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## **U.S. Department of Education Doubles Down on Applying Bostock Reasoning to Title IX to Protect LGBT Students**

Arthur S. Leonard

to achieve with its first iteration of the Religious Freedom Restoration Act: return Free Exercise law to where it was before *Smith* was decided.

The Court had another opportunity to address the question next term, in *Arlene's Flowers v. State of Washington*, No. 19-333 (petition filed 9/11/2019). The day after the Court announced its decision in *Fulton*, Alliance Defending Freedom filed a Supplement to its cert petition (which had not been listed for discussion at the Court's conferences in more than a year, according to the Court's docket listings), renewing its call for a grant of cert and quoting from the concurring opinions in *Fulton*. The Supplement asserted a 4-2 split in lower federal and state courts about how to deal with the clash between anti-discrimination laws and First Amendment freedom of expression or religious exercise claims, as well as a split over whether the "hostility to religion" holding in *Masterpiece Cakeshop* applies only to adjudicatory bodies, or as well the to elected officials and prosecutors in making decisions whether to proceed on discrimination claims. But the Court did not take the bait, announcing on July 2 that it was denying the petition, with only Alito, Thomas and Gorsuch indicating they would have granted it (no surprise there).

Alliance Defending Freedom represented the Petitioners in *Fulton*, with Lori H. Windham arguing at the telephonic hearing. The Trump Administration argued in support of CSS as an amicus, with Hashim M. Mooppan appearing from the Solicitor General's Office. Neal K. Katyal and Jeffrey L. Fisher argued for Respondents, Fisher for the City of Philadelphia and Katyal for the Intervenor organizations – Support Center for Child Advocates and Philadelphia Family Pride – who defended the City's action to terminate CSS's participation in the foster care system in the district and circuit courts. The ACLU was also listed as a counsel of record for the Intervenors. ■

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## U.S. Department of Education Doubles Down on Applying *Bostock* Reasoning to Title IX to Protect LGBT Students

*By Arthur S. Leonard*

President Joseph R. Biden, Jr., issued an Executive Order on January 20, 2020 (Inauguration Day), directing that Executive Branch agencies should apply the Supreme Court's reasoning in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), to interpret statutes forbidding discrimination because of sex to cover claims of discrimination because of sexual orientation or gender identity "so long as the laws do not contain sufficient indications to the contrary." The EO specifically referenced Title IX of the Education Amendments of 1972 as one such law. The president followed up with an EO on March 8 specifically concerning equality in education, again referencing Title IX, and a March 26 Memorandum issued by the Civil Rights Division of the Department of Justice reiterated its view that Title IX should be interpreted to ban discrimination based on sexual orientation or gender identity.

The Office of Civil Rights of the U.S. Department of Education (OCR) announced on June 16 that it was sending a "Notice of Interpretation" to the Federal Register for publication formally confirming that Title IX, which prohibits educational institutions that receive federal funding from discriminating against students "on the basis of sex," applies to discrimination because of sexual orientation or gender identity (transgender status).

This announcement came just a year and a day after the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of sex," to include discrimination because of sexual orientation or transgender status, in *Bostock*. In that case, the Court combined appeals from the 2nd, 6th and 11th Circuit Courts of Appeals involving two gay men and a transgender woman alleging wrongful discharge under Title VII and voted

6-3 that any discrimination against an employee because they are gay, lesbian or transgender is necessarily at least in part because of their sex and thus covered by the statute. President Donald J. Trump's first appointee to the Court, Justice Neil Gorsuch, wrote the opinion by assignment from Chief Justice John Roberts, who joined the opinion together with Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor. Justice Gorsuch premised his ruling on a textual interpretation of the language of Title VII, focusing on the ordinary meaning that would attach to the words and phrases of the statute when it was enacted in 1964, and found that the result was "clear."

Although the *Bostock* decision directly interpreted only Title VII, its reasoning clearly applied to any law that prohibits discrimination "because of sex" or "on the basis of sex," as the Education Department's Acting Assistant Secretary for Civil Rights, Suzanne B. Goldberg, explained in the Notice issued on June 16.

