

Biden Administration Relies on Supreme Court Decision to Bolster LGBTQ+ Protections for Students and Employees

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Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employers from discriminating against any individual “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). [Title IX](#) of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex at educational institutions that receive federal funds, which includes all public schools from elementary through college-level institutions, as well as private colleges and universities that receive federal loan money through their financial assistance programs. 20 U.S.C. § 1681. Federal courts generally interpret Title VII and Title IX in tandem, such that the prohibitions of discrimination on the basis of sex carry the same meaning in both statutes. However, the meaning of [discrimination on the basis of sex](#), and whether it extends to [discrimination on the basis of sexual orientation and gender identity](#), was an unsettled question until the Supreme Court decided *Bostock v. Clayton County* in 2020.

In recent years, the agencies responsible for the enforcement of Title VII and Title IX have taken conflicting positions on the meaning of sex in these statutes and each presidential administration has offered new and differing interpretations of these protections. This article traces the evolution of these interpretations through the Obama, Trump, and Biden administrations, then outlines how the *Bostock* decision has largely resolved this debate and provided firm footing for the Biden Administration’s current interpretation and enforcement of these protections. This history and the Court’s analysis highlight the fragility of the idea that sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity, making it clear that Congressional action may be required to provide a firmer foundation for these protections.

The Obama administration interpreted Title VII and Title IX to protect LGBTQ+ employees, but these strides were tenuous.

The Equal Employment Opportunity Commission (“EEOC”), the federal agency established to enforce federal laws that prohibit employment discrimination, determined in 2012, in a case brought by a federal employee, that Title VII’s prohibition of discrimination in employment on the basis of sex also prohibits discrimination in employment on the basis of gender identity. The five-person bi-partisan commission, which at the time was composed of four Obama appointees, one of whom was a Republican, determined that transgender discrimination, including discrimination because an employee does not conform to gender norms or stereotypes, is sex discrimination in violation of Title VII based on a plain interpretation of the statutory language prohibiting discrimination because of sex. [Macy v. Dep’t of Justice](#), EEOC

Appeal No. 0120120821 (Apr. 20, 2012).

The Department of Justice soon after adopted the EEOC's position. On December 15, 2014, Attorney General Eric Holder circulated a [memo](#) announcing that the Department of Justice would take the position in litigation that Title VII protections extend to claims of discrimination based on an individual's gender identity, including transgender status.

Also under President Obama, the EEOC interpreted Title VII to prohibit discrimination on the basis of sexual orientation. In *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), a Commission-voted decision in another federal employee case involving a failure to permanently hire an individual as an air traffic controller, the Commission concluded that a claim alleging discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

Meanwhile, on October 26, 2010, the Department of Education under President Obama issued [guidance](#) clarifying that Title IX protects LGBT students from harassment on the basis of sex stereotypes. The guidance stated that, although Title IX does not prohibit discrimination based on sexual orientation, "[t]he fact that the harassment [of a hypothetical gender non-conforming student] includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment."

On May 13, 2016, the U.S. Departments of Justice and Education under President Obama jointly issued a [Dear Colleague letter](#) stating that Title IX's prohibition of discrimination on the basis of sex encompasses discrimination based on gender identity. The Obama Administration's letter offered guidance to schools on issues including access to restrooms, locker rooms, and similar facilities; equal participation in educational programs and activities; and recordkeeping and privacy.

While many praised these interpretations as commitments to protect the civil rights of LGBTQ+ students and workers, the interpretations were also met with strong resistance, particularly from states in the South and Midwest. In 2016, a total of [twenty-three states](#) filed federal lawsuits challenging the Obama administration's interpretations of Title VII and Title IX. One lawsuit, brought by thirteen states led by Texas, alleged that the Education and Justice Departments "have conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights." The plaintiff states dropped the lawsuits when the Trump Administration rescinded the challenged guidance.

The Trump Administration never achieved a coherent position, but generally favored interpretations of Title VII and Title IX that revoked LGBTQ+ rights.

On February 22, 2017, the Departments of Justice and Education under President Trump [withdrew and rescinded](#) the guidance interpreting Title IX to prohibit discrimination on the basis of gender identity. To justify the reversal, the Departments claimed that the Obama-era interpretation lacked extensive legal analysis and gave rise to significant litigation. The

Trump Administration further claimed that “due regard” must be given to the role of state governments and local school districts in establishing “educational policy.”

At the same time, executive agencies disagreed about whether to interpret Title VII to protect transgender employees. On October 4, 2017, the EEOC argued *EEOC v. Harris Family Funeral Homes* before the Sixth Circuit Court of Appeals, advancing the position it had taken throughout the litigation, originally filed in 2015, that discrimination on the basis of gender identity is a form of prohibited sex discrimination. That same day, Attorney General Jeff Sessions circulated a [memo](#) articulating the Justice Department’s position that “Title VII’s prohibition on sex discrimination . . . does not encompass discrimination based on gender identity.” When the Sixth Circuit decided *Harris* in favor of the EEOC on March 7, 2018, the Justice Department [asked](#) the Supreme Court to reverse the decision, and when the Court took the case, the Solicitor General filed the government’s brief and argued the government’s position that Title VII’s prohibition on sex discrimination does not extend to LGBTQ individuals.

