a waiver may be requested for "good cause." OCR [Case Processing Manual](#), ss. 106 and 107, (August 26, 2020).

¹⁶ See OCR Case Processing Manual, ss. 601 and 602.

“undertake additional recruitment efforts for one sex” as remedial action or may choose to do so as an affirmative action. [34 C.F.R. s. 106. 23 (a).] Ultimately, most complaints and compliance reviews are resolved via a resolution agreement between the educational institution and OCR.

Enforcement Through Private Causes of Action

In addition to administrative mechanisms to enforce Title IX, an individual may also commence a court action to prevent or stop sex discrimination from occurring. In *Cannon v. University of Chicago*, the U.S. Supreme Court recognized a private right of action under Title IX that allows individuals to bring such enforcement actions in federal court. Under the Court’s interpretation, a person may obtain both injunctive relief (an order to require or prevent a specific action) and damages. Generally, individuals filing under Title IX need not exhaust administrative remedies before seeking judicial enforcement. [*Cannon* at 706-708, fn. 41.]

RECENT DEVELOPMENTS

Many issues have arisen over the years regarding the scope and application of Title IX. Recently, the policy debates have focused on issues related to sexual harassment and gender identity. The implementation of new sexual harassment regulations in 2020 renewed discussions of the grievance process and what obligations an educational institution has to victims and those accused. Additionally, there have been judicial decisions and OCR guidance documents pertaining to transgender students. These decisions and guidance, however, have not yet clarified whether, and if so how, Title IX addresses gender identity discrimination. This section briefly outlines the major changes¹⁷ in sexual assault protections in the 2020 regulations and Title IX’s applicability to gender identity.

Sexual Harassment

In 1992, the U.S. Supreme Court first recognized sexual harassment as a prohibited form of sex discrimination under Title IX. [*Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992).] Five years later, OCR recognized *quid pro quo* harassment (e.g., conditioning a particular grade on the performance of a sex act) and hostile environment sexual harassment (e.g., continual comments of a sexual nature in the classroom) as the two main forms of sexual harassment for which a school could be liable under Title IX. The following year, the Court limited that liability and held that a school may only be liable for monetary damages if a school official had actual knowledge of the harassment and acted with deliberate indifference. [*Gebser*, 527 U.S. at 285.]

OCR guidance documents¹⁸ and case law were the primary sources of guidance on Title IX’s protections against sexual harassment until 2020. In 2020, OCR went through the formal rulemaking process to update the Title IX regulations and included, for the first time, regulations on sexual harassment. While there are numerous differences between the pre-2020 guidance and the 2020 rules, the main differences relate to changes to the definition of sexual harassment based upon a hostile environment as well as when and how an educational institution must take action.

¹⁷ The changes to how an educational institution addresses sexual assault are not limited to those discussed in this information memorandum. In addition, at least one complaint has disputed the legitimacy of the 2020 regulations, arguing that the regulations are contrary to the text and purpose of Title IX and are arbitrary and capricious. [See *The Women’s Student Union v. U.S. Dept. of Educ.*, Case 3: 31-cv-01626 (filed March 8, 2021).]

¹⁸ For example, see the [2001 Revised Sexual Harassment Guidance](#) (Rescinded in 2020).

The Definition of Sexual Harassment

Prior to the 2020 regulations, there were different standards for hostile environment sexual harassment depending on whether an individual was seeking administrative enforcement or monetary damages through the court. For administrative enforcement, conduct had to be sufficiently severe, persistent, **or** pervasive to constitute hostile environment sexual harassment,¹⁹ while a lawsuit seeking monetary damages required the harassment be severe, persistent, **and** objectively offensive. [*Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (emphasis added).] The 2020 regulations align the administrative requirement with the higher standard required for monetary damages in a lawsuit. Under the 2020 regulations, conduct constitutes sexual harassment only when the conduct is so severe, pervasive, **and** objectively offensive that it effectively denies equal access to an education program or activity. [[34 C.F.R. s. 106.30 \(a\) \(2\)](#).]

