



Diversity and the Law: 2021

**THE EVOLVING DEFINITION OF “SEX”  
UNDER FEDERAL NON-DISCRIMINATION LAW<sup>1</sup>**

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*This document provides a brief overview of developing law that extends the federal nondiscrimination law definition of “sex” to include gender identity and sexual orientation.*

**Introduction.** Federal nondiscrimination laws in both the employment/faculty and education/student contexts prohibit sex discrimination. Court interpretations of federal nondiscrimination statutes reflect an expansion of the definition of “sex” over time, extending the reach of nondiscrimination law to include: coverage of discrimination when based on sex or gender stereotypes, as well as when directed at individuals because of their gender identity or sexual orientation.

In the employment arena, the U.S. Supreme Court ruled in 2020 that Title VII’s prohibition against sex discrimination in employment generally extends to discrimination against individuals on the basis of their gender identity and sexual orientation. And, although the Court has not ruled on this question in the student context all federal appeals courts in recent years have affirmed the extension of Title IX’s non-discrimination protections to transgender and gay students. Correspondingly, the U.S. Department of Education’s (USED) 2021 enforcement guidance favors broad protection, relying on these cases; and relying on principles articulated by the U.S. Supreme Court in the employment context that it found relevant to the education context, consistent with prior authorities regarding the basic alignment of Title VII and IX principles.

The trends and key developments affecting students that align with the Court’s ruling in employment do not assure such an outcome for students—nor have all circumstances involving challenges in employment settings been resolved. Thus, as illustrated below, many issues await resolution by the high court.

Many institutions of higher education (IHEs) have mission-driven diversity and equity interests in the broadest definition of sex; and in using “gender” in Diversity and the Law Project resources to describe an IHE’s interest, we intend that broad definition to the greatest extent possible in the circumstances without running afoul of legal constraints.

**The Definition of “Sex” in Employment.** The Supreme Court has long held that the main federal non-discrimination in employment statute, Title VII,<sup>i</sup> prohibits sex discrimination against an individual because of his or her sex, which for decades has been deemed to include discrimination based on the individual’s nonconformance with stereotyped norms of a binary “biological” sex, and that prohibited sexual harassment can occur between individuals of the same sex.<sup>ii</sup>

In 2020, the U.S. Supreme Court expanded on those principles in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). In a 6 to 3 opinion, the Court found unlawful different treatment to exist, explaining:

Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their [binary or biological] sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.

Under the Court’s ruling, a Title VII violation occurs when, “but for” the plaintiffs’ biological sex, they would not have suffered the adverse employment action—even if there were other contributing factors for the action. Observing that Title VII used the word “sex” broadly, without including any exclusion from the definition, Justice Gorsuch applied the plain meaning of “sex” at the time of the statute’s enactment—which he indicated was only “biological” or “binary” sex. He reasoned: “An employer who

fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different [biological or binary] sex. Sex plays a necessary and undistinguishable role in the decision; exactly what Title VII forbids.” He further asserted that when a person who is biologically male is fired because he is attracted to men, he is being treated differently than a person who is biologically female and is attracted to men would be treated. That is discrimination based on sex.

On behalf of the Court majority, Justice Gorsuch also explained, that Congress did not create any exceptions to its broad use of the word “sex” in the statute and need not have had in mind all of the consequences of its language at the time of its enactment (e.g., effects on homosexuality, transgender status—or motherhood or sexual harassment of men for that matter). Rather, he concluded, the statute’s wording must be applied according to its plain meaning at the time of enactment—which he indicated was biological or binary sex—and treatment of individuals based on “homosexuality and transgender status are inextricably bound up with sex.”

The Court also specifically limited the scope of its ruling, refusing in this case to extend its logic to questions of: sex-segregated bathrooms; locker rooms and dress codes under Title VII or any other laws; any interpretation of Title IX,<sup>iii</sup> which prohibits sex discrimination in education programs of federally funded IHEs (among other entities receiving federal funding for broadly defined educational programs, including research); and the effect of First Amendment-protected free exercise of religion on claims involving sex discrimination.

***The Definition of “Sex” Affecting Students.*** Although the U.S. Supreme Court has not directly ruled on the question of Title IX’s prohibitions against “discrimination on the basis of sex,” federal appeals courts governing a number of the geographically-defined federal circuits around the country have included gender identity and expression, as well as sexual orientation, within the definition of “sex,”<sup>iv</sup> relying on Title IX and the 14<sup>th</sup> Amendment’s Equal Protection Clause. (Federal appeals courts in other federal circuits would not be bound, but may be influenced, by these decisions and by USED’s 2021 guidance.)

