

Legal Update Article

# **Biden's EO Expands Title IX to Prohibit LGBTQ Discrimination**

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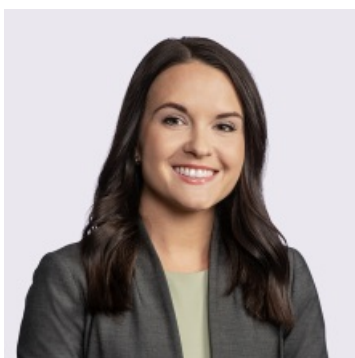
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The Biden administration's Executive Order 13988, "[Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation](#)," expands prohibited forms of sex discrimination under Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964 to include discrimination on the basis of gender identity and sexual orientation.

The Executive Order cites the U.S. Supreme Court's 2020 decision in [Bostock v. Clayton County, Georgia](#) for the proposition that Title VII's prohibition on discrimination "because of ... sex" covers discrimination on the basis of gender identity and sexual orientation. The Executive Order proceeds to state that it is the Biden administration's policy to apply the reasoning in *Bostock* to all laws and implementing regulations that prohibit sex discrimination, including Title IX. Essentially, sex discrimination under Title IX now prohibits discrimination on the basis of gender identity and expression and sexual orientation. The Executive Order directs all federal agencies to review and revise all existing orders, regulations, guidance documents, policies, programs, or other agency actions administered under any statute or regulation that prohibits sex discrimination for inconsistency with the Executive Order by April 30, 2021.

The Executive Order is a return to the transgender rights policy established by the Obama administration in [guidance](#) published by the Department of Justice and the Department of Education on May 13, 2016. The Trump administration [rescinded](#) that guidance in 2017. The 2016 guidance required institutions to "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity." The Biden administration's Executive Order similarly expands the categories of prohibited sex discrimination to include gender identity, gender expression, and sexual orientation.

Educational institutions should review their policies and practices to ensure they protect the rights of transgender students and employees and prohibit discrimination on the basis of sexual orientation. In addition to revising anti-discrimination and harassment policies, institutions should review their approach to issues such as housing, bathroom and locker-room access, athletics, and preferred name and pronoun policies. Most significantly, this means that schools must ensure their restroom and locker room access policies provide equal access to students and employees consistent with their gender identity. Additionally, any harassment prevention training should address LGBTQ-related protections. The Department of Education is expected to issue guidance to aid institutions in complying with the Executive Order.

The Jackson Lewis [Higher Education](#) Team is well-versed in Title IX issues and continues to analyze ongoing developments in this area. Please contact the Jackson Lewis attorney with whom you regularly work with any questions about the recently issued executive order and any other Title IX developments.

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