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# What Do We Do Now? District Court Invalidates 2024 Title IX Regulations

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On January 9, a federal judge in the Eastern District of Kentucky entered an order vacating the 2024 Title IX regulations (the Final Rule). The case is *Tennessee, et al. v. Cardona* (Civil Action No. 2: 24-072).

Published in April 2024, the Final Rule, among other things, clarified that discrimination "on the basis of sex" for purposes of Title IX "includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." The Final Rule also redefined the term "sexual harassment" to encompass both "sexual harassment and other harassment on the basis of sex," including the bases previously mentioned. It also expanded protections for students and applicants based on "past, current, or potential parental, family, or marital status" and pregnancy or related conditions, and required schools to provide certain accommodations for lactating students and students who are pregnant or have pregnancy-related conditions.

The plaintiffs in *Tennessee v. Cardona* included the states of Tennessee, Ohio, Indiana, and West Virginia, and the Commonwealths of Kentucky and Virginia, joined by intervenors Christian Educators Association International (Christian Educators) and A.C., a 15-year-old female student athlete. They asserted that the U.S. Department of Education exceeded its lawful authority in implementing the Final Rule, and that the Rule was contrary to law. The district court agreed and invalidated the Final Rule on the basis that it exceeded the agency's authority, violated the Constitution, and was the result of arbitrary and capricious agency action.

The district court found the Department exceeded its statutory authority in issuing the Final Rule by expanding the definition of "on the basis of sex" to include "gender identity." The district court found "there is *nothing* in the text or statutory design of Title IX to suggest that discrimination 'on the basis of sex' means anything other than it has since Title IX's inception—that recipients of federal funds under Title IX may not treat a person worse than another similarly-situated individual on the basis of the person's sex, i.e., male or female." The district court also found the Final Rule suffered from several constitutional infirmities, including: (a) violating the First Amendment by requiring Title IX recipients, including teachers, to use names and pronouns associated with a student's asserted gender and punished the violation under a *de minimis* standard; (b) being vague and overbroad because it uses vague terms in regulations that render Title IX recipients unable to predict what conduct violates the law; and (c) violates the Spending Clause by conditioning receipt of federal funding on the prohibition of discrimination on gender identity, when Title IX does not unambiguously condition the receipt of funds on the prohibition of gender identity discrimination.

Instead of vacating just the portions of the Final Rule that it deemed problematic, the district court vacated it in its

entirety. The court did not address the implications of doing so, leaving University administrators scratching their heads about what they need to do with their current Title IX policies. This alert seeks to provide some initial guidance.

First, the court's action in vacating the Final Rule does not mean that no Title IX regulations are in place. Instead, vacating the Final Rule means that the prior Title IX regulations, implemented in 2020 (the 2020 Rule) once again are the applicable regulations. Numerous courts of appeal—including in the Sixth Circuit, which includes Kentucky—have addressed the consequences of vacating regulations and concluded that "[v]acating or rescinding invalidly promulgated regulations has the effect of reinstating prior regulations."[1]

Second, even though the district court vacated the Final Rule, including regulations that explicitly prohibited harassment on the basis of gender identity, that does not mean no protections for gender identity exist under the law. The *Cardona* decision vacated the Rule, but only the Department of Education was a party to that case and the case's broader holdings are not binding on colleges and universities—it is but one of multiple interpretations of the issue by a single district court. The U.S. Supreme Court held in *Bostock v. Clayton County*, Ga., 590 U.S. 644 (2020) that Title VII bars employment discrimination based on sexual orientation and gender identity, concluding that "homosexuality and transgender status are inextricably bound up with sex," *id*. at 660–61, and "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex," *id*. at 669. Although the district court found *Bostock's* holding was limited to the Title VII employment context and did not bear on the interpretation of Title IX, numerous courts of appeal have taken the opposite view, acknowledging that courts "construe Title VII and Title IX protections consistently." *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023).[2] Applying *Bostock,* courts have found that Title IX bars discrimination based on sexual orientation or gender identity under Title IX, irrespective of any agency rule.[3] We also note that state laws also may offer protections similar to those provided in the now-invalidated Final Rule. By way of example, New Jersey provides protections against discrimination on the basis of sex and gender identity.[4] And, *Cardona* does not forbid schools—particularly private schools—from having their own policies prohibiting various types of gender discrimination, as Title IX provides a floor, not a ceiling.

Finally, although vacating the Final Rule eliminated certain regulations expressly providing protections for students who are pregnant, lactating, or have conditions related to pregnancy, protections similar to those found in the invalidated Final Rule still exist in Title VII—including the Pregnancy Discrimination Act, which bars discrimination on the basis of "pregnancy, childbirth, or related medical conditions." In addition, all but four states (South Dakota, Mississippi, Alabama and North Carolina) have laws that provide some protections for pregnancy.

But schools do need to take action. In particular, the procedural protections set forth in the 2020 Rule, such as requiring live hearings and cross examination in a multitude of cases, need to be reinstated. If your school switched to a "single investigator" model for issues previously covered by the live hearing requirement, you will likely need to switch back. Schools should inventory the changes that they made last summer on procedural issues and determine whether those changes would be permitted under the 2020 Rule. If not, they will need to be adjusted.

As higher education institutions wait to see if there will be an appeal of the district court's decision—unlikely with the new administration—or if the Department of Education will issue guidance on Title IX in light of the decision, they should revert to their prior Title IX policy, at least with respect to necessary procedural issues, and should be

vigilant in consulting both federal and state law to determine what obligations, if any, exist when addressing issues involving alleged harassment on the basis of gender identity and pregnancy status.

Troutman Pepper Locke has a team of attorneys experienced in handling Title IX issues. If you have any questions about Title IX, the implications of the Final Rule or this alert, please feel free to contact the authors or any member of the firm's Higher Education Group.

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[1] *See PJM Power Providers Grp. v. FERC*, 88 F.4th 250, 266 (3d Cir. 2023), amended sub nom. *PJM Power Provisers Grp. v. FERC*, No. 21-3068, 2024 WL 259448 (3d Cir. Jan. 24, 2024), *and cert. denied sub nom. Pub. Utilities Comm'n of OH v. FERC*, No. 23-1069, 2024 WL 4426548 (U.S. Oct. 7, 2024) ("While these potentially "disruptive consequences" may militate toward less drastic solutions, such a remedy is nonetheless within the scope of our statutory authority."); *Mason Gen. Hosp. v. Sec'y of Dep't of Health & Hum. Servs.*, 809 F.2d 1220 (6th Cir. 1987); *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam); *Menorah Medical Center v. Heckler*, 768 F.2d 292, 297 (8th Cir.1985); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1569 (11th Cir. 1985).

[2] *Accord Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020).

[3] *See Grimm*, 972 F.3d at 616 ("After the Supreme Court's recent decision in Bostock . . . we have little difficulty holding that a bathroom policy precluding [plaintiff] from using the boys restrooms discriminated against him "on the basis of sex."); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *cert. denied sub nom. Metro. Sch. Dist. of Martinsville v. A. C.*, 144 S. Ct. 683, 217 L. Ed. 2d 382 (2024) (same); *Grabowski*, 69 F.4th at 1116 (9th Cir. 2023) ("The Court held that discrimination 'because of' sexual orientation is a form of sex discrimination under Title VII. We conclude that the same result applies to Title IX.").

[4] *See N.J.S.A.* 10:5-12.

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