The U.S. Department of Education (USED) in 2021 published a Title IX enforcement guidance, *Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021). That guidance explains that:

- ◆ The nondiscrimination language of Titles VII and IX is similar,
- ◆ Both statutes protect individuals and neither includes exceptions from their broad mandate against “sex” discrimination;
- ◆ Federal circuit courts of appeal have recognized the extension of Title IX’s protections to gay and transgender individuals, consistent with the statutory purpose of Title IX;
- ◆ The logic of the extension of the Supreme Court’s *Bostock* analysis has been affirmed by the U.S. Department of Justice.

Thus, the guidance concludes that USED interprets *Bostock*’s rationale to apply to Title IX claims and determines that USED will be guided by *Bostock* in its investigations and enforcement of the statute.<sup>v</sup> Notably, agency enforcement guidance does not bind private litigants from asserting discrimination claims, when the Supreme Court has not directly decided an issue. However, agency enforcement guidance is helpful to inform institutional policies and the new USED guidance is well reasoned.

**Agency interpretations and the evolving legal landscape.** Note that agency enforcement guidance also can be easily rescinded to reflect differing interpretations of statutes as administrations change, when the Supreme Court has not directly decided an issue.<sup>vi</sup> Also, on August 31, 2021, 22 states' attorneys general filed a lawsuit challenging, the June 2021 guidance and related materials,<sup>vii</sup> in federal district court in Tennessee. The suit seeks to limit the U.S. Department of Education's extension to Title IX of *Bostock's* definition of sex under Title VII. Institutions should track this case because its outcome could affect consequential federal policy on sex non-discrimination law's protection of transgender students and employees.

We cannot predict the outcome of future cases or future administration policies that may raise these issues. However, if the Supreme Court is to make decisions that are consistent with its holdings in *Bostock*, then, putting aside a lack of clarity concerning the dimensions of a religious exercise exception which is still to be decided, it would be hard to justify the Court or an agency upholding discrimination against transgender people who seek to use bathrooms consistent with their gender identity in an employment or in an education context. The logic of *Bostock* has potentially broader implications than that, as law in this area further develops.

**Conclusion.** Federal court and agency trends are indicative of an expansion of coverage of federal non-discrimination statutes that prohibit discrimination because of (Title VII) or on the basis of (Title IX) sex to extend to gay and transgender individuals. But, not all circumstances of such protection (e.g., in circumstances where claims of religious rights may be in conflict) have been litigated. IHEs should continue to monitor developments on this set of issues.

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<sup>i</sup> “It [is] an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or...to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive [them] of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a).

<sup>ii</sup> The U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), held that Price Waterhouse’s failure to promote a woman to partner because she was insufficiently feminine constituted stereotyping based on sex and was a violation of Title VII, even if there were also other reasons for that decision. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), a case involving two male oil rig workers, the Court held that sexual harassment of a person of the same sex is covered by Title VII.

Without changing the meaning of “sex” for purposes of Title VII protection or the holding that there was a violation of the statute, the Supreme Court in *Comcast Corporation v. National Association of African American-Owned Media*, 140 S.Ct. 1009, 1017 (2020) superseded aspects of *Price Waterhouse* that affect remedies available for violations. In *Comcast*, the Court held that, by enacting the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), 2000e-5(g)(2)(B), Congress refined Title VII to provide that a plaintiff, who shows that discrimination was even a motivating factor in the defendant’s challenged employment decision, has violated Title VII and is entitled to declaratory and injunctive relief to at least stem the discriminatory conduct. Whether a plaintiff is also entitled to damages and reinstatement, however, depends on successfully claiming—“but-for” gender- (or race-) based discrimination (as the determinative consideration)—the defendant would not have taken adverse employment action against the plaintiff. A defendant may invoke lack of but-for causation as an affirmative defense only to stave off damages and reinstatement, not to avoid liability in general. While this case did not affect *Price Waterhouse’s* holding on the extent of Title VII’s protection from—or definition of “sex” discrimination—*Comcast* did limit the scope of available remedies for a violation in the absence of a “but for” discriminatory cause for the adverse employment action.

<sup>iii</sup> “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U. S. C. §1681(a). This provision is interpreted to apply institution-wide to IHEs that receive any federal funding for any purpose because their primary mission is education.

