

U.S. Department of Education Announces Title IX Applies to Discrimination Based on Sexual Orientation and Gender Identity

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Notice of Interpretation

On June 16, 2021, the U.S. Department of Education (DOE) issued a Notice of Interpretation (Notice) explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity. This Notice can be found at: <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

While this Notice does not have the force and effect of law, it reflects DOE's current position on Title IX, which has changed over the past few years as administrations have changed. This Notice also reaffirms that DOE's Office for Civil Rights (OCR) will again investigate complaints of discrimination based on sexual orientation and gender identity and will address compliance concerns or violations when necessary, a practice that was halted during the past administration. In fact, OCR stated that it will investigate "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 benefits of such programs or activities or otherwise treated differently because of their sexual orientation or gender identity.”

Other Interpretations

Earlier this year, the U.S. Department of Justice came to the same conclusion as DOE: that Title IX protects against discrimination based on sexual orientation and gender identity. This reflects a shift from the prior administration and stems from the United States Supreme Court’s decision in *Bostock v. Clayton County* in June 2020, wherein the Court concluded that under Title VII of the Civil Rights Act of 1964, sex discrimination by an employer encompasses discrimination on the basis of sexual orientation and gender identity. *Bostock* determined that such discrimination is necessarily based on sex as the individual is treated differently because of “traits or actions [that] would not have been questioned in members of a different sex.” DOE concludes that this holding provides support for its interpretation of Title IX because the laws have similar language and because courts and agencies often look to the interpretation of Title VII when interpreting Title IX.

Effect on School Districts

School districts should take careful note of DOE’s recent Notice and review nondiscrimination policies and procedures with respect to sexual orientation (which is already protected under Wisconsin law) and gender identity.

While nondiscrimination (including harassment) policies need not explicitly include sexual orientation and gender identity as subsets of “sex” to avoid OCR scrutiny, there are sound reasons to consider including them. Board policy is the primary tool for communication between the Board, administration, staff, students, parents, and the larger school community. Expressly declaring that sexual orientation and gender identity are encompassed within these policies provides direction to administration and staff and affirms the Board’s commitment to ensuring a safe and supportive school environment for LGBTQ+ students and other members of the school community. Likewise, while a formal board policy specific to the rights of

LGBTQ+ students may not be required, developing one offers the opportunity for dialogue and collaboration within a controlled process that underscores respect and acceptance.

If policies and procedures do not specifically identify sexual orientation and gender identity, districts must ensure that they are interpreted to include them and implemented such that students are not denied participation in district programs or activities, harassed, or otherwise treated differently because of their sexual orientation or gender identity. To this end, administration and staff may benefit from additional training to understand the full range of a district's obligations under Title IX. Further, in the absence of formal policies, districts may wish to develop informal guidelines or procedures to address issues specific to LGBTQ+ students including preferred names and pronouns, facility use, and participation in extracurricular activities.

If a district's policies and practices are not aligned with DOE's interpretation of Title IX, the district may be at heightened risk for an OCR complaint or compliance review. Protecting the rights of LGBTQ+ students is a priority of DOE, and as such, DOE has directed OCR to increase its enforcement efforts to ensure that students are not discriminated against on the basis of sexual orientation or gender identity. Districts should expect more OCR enforcement action as DOE's efforts unfold.

Boardman Clark attorneys are available to assist you in reviewing your policies, developing guidelines or procedures, or answering any questions you might have regarding this Notice.

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