

No Question: OCR Recognizes Sexual Orientation and Gender Identity Discrimination as Violation of Title IX

Education Law Notes

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In a somewhat unsurprising development, the United States Department of Education’s Office for Civil Rights [OCR] has issued a new interpretation of Title IX, recognizing that it prohibits discrimination on the basis of sexual orientation and gender identity. OCR’s interpretation follows, and is based upon, the United States Supreme Court’s 2020 decision in *Bostock v. Clayton County*, in which the Court arrived at the same conclusion in the context of Title VII’s proscription against workplace, gender-based discrimination. This interpretation constitutes a reversal of a Trump-era policy, for in the immediate aftermath of *Bostock*, OCR had

vigorously denied that its holding applied to Title IX, protestations that were analogous to watching a bad ventriloquist – OCR claimed to be talking, but you could see the Administration’s lips move.

Relying on *Bostock*, OCR quoted the Supreme Court’s reasoning therein, writing both “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,’” and that “when an employer discriminates against a person for being gay or transgender, the employer necessarily discriminates against that person for ‘traits or actions it would not have questioned in members of a different sex.’” OCR further cited the concrete examples Justice Gorsuch employed in order to illustrate the practical application of the Court majority’s reasoning.

OCR additionally dismissed arguments that Title VII and Title IX were distinguishable because they use different language, regarding them as little more than ointment in search of a fly. As OCR correctly opined, Title VII’s “because of . . .sex” and Title IX’s “on the basis of sex” is a distinction without a difference, particularly given that in *Bostock*, the Court “used these two phrases interchangeably.” Furthermore, OCR noted that both statutes are designed to protect *individuals*, that neither one contains an exception that would exclude sexual orientation or gender identity, and that both are what are considered “remedial” statutes, and as such are intended to be construed broadly in favor of those they are designed to protect.

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In further justifying its new interpretation of Title IX, OCR essentially admitted that it was late to the party. It cited federal court decisions that had already applied *Bostock* to Title IX, and noted that on March 26, 2021, the United States Department of Justice's Civil Rights Division had issued a memorandum, extending Title IX's proscriptions to "discrimination on the basis of gender identity and sexual orientation."

Consequently, based upon this new interpretation, OCR advised that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department." To further clarify, OCR warned that this would include "allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently." Thus, OCR shall "carefully review[] allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways."

As is often the case with any shifts in governmental policy, there are some questions that remain to be answered. Perhaps the most notable is the extent to which OCR's enforcement will be used against religious schools that have sincerely held doctrinal beliefs that are at odds with this extension of Title IX's protections to cases involving sexual orientation or gender identity. Until that potential collision occurs, however, educational institutions that receive federal funds are on notice that the scope of their preexisting Title IX policies and practices must be reevaluated and expanded.

Posted in Discrimination, Title IX, Transgender

Tags: Office for Civil Rights (OCR), U.S. Department of Education