When and How an Educational Institution Must Take Action

Prior to the 2020 rule promulgation, different standards applied in administrative enforcement actions and judicial actions regarding when an institution had notice of harassment and what actions the school was required to take to remain compliant with Title IX. Under the pre-2020 OCR guidance documents, if a responsible employee knew or reasonably should have known of possible sexual harassment, the educational institution was required to take immediate and appropriate steps to investigate or otherwise determine what occurred and respond promptly and effectively.²⁰ To obtain monetary damages through the court, however, the plaintiff is required to prove the educational institution had actual notice and responded in a deliberately indifferent manner. [*Gebser*, 524 U.S. at 290; *Davis*, 562 U.S. at 648.] The 2020 regulations adopted the higher notice and action requirements set forth for monetary damages. Therefore, under current regulations, a violation of Title IX occurs when an educational institution has **actual knowledge** of sexual harassment and responds in a **deliberately indifferent** manner. [[34 C.F.R. ss. 106.30 \(a\) and 106.44 \(a\)](#) (emphasis added).]

Gender Identity and Title IX

In addition to discussions about the sexual harassment regulations, there are nationwide debates regarding whether, and if so how, Title IX applies to gender identity. State legislatures, including the Wisconsin Legislature, have primarily debated the application of Title IX to transgender participation in athletics. There are broader questions, though, about whether Title IX protects transgender individuals more generally. Title IX's language does not explicitly address whether discrimination on the basis of someone's gender identity is prohibited discrimination "on the basis of sex." In addition, over the last decade, OCR has modified its guidance on gender identity. As a result of an absence of clarity, plaintiffs are bringing Title IX challenges in federal courts regarding discrimination on the basis of gender identity at educational institutions. There is ongoing litigation in federal district²¹ and appellate courts²² and it remains to be seen what the response will be, if any, from the U.S. Supreme Court. This

¹⁹ Department of Education, Office for Civil Rights, [Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties](#) (Jan. 2001).

²⁰ *Id.* at p. 13.

²¹ For example, *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018).

²² For example, *Adams v. Sch. Bd.*, 968 F.3d 1286 (11th Cir. 2020), vacated by *Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369 (11th Cir. 2021).

section discusses the judicial and administrative developments that may be relevant should such a Title IX case arise.

Judicial Treatment of Gender Identity Discrimination Claims

In the summer of 2020, the U.S. Supreme Court in [*Bostock v. Clayton County*](#), 590 U.S. ___ (2020), considered whether discrimination based on sex includes discrimination based on sexuality and gender identity in the employment context. The Supreme Court held that Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, color, religion, sex, and national origin, prohibits an employer from discriminating “on the basis of,” or because of, a person’s sexuality or gender identity. The U.S. Supreme Court has not addressed discrimination based on sexuality and gender identity in the context of Title IX. *Bostock* is significant to the discussion of how Title IX applies to gender identity because the opinion provides insight regarding how a court might interpret similar nondiscrimination language in Title IX.

Federal court precedent provides some guidance on what a court may consider when determining whether the *Bostock* analysis applies to a Title IX case. However, courts have not consistently applied the same analyses to Title VII and Title IX claims. Specifically, prior to *Bostock*, some federal courts drew from Title VII when interpreting Title IX protections while other courts distinguished the two statutes. For example, in *Franklin*, 503 U.S. 60 (1992), the U.S. Supreme Court used the reasoning in Title VII case precedent to recognize sexual harassment as a form of sex discrimination under Title IX. Conversely, three years later in *Gebser*, the U.S. Supreme Court upheld the dismissal of a Title IX sexual harassment claim in part by distinguishing Title IX from Title VII because of the differences in statutory language and the statutorily provided remedies. [524 U.S. at 285-287.] Throughout the intervening decades, the U.S. Supreme Court both considered Title VII jurisprudence as applicable in Title IX cases and distinguished the two statutes. When distinguishing Title VII from Title IX, the court cited certain aspects of Title IX as significant. Specifically, courts have noted that Title IX conditions federal funding on compliance, its exceptions, and the mechanisms of enforcement.

