



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Monica D. Batanero
Jennifer Henry
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Kaitlyn A. Schwendeman
Loren W. Soukup
Erin E. Stagg

Of Counsel
Ellie R. Austin
Robert J. Henry
Frank Zotter, Jr.

LEGAL UPDATE

February 12, 2021

To: Superintendents, Member School Districts (K-12)
From: Monica D. Batanero, Senior Associate General Counsel ^{MDB}
Subject: Executive Order Clarifies that Title IX Prohibits Discrimination
on the Basis of Gender Identity or Sexual Orientation
Memo No. 04-2021

On January 20, 2021, President Biden issued an executive order¹ addressing last year's U.S. Supreme Court decision², which held that Title VII prohibited employers from discriminating on the basis of sexual orientation and gender identity. The *Bostock* decision did not explicitly state that the legal reasoning applied under Title IX as well. As you may know, Title IX is a federal law that prohibits educational institutions that receive federal funds from discriminating on the basis of sex. Under the previous administration, the Department of Education ultimately took the position that it would not apply the reasoning of *Bostock* in the Title IX context.

Under the Biden Administration, the executive order made the issue much clearer, stating that under *Bostock's* reasoning, Title IX and its implementing regulations prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

The executive order further instructs federal agencies administering statutes or regulations that prohibit sex discrimination, such as the Department of Education, to consider in the next 100 days whether new guidance documents need to be issued or regulations need to be revised to comply with this new order.

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

² *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).



This executive order further states that “children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.” Therefore, it is anticipated that the Department of Education will be issuing guidance in line with guidance previously issued by the Obama Administration³, which stated that students have the right to participate in athletics and sex-segregated activities and facilities consistent with their gender identity.

It is important to note that California law currently prevents gender discrimination. California Education Code section 220 states that “No person shall be subjected to discrimination on the basis...gender, gender identity, gender expression...in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.”

In addition, California law already explicitly prohibits local educational agencies from discriminating against students by prohibiting them from participating in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity.⁴ Therefore, this executive order, practically speaking, does not and should not affect the protections under state law already afforded to students based on their gender identity and sexual orientation, but it does clarify that investigations be conducted in accord with Title IX processes for such complaints.

This office will keep you updated on any subsequent guidance issued as a result of this executive order.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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³ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (RESCINDED)

⁴ Cal. Educ. Code §221.5(f)