



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

July 17, 2020

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

Possible Impact of *Bostock v. Clayton County, Georgia*

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.

Questions have been raised as to how far this decision will extend, including whether it will extend to Title IX and to the Department of Education’s regulations on sexual harassment under Title IX. The answer is still up in the air. As noted, *Bostock* and its companion cases before the Court involved the discharge of employees, who are protected from sex discrimination under Title VII. The Court’s reasoning would also seem 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 states:

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.

Slip opinion at 18-19. 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 prejudge 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.



such question today." *Id.* at 31. 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...

Id. at 21.

Given the limitations and cautions in the Court’s decision, it is 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 will 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. This includes the possible applicability to sex- or gender-based harassment, i.e., whether harassment based on sexual orientation or gender identity is prohibited by Title IX.² Actions by OCR (including the February 2017 withdrawal of the May 2016 Dear Colleague Letter on Transgender Students and the May 2020 Connecticut Interscholastic Athletics Association resolution letter regarding participation of transgender students in athletics) might suggest that for its part, the current OCR will attempt to distinguish or limit the *Bostock* decision’s applicability to Title IX.

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. If OCR or court action does not apply *Bostock*’s definition of sex to Title IX, complaints of such harassment may be addressed through a school’s code of conduct or HR procedures rather than its Title IX procedures.

² The complaint process set out in § 106.45 is for complaints of sexual harassment, defined in § 106.30 as including “unwelcome conduct on the basis of sex” – a change from the definition in the Department’s previous guidance of “unwelcome conduct of a sexual nature.” Note 670 in the Preamble explains that the regulations include both conduct of a sexual nature as well as conduct devoid of sexual content that targets a particular sex – what is often called sex- or gender-based harassment. If OCR adopts the Court’s definition of sex for Title IX purposes, harassing conduct of a non-sexual nature based on sexual orientation or gender identity would seem to fall under the new regulations.



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