

# HIGHER EDUCATION INFORMATION MEMO

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## Implications for Colleges and Universities of Expanded Legal Protections for LGBTQ+ Students, Faculty and Staff

In its *Bostock v. Clayton County, Georgia* ruling in June 2020, the U.S. Supreme Court ruled that the prohibition on “sex” discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and/or gender identity. The *Bostock* ruling raised, but did not decide, the question of whether or not other federal sex discrimination laws, such as Title IX of the Education Amendments of 1972 and the Fair Housing Act, might also inherently prohibit LGBTQ+ discrimination. While the *Bostock* ruling applies only to Title VII claims, the Biden administration has announced that federal agencies will apply *Bostock*’s definition of “sex” to other federal civil rights laws. On the day he was inaugurated, Jan. 20, 2021, President Biden issued an executive order stating that federal sex discrimination laws besides Title VII – including Title IX and the Fair Housing Act – should be interpreted as prohibiting gender identity and sexual orientation discrimination. Subsequently, in June 2021, the U.S. Department of Education (ED) issued guidance that Title IX prohibits LGBTQ+ discrimination. In addition, in February 2021, the U.S. Department of Housing and Urban Development (HUD) announced that it would enforce the sex discrimination provisions of the Fair Housing Act as encompassing LGBTQ+ discrimination.

Prior to the *Bostock* ruling, there was an evolving debate in federal courts about whether Title VII or Title IX prohibited LGBTQ+ discrimination, as neither of these laws or any other federal nondiscrimination law expressly identifies gender identity or sexual orientation as legally protected characteristics. As this debate went on, federal courts around the country were split on whether sex discrimination under these laws includes LGBTQ+ discrimination. Outside the federal realm, a minority of states and some counties and cities had antidiscrimination laws that expressly covered sexual orientation or gender identity. This split of authority around the country meant that potential student, faculty and staff protections varied by the location in which these individuals were located and filed their claims.

This changed in June 2020 when the Supreme Court issued the *Bostock* ruling in three companion Title VII employment cases. The Court held that Title VII’s prohibition on sex discrimination encompasses sexual orientation and gender identity discrimination, because when an individual engages in those forms of discrimination, they are necessarily treating a homosexual or transgender person differently based on their sex. For example, if an employer has a problem with a female employee being married to a woman, they are acting based on behavior they would not question if the employee was male and, as such, are necessarily considering and acting based on the employee’s sex.

The *Bostock* ruling has broad implications for colleges and universities—both public and private. Students and employees now have new ways to seek redress for discrimination on the basis of sexual orientation or gender identity. Previously, student victims of harassment or discrimination on the basis of sexual orientation or gender identity were limited to code of conduct complaints if they lived in a jurisdiction without LGBTQ+ anti-discrimination protections. They now have possible redress under Title IX given the Biden administration’s position on the scope of that law and the implications of the *Bostock* case. In addition, employees now have additional legal protections under both Title VII and possibly Title IX.

## **How Colleges Should Respond Now**

Because the law is now uniform around the country, schools should be sure their nondiscrimination and harassment policies and procedures extend to LGBTQ+ discrimination and that they are educating and training their campus community members on conduct expectations and how to report potential discrimination or harassment concerns. Core terms and cultural competency should be part of training – beyond conduct standards and reporting – because the goal should be to promote and foster a diverse, inclusive and welcoming environment for LGBTQ+ individuals.

Colleges should develop different types of training for different audiences. Some personnel have heightened responsibilities, such as the Title IX team, deans, student affairs administrators, admissions, registrar employees, faculty, athletics personnel, residential life and the like. These groups may need unique training beyond what is covered generally with students or other staff.

Colleges need to review their health care services, both for students and employees. They need to review insurance policies to ensure that they have inclusive coverage for treatments needed by a transgender individual. Employers have faced lawsuits over policies with allegedly discriminatory coverage. Onsite health care facilities will need to have providers trained to deliver medical services needed by the college's LGTBQ+ population and who are culturally trained. In addition, if an individual is transgender but has not had gender affirmation procedures, they might run into billing coding and insurance traps if coded by their correct gender identity and, due to anatomy, they need a procedure associated with their anatomy that does not match the coded gender. Working proactively with insurers to try to prevent such issues promotes inclusion.