"After reviewing the text of Title IX and Federal courts' interpretation of Title IX," wrote Goldberg, "the Department has concluded that the same clarity [that the Supreme Court found under Title VII] exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discrimination based on sexual orientation and gender identity in their education programs and activities. The Department has also concluded for the reasons described in this Notice that, to the extent other interpretations may exist, this is the best interpretation of the statute."

The Notice listed "numerous" lower federal court decisions that were issued over the past year taking this position, including the most recent ruling by the 4th Circuit Court of Appeals in *Grimm v. Gloucester County School Board*, 972 F. 3d 586 (4th Cir. 2020), rehearing

*en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert denied*, June 28, 2021, concerning a transgender boy who was denied access to restroom facilities at a Virginia high school. The Supreme Court denied the cert petition after the Education Department's Notice was announced.

Reversing the position taken by the Education and Justice Departments during the Trump Administration, the Notice announces that OCR will investigate sexual orientation and gender identity discrimination allegations by students. "This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity," wrote Goldberg. She also pointed out that a determination whether Title IX was violated will depend on the facts of individual cases, and of course Title IX applies only to schools that receive federal funds.

In a footnote, Goldberg stated that "educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets," citing 20 U.S.C. section 1681(a) (3). There is a pending federal lawsuit against the Department of Education by a group of students from such religious schools claiming that this section violates the 1st Amendment Establishment Clause. Religious schools have moved to intervene as defendant-parties in that lawsuit, claiming that the government may not sufficiently defend their exemption. The Justice Department has opposed their motion in a court filing, asserting that the government will "vigorously" defend the challenged provision. The religious exemption was obviously a politically necessary compromise to get Title IX adopted by Congress.

While the June 16 Notice states that its interpretation of Title IX "supersedes

and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation or gender identity," it goes on to say that this "interpretation does not reinstate any previously rescinded guidance documents." This comment is significant, because during the Obama Administration the Education Department issued guidance documents on Title IX compliance requirements that took positions on many of the controversial issues that have been subjected to litigation. Those guidance requirements were cited by school boards and administrators in defending actions they took, even after the guidances were formally rescinded by the Education and Justice Departments shortly after Betsy DeVos was confirmed as Secretary of Education, when the Trump Administration prevailed on the Supreme Court to cancel a scheduled argument in an earlier stage of the *Grimm* case on the ground that the rescission of these policies required the lower courts to reevaluate their ruling. Secretary DeVos took the position, later bolstered by a memorandum by Attorney General Jeff Sessions in October 2017, that Title IX did not cover sexual orientation or gender identity discrimination.

Miguel Cardona, Biden's Secretary of Education, told *The New York Times* in an interview published on June 16 that "Students cannot be discriminated against because of their sexual orientation or their gender identity," but left unclear the question whether his department would be challenging state laws that ban transgender girls from competing in school sports. (This ambiguity was cleared up a few days later when the Justice Department filed a statement of interest in a lawsuit challenging such a state statute, taking the position that the statute violates the Equal Protection Clause and Title IX. DOJ also filed a statement of interest in a pending challenge to Arkansas's new law banning provision of gender transition services to minors.) Cardona stated, "We need to make sure we are supporting all students in our schools," but he did not get specific

about particular challenged policies in his public statement accompanying the release of the Notice on the DOE webpage. However, making clear that "all" really means "all," the Notice says that the Department's Office of Civil Rights "carefully reviews allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways."

The U.S. Court of Appeals for the 9th Circuit recently heard arguments in the State of Idaho's appeal in *Hecox v. Little* from a district court decision finding that the state's ban on transgender girls playing sports, the first such ban to be enacted, violates the constitutional rights of the transgender girls as well as Title IX. If this issue ends up in the Supreme Court, the Biden Administration will have to take a position one way or the other. A federal court in Connecticut recently dismissed a lawsuit by a group of cisgender female high school athletes challenging a state policy of allowing transgender girls to compete in athletics, finding that the plaintiffs lacked standing to bring the issue to the court.

