



U.S. Commission on Civil Rights Calls on Trump Administration to Revise Regulations and Enforcement Practices To Recognize Civil Rights Protections for LGBT Americans and Comply with the *Bostock* Decision

June 19, 2020

On Monday June 15, 2020, the Supreme Court ruled in no uncertain terms that Title VII of the Civil Rights Act of 1964 and its prohibition on employment discrimination “because of . . . sex” protects against discrimination on the basis of sexual orientation and gender identity.¹ As the Court stated “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”² The Court called the question not even close, holding that “it’s no contest” that “the express terms of [the] statute” mandate this conclusion.³ Indeed, the Court deems its holding a foregone conclusion, recognizing that “[a]ll that the statute’s plain terms suggest, this Court’s cases have already confirmed.”⁴

Given the Court’s unequivocal holding, the Trump Administration must drop its repeated and ongoing efforts to perpetuate discrimination on the basis of sex with respect to sexual orientation and gender identity. The Court’s decision interpreted Title VII, but as the Trump Administration points out and courts have held for decades, “Title VII case law has often informed Title IX case law with respect to the meaning of discrimination ‘on the basis of sex,’” and therefore the Supreme Court’s holding “under Title VII [will] have similar force for the interpretation of Title IX.”⁵

¹ *Bostock v. Clayton County, Georgia*, 590 U.S. ___ (2020).

² *Id.* at ___, slip op. at 9. The Court later explained: “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” *Id.* at ___, slip op. at 19.

³ *Id.* at ___, slip op. at 2.

⁴ *Id.* at ___, slip op. at 12.

⁵ U.S. Dep’t of Health and Human Services, Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, unpublished document available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-11758.pdf>, at 34; *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX”); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (holding that Title VII is the “most appropriate analogue when defining Title IX’s substantive standards”) (quoting *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n. 6 (10th Cir.), cert. denied, 484 U.S. 849 (1987)); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000) (applying “Title VII precedents in analyzing

In the Supreme Court’s words, the Administration must cease “to ignore the law as it is.”⁶ The Administration must, in all of its regulatory and enforcement activities, finally conform to the law and afford the federal nondiscrimination protection Congress has promised to the American people for close to six decades now. Most urgently, the Department of Health and Human Services (HHS) must immediately rescind and revise its recently announced regulation for Section 1557 of the Patient Protection and Affordable Care Act. The Department of Education Office for Civil Rights (ED OCR) must also rescind its May 15, 2020 letter of impending enforcement action to various Connecticut public school districts and the Connecticut Interscholastic Athletic Conference regarding the participation of transgender youth in school athletics.

In addition, the Trump Administration and each federal agency should also cease any regulatory or enforcement actions, including guidance issuance and adoption of litigation positions, that further erroneous interpretations of civil rights laws. The Administration must begin enforcing civil rights laws to their full extent as Congress enacted them and as courts interpret them, including by guarding against discrimination on the basis of sexual orientation and gender identity.

As we found in our 2019 report, [*Are Rights A Reality? Evaluating Federal Rights Enforcement*](#), “in the Trump Administration several federal civil rights offices have acted to interpret statutory and regulatory language to not protect against discrimination on the basis of gender identity and to treat sex as exclusively assigned at birth.”⁷ The most recent action came just days before the Supreme Court’s decision, when on Friday June 12, 2020 HHS announced its rule pursuant to Section 1557 of the Patient Protection and Affordable Care Act, which bars discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.⁸ The previous rule implementing this section stated, correctly, that sex discrimination included discrimination on the basis of gender identity and defined “gender identity” as “one’s internal sense of gender, which may be male, female, neither, or a

plaintiff’s Title IX claim” as “no logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised.”). *See also* Dissenting Statement of Commissioner Peter N. Kirsanow, U.S. Comm’n on Civil Rights, *Are Rights A Reality? Evaluating Federal Civil Rights Enforcement*, <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> (2019), at 542 n. 61 (noting that “[b]ecause Title IX adopts the substantive and legal standards of Title VII, a holding by the U.S. Supreme Court on the definition of ‘sex’ under Title VII will likely have ramifications for the definition of ‘sex’ under Title IX, and for the cases raising sexual orientation or gender identity claims under Section 1557 and Title IX[.]”).

⁶ *Bostock*, 590 U.S. at ___, slip op. at 16.

⁷ U.S. Comm’n on Civil Rights, *Are Rights A Reality? Evaluating Federal Civil Rights Enforcement*, <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> (2019), at 501. This Commission also recognized two years ago what the Court held today: Title VII protects against discrimination on the basis of sexual orientation and gender identity. U.S. Comm’n on Civil Rights, *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans*, https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf (2017).

