

Executive Order on Preventing and Combating Discrimination Based on Gender Identity or Sexual Orientation

January 20, 2021

Q&A for Public Schools

What policy is asserted in the EO?

The Executive Order makes the policy statement that all persons should receive equal treatment under the law without regard to their gender identity or sexual orientation. Specifically:

- Every person should be treated with respect and dignity without regard to who they are or whom they love.
- Children should be able to learn without worrying about whether they will be denied access to the restroom, locker room, or school sports.
- Adults should be able to earn a living without worrying about being fired or demoted because of who they go home to or whether their dress conforms to sex-based stereotypes.
- People should have access to healthcare and be able to put a roof over their heads without being subjected to sex discrimination.

The Order bases these policy statements in Title VII of the Civil Rights Act of 1964 and the Supreme Court's recent ruling on that law, *Bostock v. Clayton County*. In that case, the Court ruled that Title VII's prohibition against discrimination based on sex in employment includes gender identity and sexual orientation. Under *Bostock's* reasoning, the Order explains, other laws that prohibit discrimination based on sex—like the Fair Housing Act, Section 412 of the Immigration and Nationality Act, and Title IX, along with their respective implementing regulations—cover discrimination based on gender identity and sexual orientation.

The Order also notes that discrimination based on gender identity or sexual orientation often overlaps with other types of discrimination based on characteristics like race or disability. It states a final policy goal to combat and prevent discrimination on the basis of gender identity or sexual orientation and to address overlapping forms of gender discrimination such as housing disparities regarding transgender African Americans.

What does the EO require federal entities to do?

It requires the head of every federal agency to:

- Consult with the United States Attorney General as soon as practicable;
- Review all existing orders, regulations, guidance documents, policies, programs, or other agency actions that were promulgated or administered by the agency under any statute or regulation that prohibits sex discrimination;
- Ascertain whether their agencies' policies are consistent with the Order's policy statements (above); and
- Consider whether to revise, suspend or rescind agency actions and promulgate new ones, or take further action, to implement the Order's stated policies.

- Within 100 days of the Order, work with the Attorney General to implement an action plan to carry out the actions identified in its review of its policies, programs, guidance, rules, or regulations and that may be inconsistent with the Order's stated policy.

Which federal officials and agencies are required to take action?

All federal agencies are required to undergo the required review and to implement the goals of the policy.

How are the stated policy and required action different from the past?

The Order's policy statements stand in direct contrast with the prior administration's stance on legal protections for students based on sexual orientation and gender identity. For example, under the prior administration, the Department of Justice had filed Statements of Interest in pending litigation, and the Department of Education had issued guidance documents, taking the position that neither the Constitution's Equal Protection requirement nor Title IX's prohibition of sex-based discrimination in educational programs prevented schools from excluding students from athletic teams based on gender identity.

The policy stated in this Order rejects the previous administration's assertion that the *Bostock* decision does not apply to agency interpretation of Title IX.

What past orders or actions were specifically rescinded?

This Order does not specifically rescind any specific order or action. Its broad mandate that agencies review existing programs and policies likely will lead to several rescissions, however, including the previous administration's position that Title IX does not specifically prohibit discrimination in education programs based on sexual orientation and gender identity.

This Order signals a rebuke of the previous administration's position about a transgender student's right to use the bathroom or locker room consistent with his gender identity. The Department of Education is expected to rescind the previous administration's stance that transgender girls can be prohibited from competing on athletic teams with cisgender girls.

What changes do we anticipate in federal policy, including regulation, guidance, enforcement, etc.? Specifically, what past administrative directive is likely to be changed significantly or rescinded entirely?

We anticipate major changes in policy, regulation, guidance, and enforcement related to discrimination on the basis of sexual orientation or transgender status. The Order is likely to result in the rescission of the previous administration's rules, regulations, and guidance stating that Title IX does not specifically prohibit discrimination in education programs based on sexual orientation or gender identity. It may prompt regulations and guidance that expressly require schools to allow students to use bathrooms and locker rooms that are consistent with their gender identity, and to play on athletic teams that are consistent with their gender identity.

We expect that the Department of Education will change its enforcement position regarding school policies that do not permit transgender students to use the bathrooms and locker rooms consistent with their gender identity. We also expect that, in an attempt to address overlapping discrimination, more agencies will examine sexual harassment complaints alleging discrimination based upon gender identity and sexual orientation to see whether the violation overlaps into some other area of discrimination. For example, agencies are likely to develop policies, guidance, and regulations that address discrimination in housing or workplaces as they apply to African American transgender persons.

What will the impact be on local policies?

The policy only addresses federal agencies, but we anticipate more robust federal agency investigation of complaints of discrimination based on gender identity and sexual orientation. Local school districts are wise to review their policies and determine whether to adjust them for consistency with the policy outlined in the Executive Order.