Beyond the legal issues, colleges need to think about the campus experience of an LGBTQ+ individual who might want to be part of the college's community or who is already in the community. Historically, a college's forms – in paper and online – have had a binary approach to gender. Those should be expanded beyond that to include more inclusive choices for those who are not cisgender. Colleges should work with vendors to have them do the same. In addition, colleges should make sure that students, faculty and staff are trained to think beyond a binary concept of gender and know to use a non-binary person's chosen name and correct pronouns. Legal documents may require use of an individual's legal name but, if that name differs from the chosen name, colleges can consider also including the individual's chosen name via "also known as" language in legal documents.

A potentially difficult issue for colleges is how to handle situations where a community member's religious beliefs conflict with the college's commitment to nondiscrimination, equity and inclusion. Colleges can face competing obligations in this situation since Title VII and many state laws prohibit religious discrimination and require reasonable accommodations for sincerely-held religious beliefs. Most government agencies and courts take the position, however, that it is not religious discrimination or a failure to accommodate religious beliefs to require adherence to workplace conduct standards that promote respectful, nondiscriminatory treatment of an LGBTQ+ individual.

## **Co-Curricular Issues**

Some other issues to consider include:

*Housing*—The U.S. Department of Housing and Urban Development (HUD), which enforces the Fair Housing Act, issued a directive in February 2021 that states that *Bostock* will be applied to the definition of sex under the Fair Housing Act. This raises questions, similar to restroom and locker access issues, about single-sex residence halls or floors, and poses the question of whether schools

will need to give access to an all-women's residence hall, for example, to someone assigned a male sex at birth who identifies as female. That seems to be emerging as a best practice, but there are likely to be court challenges and ongoing debate. For example, the College of the Ozarks in Missouri is suing HUD, saying that HUD's directive requiring the college to "open female showers, restrooms and dorm rooms to biological males who assert a female identity" forces the college to violate its "religiously informed code of conduct." A trial court dismissed the lawsuit, but the College has appealed the ruling to the Eighth Circuit, which has promised a hearing in November of this year.

*Student Organizations*—Recent federal circuit court opinions have found for student plaintiffs when they alleged that a college's nondiscrimination policy, which included sexual orientation and gender identity as protected classes, interfered with a religious student organization's constitutional right to limit membership to students who agreed with the organization's religious doctrine. Expansion of Title IX could also make these organizations' exclusionary membership rules a possible Title IX violation if the institution exempted the student organization from opening membership to all students.

*Restrooms / Locker rooms*—A potentially difficult issue for colleges is how to handle restroom and locker room access issues, including situations where a community member's religious beliefs conflict with the college's commitment to nondiscrimination, equity and inclusion. Colleges can face competing obligations in this situation since Title VII and many state laws prohibit religious discrimination and require reasonable accommodations for sincerely held religious beliefs.

The *Bostock* case did not address this issue of restroom or locker room access under Title VII or otherwise. There are legal arguments on both sides of the question of whether requiring access based on anatomy versus gender identity is an act of discrimination, and there are different issues than in other settings due to the intimate, private nature of what goes in restrooms, locker rooms, housing, etc.

This being said, the Equal Employment Opportunity Commission (EEOC) and many other governmental agencies are taking the position that nondiscrimination laws require access based on gender identity rather than anatomy. There have also been a number of restroom cases around the country, particularly for public K-12 schools, with mixed results. However, in the education context, the trend is increasingly to find that it is discriminatory not to give access based on gender identity, and that trend is emerging as a best practice. The U.S. Supreme Court recently declined to review a federal appellate ruling that a transgender student was entitled to restroom access under Title IX and the Equal Protection Clause based on gender identity rather than anatomy.

As for objections from individuals who may not want to use restroom or locker facilities with a transgender individual, whether based on religious beliefs or otherwise, there is a long line of cases regarding "customer preferences," rejecting the claim that such an objection is a defense to discrimination (most of these were on the basis of race after the Civil Rights Act of 1964 was enacted). It can be complicated though. The U.S. Court of Appeals for the Sixth Circuit recently published a case in which a professor refused to use the appropriate pronoun for a transgender student. He was disciplined for violating the university's nondiscrimination policy, which included protections for gender identity. The court ruled that the public university had violated his rights to free speech and free exercise of religion, and created an academic freedom exception to a 2006 U.S. Supreme Court ruling, *Garcetti v. Ceballos*, that said that public employee speech related to their job duties was not protected by the First Amendment.