The Education Department's interpretation of Title IX is not binding on the federal courts but is entitled to deference under principles of administrative law. After DeVos and Sessions "rescinded" the Obama Administration's interpretation and guidance documents, many federal courts continued to rule in favor of transgender students and school administrators who had adopted policies allowing transgender students to use restroom facilities, despite the "rescission" of the Obama Administration's position to that effect. The lower federal courts have been united up to now in rejecting claims by parents and students that allowing transgender students to use restroom and locker room facilities violates the constitutional privacy rights of non-LGBTQ students, and the Supreme Court has so far refrained from hearing those cases. The *Bostock* ruling, President Biden's Executive Orders, and the new Notice of Interpretation

to be formally published in the Federal Register, will reinforce that position in the courts.

The Department of Education has posted a document on its website titled “Confronting Anti-LGBTQIA+ Harassment in Schools” providing examples of situations that would justify investigation and providing information about where to file complaints with DOE and the Justice Department’s Civil Rights Division.

As President Biden has boasted about how many LGBTQ people he has appointed, it is worth noting that both the Justice Department Civil Rights Division March 26 Memo and the June 16 OCR Notice were authored by out lesbian appointees, Pamela Karlan and Suzanne Goldberg. ■



## Historic Ruling in India Grants Widespread Protections to LGBTQIA+ Community

By Eric Wursthorn

In an order dated June 7, 2021, Justice N. Anand Venkatesh of the High Court of Madras issued a ruling that granted sweeping protections to the LGBTQIA+ community in India (*S. Sushma vs Commissioner of Police*, W.P. No. 7284 of 2021). In doing so, the Justice went well beyond the relief requested by the petitioners in the underlying proceeding – a lesbian couple who sought an order protecting them from interference by their parents or the police.

The petitioners are S. Sushma and U. Seema Agarwal, aged 22 and 20 years respectively. This case arose from their parents’ opposition to their relationship. In the face of that opposition, the petitioners fled to Chennai from their homes in Madurai. In Chennai, they found support and accommodations with the help of several NGOs and LGBTQIA+ persons while they continued their education and sought to obtain employment. Meanwhile, the petitioners’ parents filed “missing-girl” complaints with the police. The police located and interrogated the petitioners who filed the instant proceeding due to fear and concern for their safety and security. The petitioners specifically sought an order from the court directing the police not to harass them as well as a protective order against their parents.

The case was assigned to Justice N Anand Venkatesh of the Madras High Court, who held an *in camera* hearing on March 29, 2021. The petitioners, their parents and the police appeared in person. Police representatives indicated that the missing-girl complaint would be closed, and the police would no longer interfere in the underlying dispute between the petitioners and their parents. The Justice ordered one-on-one interactions between the parents and their respective children, which led to the court directing the parties to attend counseling with a psychologist. Justice Anand Venkatesh

expressed empathy with the petitioners, writing: “I am also trying to break my preconceived notions about this issue and I am in the process of evolving, and sincerely attempting to understand the feelings of the Petitioners and their parents. . . .”

On April 28, 2021, after petitioners and their parents underwent counseling, the court issued another order. Justice Anand Venkatesh summarized the psychologist’s findings as follows: “[i]nsofar as the petitioners are concerned, the psychologist has opined that both the petitioners perfectly understand the relationship they have entered into and there is absolutely no confusion in their minds about the same. It is also observed that they have lot (sic) of love and affection for their parents and their only fear is that they may be coerced into separation. . . . Insofar as the parents of the petitioners are concerned, it is observed that they are more concerned about the stigma attached to the relationship in the society and the consequences it may ensue on their family. They also apprehend that they will be looked down upon by the society and their own community. The parents are also very much concerned about the safety and security of their respective daughters. . . . the parents would rather prefer their daughters to live a life of celibacy, which according to them will be more dignified than having a partner of the same sex.”

After summarizing the psychologist’s findings, Justice Anand Venkatesh not only ordered the parents to undergo another round of counseling, but, in an extraordinary move, indicated that he would “subject” himself for “psycho-education” with the counselor. The Justice explained: “I honestly feel that such a session with a professional will help me understand same-sex relationships better and will pave way for my evolution”. Justice Anand