Although the U.S. Supreme Court has not addressed discrimination based on sexuality and gender identity in a Title IX challenge, the Seventh Circuit recently reviewed a transgender student’s Title IX claim and relied upon Title VII analysis. In [*Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*](#), 858 F.3d 1034 (2017), the court held that it was a violation of sex discrimination under Title IX for an educational institution to prohibit a transgender student from using the bathroom that aligned with his gender identity. The court cited precedent for relying upon Title VII analysis and held that a policy requiring “an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” [*Whitaker*, 858 F.3d at 1047-49.] In a similar case post-*Bostock*, the Fourth Circuit applied *Bostock* to hold that a school could not prohibit a transgender student from using the bathroom that aligned with his or her gender identity. [*Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-618 (4th Cir. 2020).]

Administrative Treatment of Gender Identity Discrimination

In addition to recent Title IX court interpretations, OCR has revised the administrative guidance relating to Title IX and its applicability to discrimination based on sexuality and gender identity.

OCR first issued guidance on the application of Title IX to discrimination based on gender identity in 2010. The guidance addressed how Title IX applied to transgender students in the area of athletics and bathroom and locker room facilities, and stated that Title IX extends to claims of discrimination based on gender identity. In 2016, OCR followed up with a [“Dear](#)

[Colleague](#)” letter affirming OCR’s position that Title IX prohibits recipients from treating transgender students differently than other students of the same gender. [OCR, [Questions and Answers on Title IX and Sexual Violence \(April 4, 2011\)](#); and OCR and U.S. DOJ, [Dear Colleague Letter](#), (May 14, 2016).]

In 2017, OCR rescinded both documents on the basis that the guidance documents did not contain extensive legal analysis or explain how they were consistent with the language of Title IX, and that they did not undergo a formal process. OCR also cited conflicting federal court decisions and noted the role of states and local school districts in establishing educational policy as a reason for rescinding the earlier “Dear Colleague” letter. [OCR and U.S. DOJ, [Dear Colleague Letter](#), (February 22, 2017).]

In August 2020, OCR issued a [letter of impending enforcement action](#), in response to a complaint brought by high school student athletes in Connecticut, *Soule et al. v. Connecticut Ass’n of Schls, Inc. et al.*, No. 3:2020-cv-00201-RNC. In its letter, OCR concluded that allowing transgender girls to compete on girls’ or women’s athletic teams discriminates against women in violation of Title IX, despite the U.S. Supreme Court’s ruling and analysis in *Bostock*. OCR emphasized that “unlike Title VII, one of Title IX’s crucial purposes is protecting women’s and girls’ athletic opportunities,” and Title IX’s purpose is furthered by dividing athletes by sex, unlike in the employment context at issue in *Bostock*. OCR [withdrew](#) this letter in 2021. OCR noted that, while the letter was presented as a formal statement of OCR’s interpretation of Title IX, the letter should not be used as such because it did not go under the requisite review.

In June 2021, OCR again issued revised guidance, which is currently in effect. Specifically, OCR issued a [notice of interpretation](#) stating, “the Department interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation.”²³ OCR determined that this guidance is consistent with the holding in *Bostock* and that *Bostock* is applicable given: (1) the textual similarities between Title VII and Title IX; (2) case law applying *Bostock*’s reasoning to Title IX; and (3) the DOJ’s conclusion that *Bostock*’s analysis applies to Title IX. Regarding textual similarities, OCR identified that both statutes prohibit sex discrimination and specifically protect individuals. In addition, neither statute contains an exception for sex discrimination based on an individual’s sexual orientation or gender identity. The Biden administration also issued an executive order that “laws that prohibit sex discrimination – including Title IX ... prohibit discrimination on the basis of gender identity or sexual orientation.”²⁴

This information memorandum was prepared by Abby Moe, Legal Intern, and Melissa Schmidt, Senior Staff Attorney, on December 7, 2021.

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²³ 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*, [86 Fed. Reg. 32637](#) (Jun. 22, 2021).

²⁴ [Executive Order 13988](#), *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan. 20, 2021).