

Insights

WHAT CONSTITUTES SEX DISCRIMINATION?

BIDEN EXECUTIVE ORDER FORESHADOWS SIGNIFICANT CHANGES IN TITLE IX FOR INSTITUTIONS OF HIGHER EDUCATION

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Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

As one of his first acts as president, President Biden issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (the “EO”) that is likely to have far-reaching impact on institutions of higher education subject to Title IX and other laws preventing discrimination on the basis of sex. Biden formalized his commitment to combatting discrimination on the basis of gender identity and sexual orientation, and clarified his view that “laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.” This proclamation that in all contexts in which sex discrimination is barred that discrimination based on gender identity and sexual orientation likewise are prohibited, as the Supreme Court found was the case under Title VII in *Bostock v. Clayton County*, 590 U.S. __ (2020), promises significantly expanded protections for the LGBTQ+ community.

To implement those heightened protections, the EO directs all federal agencies to undertake an extensive review of all existing orders, regulations, guidance documents, policies, programs or other agency actions that were promulgated or administered to prohibit sex discrimination to determine if they are consistent with the position that prohibitions on sex discrimination prohibit discrimination based on sexual orientation or gender identity. Within 100 days of the EO (i.e., by May 1, 2021), each agency will have to prepare a plan to carry out any actions necessary to revise, suspend or rescind existing agency actions, or to promulgate new actions, to fully implement all statutes that prohibit sex discrimination based on this expanded understanding of what constitutes sex discrimination. This mandate will have particular importance for institutions subject to Title IX based on the direct conflict with edicts issued by the Department of Education’s Office of Civil Rights (the “OCR”) under Trump. This alert addresses only the Title IX implications, but more than 100 federal laws addressing sex discrimination will be subject to review based on the implementation of *Bostock*.

Likely Impact on Bathroom and Intimate Facilities Policies

The Trump administration's OCR took the position that Title IX's bar on discrimination on the basis of sex did not preclude discrimination on the basis of gender identity or sexual orientation in the context of intimate facilities, such as bathrooms or locker rooms, because "sex" means "biological sex." This position was reiterated as recently as January 8, 2021, by OCR even though the Fourth and Eleventh Circuits have relied on *Bostock* in holding that discrimination on the basis of gender identity with respect to access to bathrooms is illegal discrimination on the basis of sex.

Institutions should anticipate the Biden administration adopting this position when implementing *Bostock* and requiring institutions to change any bathroom policies that bar transgendered individuals from utilizing facilities designated for the sex with which they gender identify. Similar changes may be required in relation to policies regarding the use of locker rooms, dormitories, and other facilities to which access may be limited based on sex, though one could see less aggressive guidance being developed to govern shared facilities, as opposed to gendered bathrooms.

Potential Impact on College Athletics

In the context of collegiate athletics, the Trump administration's OCR took the position that sex segregation in sport should be on the basis of biological sex, without regard to transgender status or sexual orientation, in order to comply with Title IX. This led the OCR to declare that policies allowing transgendered girls, for example, to participate in girls sports violate Title IX. This position will be a clear target for review under the EO. The nature of the changes to that policy that will come out of that review is less clear.

We may see the OCR recommend a blanket rule permitting transgendered athletes to participate in sports based on their gender identification, without regard to the status of the athlete's transition or hormone treatment. Such an approach would probably draw significant push-back, with a more likely outcome being a set of rules akin to those adopted by many Olympic sports or the NCAA, which have particular focus on trans-women athletes, and condition participation on completing certain hormone therapies. We may see an even more nuanced set of guidance that also takes into account legitimate safety concerns in certain female contact sports like rugby or that accommodates the realities of competitive advantages that persist at least for a period during and after a trans-athlete's transition.

Equally possible, however, is the possibility that the OCR proposes maintaining restrictions limiting trans-athlete participation on the grounds that trans-athletes are not similarly situated to athletes of the opposite biological sex. The *Bostock* decision recognized that treating differently persons who were similarly situated constitutes discrimination in the employment context. In the context of sport, advocates for excluding trans-women from female sport have argued that the physiological differences between biological women and trans-women mean they are not actually similarly situated, rendering discriminatory treatment permissible. One therefore could imagine a scenario in which the OCR proposes rules that do not mandate treating trans-women akin to

female athletes for the purposes of sport, while allowing trans-men, who do not have the same physiological competitive advantages post-transition, to compete in men's sport as currently permitted by the NCAA.

We will be monitoring the outcome of the agency review of Title IX-related agency actions, and will provide further updates as agency proposals are published. It would be prudent for all institutions of higher education to review and evaluate all non-discrimination policies and procedures in light of these changes. Institutions with questions about how the EO and the resulting agency actions may impact your policies and procedures, or looking for assistance in conducting an internal audit of affected policies and procedures, can contact sarah.hartley@bclplaw.com or the BCLP Higher Education Team for guidance.

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