



CLIENT ALERT

Title IX Update: LGBTQ+ Students

Title IX of the Education Amendments of 1972 (Title IX) is recognized as landmark legislation that has helped break down barriers to education created by sexual discrimination. Title IX applies to all educational institutions that receive Federal financial assistance, including their recruitment, admissions, counseling, financial assistance, athletics, and discipline processes and programs. It also provides protections against sex-based harassment, including sexual assault and other forms of sexual violence, and affords equal access to classes and activities to all students without regard to sex. The U.S. Department of Education’s Office for Civil Rights (OCR) acknowledges that, while much progress has been made under Title IX to ensure that all students have equal access to educational opportunities, there is still more to do.

Last week, OCR issued new guidance clarifying the application of Title IX to discrimination based on sexual orientation and gender identity. OCR has long recognized that Title IX protects all students, including lesbian, gay, bisexual, transgender, queer and intersex (LGBTQ+) students, from harassment and other forms of sex discrimination. OCR has also long recognized that Title IX prohibits harassment and other forms of discrimination against all students for their nonconformance with stereotypical notions of masculinity and femininity. Nevertheless, in the past, OCR has sometimes stated that Title IX’s prohibition against sex discrimination does not encompass discrimination based on sexual orientation and gender identity.

The U.S. Supreme Court has never issued a decision on the application of Title IX’s prohibition against sex discrimination to discrimination on the basis of sexual orientation and gender identity. However, a recent Supreme Court case concerning a claim of workplace discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) has triggered a re-evaluation of Title IX. In Bostock v. Clayton County 140 S. Ct. 1731 (2020) (Bostock), the U.S. Supreme Court determined that the Title VII prohibition against discrimination “based on sex” includes discrimination based on sexual orientation and gender identity. Concluding that this interpretation flows from the statute’s “plain terms,” the Court asserted that “it is impossible to discriminate against a person” because of their sexual orientation or gender identity “without discriminating against that individual based on sex.”

The new OCR guidance makes clear that the U.S. Department of Education interprets Title IX’s prohibition against sex discrimination to include discrimination based on sexual orientation and general identity. The guidance states that the same reasoning used by the U.S. Supreme Court in the Bostock case applies whether the individual who is discriminated against is an adult in a workplace, or a student in a school. The OCR guidance notes the similarity between the language and purpose of Title IX and those of Title VII, the fact that numerous federal courts

recognize that Title IX's prohibition against sex discrimination encompasses discrimination based on sexual orientation and gender identity, and that a similar conclusion was reached by the U.S. Department of Justice's Civil Rights Division. In its new guidance, OCR commits to fully enforcing Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the U.S. Department of Education.

The Title IX legal landscape is shifting. New Title IX regulations were issued during the final days of the last administration, in December 2020. The U.S. Department of Education convened a virtual public hearing on Title IX, and has stated that it is reviewing comments received and expects to issue a notice of proposed rulemaking to amend the Title IX regulations. OCR has announced that it plans to release a Q&A document in the interim to address schools' existing obligations under the current Title IX regulations issued in December 2020.

Krokidas & Bluestein will present a Title IX webinar for the Massachusetts Charter Public School Association at noon on September 30th. Additional information about the webinar will be forthcoming. In the meantime, if you have any questions about Title IX or other student affairs matters, please contact Elka Sachs (esachs@kb-law.com) or Allison Lennon (alennon@kb-law.com).

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