In addressing same-sex facility tensions, many organizations seek to build in unisex restroom facilities and alternative options for those with concerns about sharing facilities with a transgender individual. It will typically be a safer legal approach to promote alternative options for the person objecting to sharing a facility with a transgender person than to limit facility access by transgender individuals although, again, the *Bostock* ruling did not address same sex facility access and the law is still evolving in this area.

*Athletics*—In 2010, the National Collegiate Athletic Association (NCAA) issued its first Policy on Transgender Student-Athlete Participation after consultation with experts in science, medicine and inclusion. The policy has been updated since 2010 and provides guidance to colleges with respect to how to evaluate the suitability of a transgender athlete to compete on the team that conforms to their gender identity. The NCAA policy includes suggested best practices and guidelines for athletics staff, media and others, as well as a list of the student’s responsibilities and the college’s responsibilities.

As of September 2021, nine states have passed laws forbidding public schools from allowing transgender women to play on women’s athletics teams, and over 20 additional states have such legislation pending. Seven of these laws also apply to public colleges and universities—Arkansas, West Virginia, Florida, Montana, South Dakota, Idaho and Mississippi. Courts have enjoined the enforcement of the Idaho and West Virginia laws, and the American Civil Liberties Union is challenging the other laws. In other states that have not forbidden the participation of transgender women in athletics, state athletic associations have permitted transgender women to participate in public high school sports. Some of these associations have been sued by the Alliance Defending Freedom, an organization that funds litigation involving religious beliefs.

### **Special Issues for Religious Colleges**

Religious colleges may be protected under federal law if their religious doctrine is opposed to admitting or employing non-binary and gay students, faculty or staff. For example, Title IX allows a religious college to claim an exemption from Title IX’s nondiscrimination requirements. Title VII, which applies to religious as well as independent colleges, allows a religious college to make employment decisions on the basis of religion, which would not be permitted for colleges without a religious affiliation. The application of these exemptions is not automatic; religious colleges should consult counsel if they believe they should be exempt from these requirements. In addition, certain employees of religious colleges may be unprotected by the federal nondiscrimination laws – including the Americans With Disabilities Act and the Age Discrimination in Employment Act – if they perform “ministerial” functions. Again, advice of counsel is necessary to determine which, if any, employees are in this category.

### **Best Practices for Colleges and Universities**

As noted above, *Bostock* and its interpretation by the federal government poses new challenges for many colleges and universities. Below is a list of suggested best practices to help institutions adjust to the expansion of legal rights under Title IX and the Fair Housing Act:

- Don’t engage in or permit discrimination or harassment based on sexual orientation, gender identity or gender expression. Apply the same practices that are used to protect other identities under the college’s nondiscrimination policy.
- Update policies, but make them more than a piece of paper – walk the talk.
- Education / training – customize to particular audience.

- Foster an inclusive, welcoming environment for all students, staff and faculty.
- Foster recruitment and retention of LGBTQ+ community members by doing the following:
  - Use inclusive language on websites, policies, documents and forms.
  - If not already in existence, create affinity groups for students and employees.
  - Host speakers, publications, events that are LGBTQ+ focused and friendly.
  - Ensure that benefits are inclusive, including health care.
  - Develop gender-transition protocols – make it a user-friendly experience. Establish protocols ahead of time, establish good communication with the transitioning person and those who will interact with the person after transition; provide targeted training; work with leaders to lead by example.
  - Ensure that the correct name and pronouns are in college records – add pronoun choices to signature blocks, residence hall name cards, etc. If the individual’s legal name or legal gender have not been changed, use the legal name in legal documents, but add an “aka” (akin to a dba).
  - Respect the privacy and individuality of the LGBTQ+ person – don’t stereotype them, and don’t assume they want to be your resource for all things transgender. Don’t assume that everyone pursues medical treatments (some do and some don’t).
  - Don’t out people – those who knew the person before a gender transition will know the history, but there is no need to announce to all who come later
  - Prepare for how to prevent and respond to push-back from some faculty, staff, students and others who don’t understand that a transgender individual has had to make difficult decisions and deserves respect and support.

If you have any questions or need Bond’s assistance, please contact [Barbara A. Lee](#), any [attorney](#) in Bond's [Higher Education practice](#) or the attorney at the firm with whom you are regularly in contact.