⁸ 42 U.S.C. § 18116.

combination of male and female, and which may be different from an individual's sex assigned at birth.”⁹ The 2020 rule strips this provision, and instead both wrongly and, as the Supreme Court this week recognized, irrelevantly defines sex “as male or female and as determined by biology.”¹⁰ As the Supreme Court explained, whatever definition of “sex” is appropriate, the statutory prohibition against discrimination on its basis must be given effect and “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹¹ The 2020 rule cannot be reconciled with the Supreme Court's holding three days later, on June 15, 2020. HHS must act immediately to eliminate the civil rights harm its misguided regulation imposes on Americans and rescind its unlawful rule.

Likewise ED OCR must discontinue the campaign it has mounted to deny transgender students protection from discrimination “on the basis of sex” as promised in Title IX of the Education Amendments of 1972. Most recently ED OCR threatened to withhold federal funds from multiple Connecticut school districts on the flatly mistaken claim that their allowance of transgender students' participation in athletics based on their gender identity violated Title IX.¹² Before that action last month, ED OCR withdrew guidance, rejecting the interpretation of Title IX protection against discrimination “on the basis of sex” to include sexual orientation and gender identity, exactly as the United Supreme Court this week explained the law.¹³ ED OCR also took litigation positions consistent with its demonstrably wrong interpretation of Title IX,¹⁴ withdrew support for students' existing resolution agreements binding the students' schools to follow

⁹ U.S. Dep't of Health and Human Services, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31467 (May 18, 2016), <https://www.federalregister.gov/d/2016-11458/p-1419>.

¹⁰ U.S. Dep't of Health and Human Services, Press Release, “HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs,” Jun. 12, 2020, <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>.

¹¹ *Bostock*, 590 U.S. at ___, slip op. at 9.

¹² Letter from Timony C.J. Blanchard, Director, New York Office, U.S. Dep't of Educ. Office for Civil Rights to Lori Mizerak, Assistant Corporation Counsel, City of Hartford, et al., dated May 15, 2020, available at <http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>. The U.S. Department of Justice filed a statement of interest taking a similar position against transgender students' civil rights protection in related litigation on this issue. U.S. Dep't of Justice, Press Release, “The Department of Justice Files Statement of Interest in Title IX Womens' [sic] Equal Opportunities Case,” Mar. 24, 2020, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-title-ix-womens-equal-opportunities-case>.

¹³ U.S. Dep't of Justice and U.S. Dep't of Educ., Dear Colleague Letter: Office for Civil Rights Withdraws Title IX Guidance on Transgender Students (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>. To be clear, courts have repeatedly held that Title IX is coextensive with Title VII and follow Title VII holdings therefore. *See supra* note 5.

¹⁴ U.S. Dep't of Justice, Press Release, “The Department of Justice Files Statement of Interest in Title IX Womens' [sic] Equal Opportunities Case,” Mar. 24, 2020, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-title-ix-womens-equal-opportunities-case>.

the law as the Supreme Court this week held the law long already to have been,¹⁵ and deemed it unnecessary to enforce Title IX to protect transgender students.¹⁶

News reports indicate that the Trump Administration has still further plans to implement its dangerously inaccurate interpretation of the law: the Department of Housing and Urban Development intends to instruct single-sex homeless shelters that they may deny persons on the basis of biological sex, rather than self-identified gender.¹⁷

In short: the Trump Administration has been wrong to perpetrate civil rights harms on Americans whose rights it is sworn and statutorily bound to protect. It must act without delay to right those grievous wrongs and fulfill its responsibility to enforce civil rights law rather than, as the Supreme Court elegantly decried it, to “neglect the promise that all persons are entitled to the benefit of the law’s terms.”¹⁸

###

The U.S. Commission on Civil Rights, established by the Civil Rights Act of 1957, is the only independent, bipartisan agency charged with advising the President and Congress on civil rights and reporting annually on federal civil rights enforcement. Our 51 state Advisory Committees offer a broad perspective on civil rights concerns at state and local levels. The Commission: in our 7th decade, a continuing legacy of influence in civil rights.

Follow us on [Twitter](#) and [Facebook](#).

¹⁵ Emma Brown, “Education Dept. closes transgender student cases as it pushes to scale back civil rights investigations,” *The Washington Post*, Jun. 17, 2017, https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html.

¹⁶ Dominic Holden, “The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints,” *BuzzFeed News*, Feb. 12, 2018, <https://www.buzzfeednews.com/article/dominicholden/edu-dept-trans-student-bathrooms>.

¹⁷ Paige Winfield Cunningham, “HUD to change transgender rules for single-sex homeless shelters,” *The Washington Post*, Jun. 14, 2020, https://www.washingtonpost.com/politics/hud-to-change-transgender-rules-for-single-sex-homeless-shelters/2020/06/12/d47a5744-ad03-11ea-9063-e69bd6520940_story.html.

¹⁸ *Bostock*, 590 U.S. at ___, slip op. at 28.