<sup>iv</sup> Governing IHEs in Pennsylvania, New Jersey and Delaware; Michigan, Ohio, Kentucky and Tennessee; Wisconsin, Illinois and Indiana; Washington State, California, Oregon, Montana, Idaho, Nevada, Arizona, and Alaska, the Federal Courts of Appeal for the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup> Circuits have ruled in favor of federal law protecting students against sex discrimination on the basis of gender identity in education. See, e.g., *Parents for Privacy v. Barr*, 2020 WL 701730 (9th Cir. 2020) (upholding the dismissal of a challenge to a public high school’s Student Safety Plan – which provided that transgender high school students may use the boys’ locker room and bathroom with their peers; the dismissal was based on failure to state a claim under Title IX where the plan treated all students equally and did not discriminate based on sex, and a determination that the normal use of privacy facilities does not constitute actionable sexual harassment under Title IX against cis-gender students just because a transgender student is using the facilities); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020) (The court cited *Bostock* for the proposition that Title VII prohibits discrimination against transgender people and that, applying those principles, Title IX does as well. Further citing *Bostock* the court reasoned, “[T]he School Board’s preferred definition of ‘biological sex’ reduces Mr. Adams ‘to nothing more than the sum of [his] external genitalia at birth,’ to the exclusion of other characteristics...[t]his understanding of ‘sex’ – or, for that matter, ‘biological sex’ – is as narrow as it is unworkable.” Either way, it was identity relating to sex that resulted in differential treatment); *vacated and reversed on other grounds by Adams v. School Board of St. Johns County, Florida*, 2021 WL 2944396, (11th Cir. 2021) (This revised opinion did not reach the Title IX question of the previous Court of Appeals. The Court held that the policy is arbitrary and runs afoul of the Fourteenth Amendment because it does not treat

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all transgender students alike and requires, without justification, that the School District rejected information on current government records in favor of outdated information provided at the time the student enrolled. Also, the designation of a student's sex on his school enrollment documents is not a "legitimate, accurate proxy" for assigning a student to a particular bathroom to protect student privacy. The Fourteenth Amendment requires a substantial, accurate relationship between a gender-based policy and its stated purpose and the policy lacks that relationship.) *Joel Doe, et al. v. Boyertown Area School District*, 897 F.3d 518 (3rd Cir. 2018); *cf.*, *Joel Doe, et al. v. Boyertown Area School District*, 897 F.3d 518 (3rd Cir. 2018) (denying a preliminary injunction that sought on constitutionally protected bodily privacy grounds to enjoin the School District from applying its policy to allow students to use bathrooms aligned with their gender identities, noting that—if strict scrutiny applies—the district's protection of transgender students against established severe psychological and other harm when they are denied use of facilities aligned with their identities is a compelling interest; the district's policy is narrowly tailored; a constitutionally protected privacy interest for other students is absent where single user bathrooms are available for all students' use for privacy reasons, without stigma; Title IX allows but does not require the provision of separate bathroom facilities; plaintiffs have not established sufficient facts of harm to find a hostile environment on the basis of sexual harassment under the facts; and citing with favor a sex stereotyping rationale in support of permitting use of bathrooms aligned with a student's gender identity) .*cert. denied*, 139 S. Ct. 2636 (2019).

*See also Whitaker et. al. v. Kenosha Unified School District No. 1*, 858 F.3d 1034, 1047-52 (7th Cir. 2017) (while declining to conclude that "transgender status is per se entitled to "heightened scrutiny" applicable to differential treatment of individuals on the basis of "sex," the court, in effect, applied that standard in upholding a preliminary injunction preventing a school district from enforcing a policy restricting a transgender boy from using school facilities aligned with his gender because the district failed to demonstrate a "genuine, but also 'exceedingly persuasive'" justification for punishing transgender students for "fail[ing] to conform to the sex-based stereotypes associated with their assigned sex at birth"); *Grimm v. Gloucester County School Board*, 400 F. Supp.3d 444, 456-58 (E.D. Va. 2019) (under Title IX, discrimination on the basis of transgender status constitutes gender stereotyping because, by definition, transgender persons do not conform to gender stereotypes). *Cf. Dodds v. United States Dept. of Educ.*, 846 F.3d 217 (6th. Cir. 2016) (holding that the eleven year old student should be granted the continued use of the girls' restroom since she had already been permitted to use the restroom of her choice, and this had "greatly alleviated her distress"; and not allowing her to continue to use the restroom of her choice would cause her to suffer irreparable harm); *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267 (W.D. Penn. 2017) (holding that transgender students were reasonably likely to succeed on the merits of their equal protection claim, but not their Title IX claim, due to the law of Title IX as it then applied to transgender students was "clouded with uncertainty"), and *Bd. of Educ. of Highland Local Sch. Dist. v. United States Dep't. of Educ.*, 208 F.Supp.3d 850 (S.D. Ohio, 2016) (holding that a Title IX claim is likely to succeed because differential treatment of transgender students is based on their sex and finding that transgender girl was denied access to the girl's restroom "on the basis of [her] sex," based on the Title IX implementing regulations and Sixth Circuit's interpretation of sex discrimination under Title VII,

<sup>v</sup> On August 31, 2021, 22 states' attorneys general filed a federal lawsuit challenging USED's June 2021 guidance. That challenge seeks to preclude the extension of *Bostock's* rationale to Title IX. IHE's should monitor this case, which has the potential to affect USED's enforcement policy.