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What Remedy for Transgender Students if HHS Succeeds in Narrowly Redefining Gender Under Title IX?

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The U.S. Department of Health and Human Services (HHS) recently revealed the agency's proposal to narrow the legal definition of sex under Title IX, the federal civil rights law that bans discrimination based on sex in education programs receiving federal funding.

If the proposed definition of gender is adopted by HHS and other federal agencies that enforce Title IX, transgender students would be limited in their ability to obtain assistance from the federal government when faced with discrimination. However, transgender students alleging discrimination may still bring suit against universities and may have options to obtain relief under institutional policies and procedures.

In a recent leaked [memo](#) obtained by *The New York Times*, HHS urges government agencies enforcing Title IX, including the Departments of Education (DOE), Justice (DOJ), and Labor, to adopt a uniform definition of gender based "on a biological basis that is clear, grounded in science, objective and administrable." Specifically, HHS proposed sex to mean "a person's status as male or female based on immutable biological traits identifiable by or before birth."

HHS further proposed that the sex "listed on a person's birth certificate, as originally issued, shall constitute definitive proof of a person's sex unless rebutted by reliable genetic evidence." The proposal could affect an estimated 1.4 million Americans who identify as a gender other than that assigned at birth.

The proposed change could impact the manner in which educational institutions address discrimination that arises in a variety of contexts, including admissions policies, bathroom and locker room access, and athletic participation. The proposal also may have implications for the DOE's expected proposed rule dealing with allegations of sexual harassment at colleges and universities.

This proposal is consistent with the Trump administration's systematic efforts to roll back the Obama administration's inclusive application of civil rights protections to transgender individuals. The current legal landscape, however, is anything but certain.

As we [commented](#) earlier this year, the Trump administration's revocation of the 2015 and 2016 Title IX guidance requiring schools to treat transgender students in accordance with their gender identity comes in opposition to recent federal court decisions. Last year, U.S. Attorney General Jeff Sessions [revoked](#) the Obama administration's protection against discrimination based on gender identity in the employment context, and established the DOJ's position that Title VII's prohibition of sex discrimination "does not encompass discrimination based on gender identity *per se*, including transgender status."

However, the Equal Employment Opportunity Commission has refused to reverse course and [continues to interpret](#) Title VII's prohibition of sex discrimination as "forbidding any employment discrimination based on gender identity or sexual orientation." In addition, a number of states and municipalities have extended workplace nondiscrimination provisions to transgender individuals.

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