In *Bostock*, the Supreme Court provided a definitive interpretation of sex discrimination.

In June 2020, [the Supreme Court ruled in *Bostock v. Clayton County*](#), 140 S. Ct. 1731 (2020) that an employer who discriminates against a gay, lesbian, or transgender worker is discriminating against that individual “because of such individual’s . . . sex” in violation of Title VII. This decision firmly established that Title VII’s prohibition of discrimination on the basis of sex extends to discrimination on the basis of sexual orientation or gender identity. The Court expressly noted that it was not deciding the meaning of sex in any other federal statute, but lower courts have applied the Court’s reasoning to Title IX’s prohibition of sex discrimination. The Trump administration’s Department of Education [argued](#) that Title IX is too different to be controlled by the analysis of Title VII in *Bostock* and has also expressed its view that the Court’s interpretation of the meaning of sex has no impact on the meaning of sex in the Fair Housing Act or the Affordable Care Act. For example the Department of Housing and Urban Development issued [regulations](#) permitting discrimination against transgender individuals in homeless shelters and expressing the view that sex means biological sex at birth. And the Department of Health and Human Services issued [guidance](#) stating it would recognize “sex discrimination according to the plain meaning of the word ‘sex’ as male or female and as determined by biology.”

The Biden Administration interprets Title VII and Title IX consistently with the Obama Administration, and consistently with *Bostock*, to protect LGBTQ+ students and employees from discrimination.

On his first day in office, President Biden issued an [executive order](#) declaring that prohibitions on discrimination on the basis of sex cover discrimination on the basis of gender identity and sexual orientation. The sweeping executive order relied on *Bostock*’s interpretation of Title VII, and extended that interpretation to other federal laws that prohibit sex discrimination, including Title IX. Additionally, the order calls on agencies across the federal government to review existing regulations and policies that prohibit sex discrimination, and to revise them as necessary to clarify that “sex” includes sexual orientation and gender identity.

Consistent with President Biden's order, the Department of Education now interprets Title IX as the Obama Administration did. Citing *Bostock*, and noting that courts look to interpretations of Title VII to inform interpretations of Title IX, the Department of Education issued a [Notice of Interpretation](#) on June 16, 2021, declaring that the Department interprets Title IX's prohibition of sex discrimination to encompass discrimination based on sexual orientation and gender identity. According to the guidance, the Department's Office of Civil Rights "has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination."

These interpretations are important because they inform the Administration's enforcement of civil rights laws. Under President Biden, the Department of Education is [committed](#) to 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 Department. When the Department receives a complaint within its jurisdiction, the Education Department's Office of Civil Rights ("OCR") will investigate allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. Where OCR's investigation reveals an individual has been discriminated against, 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 because of their sexual orientation or gender identity, the OCR will seek to resolve the dispute, either by negotiating a voluntary compliance agreements with the institution, or in some case, by requesting that the Department of Justice file a lawsuit.

On the employment side, if an employer with 15 or more employees discriminates against an employee because of that employee's gender identity or sexual orientation, that employee can file a charge of discrimination with the EEOC. The EEOC investigates charges of discrimination, and if it finds that discrimination has occurred, may try to negotiate a settlement, or in some cases, may file a lawsuit on the employee's behalf. And unlike under the Trump Administration, the Biden Department of Justice will not oppose the EEOC's enforcement of civil rights laws. The EEOC promulgated [guidance](#) in mid-June 2021 that explains the Court's decision in *Bostock*, and several members of Congress have asked the agency to "undo" what they have called "radical" *Bostock* guidance.

The Administration's interpretations of civil rights laws determine whether individuals subject to discrimination can turn to the federal government for protection and enforcement of their rights. Under the Biden Administration, they can.

Conclusion

Although the Obama Administration interpreted Title VII and Title IX to protect LGBTQ+ students and employees, these interpretations were tenuous because they were based on unsettled law. The unresolved legal landscape invited substantial litigation and allowed the subsequent administration to rescind these interpretations and their corresponding protections. The Trump Administration sought to interpret the Supreme Court's *Bostock* decision on exceedingly narrow grounds, and [denied](#) that the Court's interpretation of sex

discrimination in Title VII informed the interpretation of sex discrimination in Title IX. Federal courts, however, have overwhelmingly held that *Bostock* informs interpretations of Title IX. To date, not a single federal court of appeals has denied that *Bostock*'s reasoning – that sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity – applies to interpretations of Title IX.

Future administrations could decline to follow the weight of judicial authority, and could elect to interpret *Bostock* narrowly, as the Trump Administration did. This remains a risk unless and until the Supreme Court makes clear that *Bostock*'s reasoning applies to Title IX, and other federal statutes prohibiting discrimination on the basis of sex, or until Congress enacts legislation such as the Equality Act, which would remove all doubt about the meaning of sex in the anti-discrimination statutes. In the meantime, all who care about the rights of LGBTQ+ Americans should applaud the Biden Administration's actions to protect the LGBTQ+ community. And given the trend of judicial decisions, the Biden Administration's interpretations of these statutes, and its corresponding regulations protecting LGBTQ+ students and employees, are likely to remain in place through future Administrations.