



COMPLIANCE BULLETIN

U.S. Dept. of Education Rescinds Transgender Bathroom Guidance

HIGHLIGHTS

- States and local school districts may now set their own policies regarding bathroom access for transgender students without losing federal funding
- The new guidance does not affect enforcement of anti-discrimination laws that apply to employers

IMPORTANT DATES

May 13, 2016

Obama administration directed public schools to give students access to facilities matching their chosen gender identities.

February 22, 2017

Trump administration rescinded the May 13, 2016, directive.

OVERVIEW

Educational institutions that receive federal funding are not required to let transgender students use bathrooms that correspond with their chosen gender identities, according to a [guidance letter](#) issued by the U.S. Departments of Education and Justice on Feb. 22, 2017. The letter rescinds [previous guidance](#) from May 2016, which directed public schools to treat transgender students consistent with their gender identities and threatened to withhold federal financial assistance for schools that failed to comply.

The new guidance addresses how the Departments will enforce Title IX of the Educational Amendments of 1972, which bans discrimination against students based on sex. It does not address other federal laws prohibiting sex-based discrimination.

ACTION STEPS

Schools may revise certain policies without risking loss of their federal funding. However, this guidance applies only to educational institutions, with respect to transgender students. Employers should not rely on the new guidance to shape their policies regarding sex-based discrimination against employees and other individuals.

Provided By:
Sullivan Benefits

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BACKGROUND

Under Title IX of the Educational Amendments of 1972 (Title IX), educational institutions that receive federal funding are prohibited from discriminating against students on the basis of sex. The Civil Rights Division of the U.S. Department of Justice and the Office for Civil Rights of the U.S. Department of Education (Departments) are responsible for enforcing Title IX.

In May 2016, the Departments issued guidance stating that they interpret Title IX's prohibition against sex-based discrimination to include discrimination based on a student's gender identity, including transgender status. Because of this interpretation, the Departments indicated that, if a school provides separate bathrooms or locker room facilities for students of different genders, the school must allow transgender students to use the bathroom or locker room facilities that are consistent with their gender identities rather than their biological genders.

The Departments also indicated that schools would violate Title IX if they discipline students or exclude them from participating in school activities for "appearing or behaving in a manner that is inconsistent with their gender identities or that does not conform to stereotypical notions of masculinity or femininity."

NEW GUIDANCE

Following the November 2016 election of President Donald Trump, the Departments came under new leadership and issued new guidance on Feb. 22, 2017. In the new guidance, the Departments state that they will not rely on the views expressed in the May 2016 document to enforce Title IX. Instead, the Departments specifically withdraw and rescind that previous guidance "in order to further and more completely consider the legal issues involved."

The main legal issue identified in the guidance is whether Title IX's prohibition against discrimination on the basis of sex requires schools to provide students with access to sex-segregated facilities based on gender identity. The Departments state that the interpretation of Title IX as outlined in May 2016 has led to "significant litigation" regarding school restrooms and locker rooms and note that a recent federal court held that the term "sex" in Title IX "unambiguously refers to biological sex."

CONSIDERATIONS FOR EMPLOYERS

Title IX applies only to educational institutions that receive federal funding. Title VII of the Civil Rights Act of 1964, which applies to all public employers and all private employers with **15 or more** employees, contains language that is similar to the Title IX's prohibition against sex-discrimination. Specifically, Title VII prohibits employment discrimination based on race, color, national origin, religion or sex.

The Equal Employment Opportunity Commission (EEOC), not the Departments of Education and Justice, enforces Title VII. Under EEOC [guidance](#) that remains in effect, Title VII's prohibition against sexual discrimination includes discrimination based on gender identity, sexual orientation and transgender status. Therefore, employers should not rely on the Departments' new guidance to determine whether their employment policies comply with Title VII.