The Title IX Injunctions & the Vacation of Chevron Deference

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STUDENT AFFAIRS EDUCATOR CERTIFICATION APPROVED CE PROGRAM

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ASCA Association for Student Conduct Administration

TITLE IX

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ASCA is committed to making our events accessible. We encourage you to engage in sessions in ways that fit your abilities and comfort level. In addition to any requested accommodations and use of assistive devices and technology, we encourage attendees to drink or eat during session, stretch, stand up, fidget, stim, take breaks, wear headphones for noise and stimulation reduction, and/or engage in helpful focus/regulation practices such as deep breathing, doodling, using a silent phone app, and more. In general, please engage so far as you feel emotionally and physically able to do so–it is okay to push your comfort zone, and to also prioritize your well-being.

We encourage all attendees to understand that focus and engagement can look and feel different for each individual, and that while unfamiliar behaviors may sometimes be initially distracting, they are not intentionally disruptive.

This space should feel comfortable and accessible. If you have any concerns with accessibility, please let Central Office know as soon as possible.

Language Statement

ASCA asks that all participants recognize the diversity of values, opinions, preferences, and practices represented in our academy audience, which includes professionals and students from throughout the United States and the international community. Accordingly, all who are involved in the academy, whether members, presenters, attendees, volunteers, employees, or guests of the Association, are encouraged to use bias-free communication that supports both the letter and the spirit of the Inclusive Language Policy.

Land & Labor Acknowledgment

Each speaker acknowledges: We acknowledge that we speak from land that was forcibly taken from Indigenous Americans. We also recognize the history of and present day consequences of slave labor in America. A land and labor acknowledgement are, to be clear with our words, an acknowledgement of the history of the Indigenous genocide and the chattel slavery in this country. The impact of forced physical, emotional, economic, and sexual labor continues to this day.

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It is important that we as an Association honor our values of equity and intentional inclusion by incorporating land and labor acknowledgements as part of our events, meetings, and conversations, as well as including these acknowledgements through our actions.

Land and labor acknowledgements should seek not to further traumatize people of color while emphasizing for white individuals the continued pain caused by genocide, slavery, colonization, anti-Blackness, xenophobia, and bias. We hope to spur action rather than guilt, indifference, or debate.

Legal Disclaimer

The information contained in this session is presented for informational and discussion purposes as to how certain court decisions may apply to the field of student conduct and student conduct-adjacent professionals. Nothing in this presentation should be considered or construed as legal advice. Please consult your personal or institutional attorney for legal advice regarding these court decisions and the application thereof.

THE INFORMATION IN THIS PRESENTATION IS ACCURATE AS OF AUGUST 5, 2024

Learning Outcomes

At the conclusion of the webinar the attendees will be able to:

1. Describe the timeline of Title IX litigation and identify how prior case law has impacted current policy and litigation

2. Discuss the general premises of the existing injunctions on Title IX and their impact on practice

3. Articulate the practical implications regarding the recent decisions on Chevron Deference and the injunctions

ASCA Knowledge and Skills

Area 8-Law & Policy

8.2-Compliance/Application-Advanced

8.3-Equity & Intentional Inclusion-Intermediate

Agenda for Today's Session

Chevron Deference Cases

1. Loper Bright Enterprises v. Raimondo
2. Relentless Incorporated v. Department of Commerce

Title IX Injunction Litigation

3. Texas v. Miguel Cardona and Merrick Garland
4. State of Louisiana et al. v. Department of Education
5. Tennessee v. Department of Education
6. State of Arkansas v. United States Department of Education et al.
7. State of Oklahoma v. Miguel Cardona and the United States Department of Education
8. Kansas v. Miguel Cardona and Merrick Garland
9. State of Alabama v. United States Department of Education

What comes next?

Loper Bright Enterprises v. Raimondo 601 U.S. _ (2024)

Relentless v. Department of Commerce 601 U.S. _ (2024)

Loper Bright and Relentless

- Filed by two commercial fishing companies against the National Marine Fisheries Service (NMFS).
- Filed in the district court of DC and Rhode Island, both appealed to their Circuit Court of Appeals.
- Both companies sued based on NMFS's lack of authority in imposing the laws that these companies pay for their fishing observers.
- Issue addressed by the Supreme Court: Should the *Chevron* doctrine be overruled or clarified?
- "*Chevron* is overruled."

What does this mean moving forward?

- APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to any agency interpretation of the law simply because a statute is ambiguous.
  - The courts are taking their Article III authority and applying to to administrative law.
- Amicus briefs and expert opinions become more important that ever.
- Large effect on our Title IX work, which will have an effect on our non-Title IX student conduct cases.
- Also may affect how much deference the courts may give to us as school administrators.

How did we get where we are, and where are we going?

2011-Dear Colleague Letter issued by Obama administration

2015-present-States codify various guidance issued by the Obama administration

February 2017-Notice and comment period for Title IX regulations announced by Betsy DeVos

2017-2020-States codify various guidance issued by the Trump administration

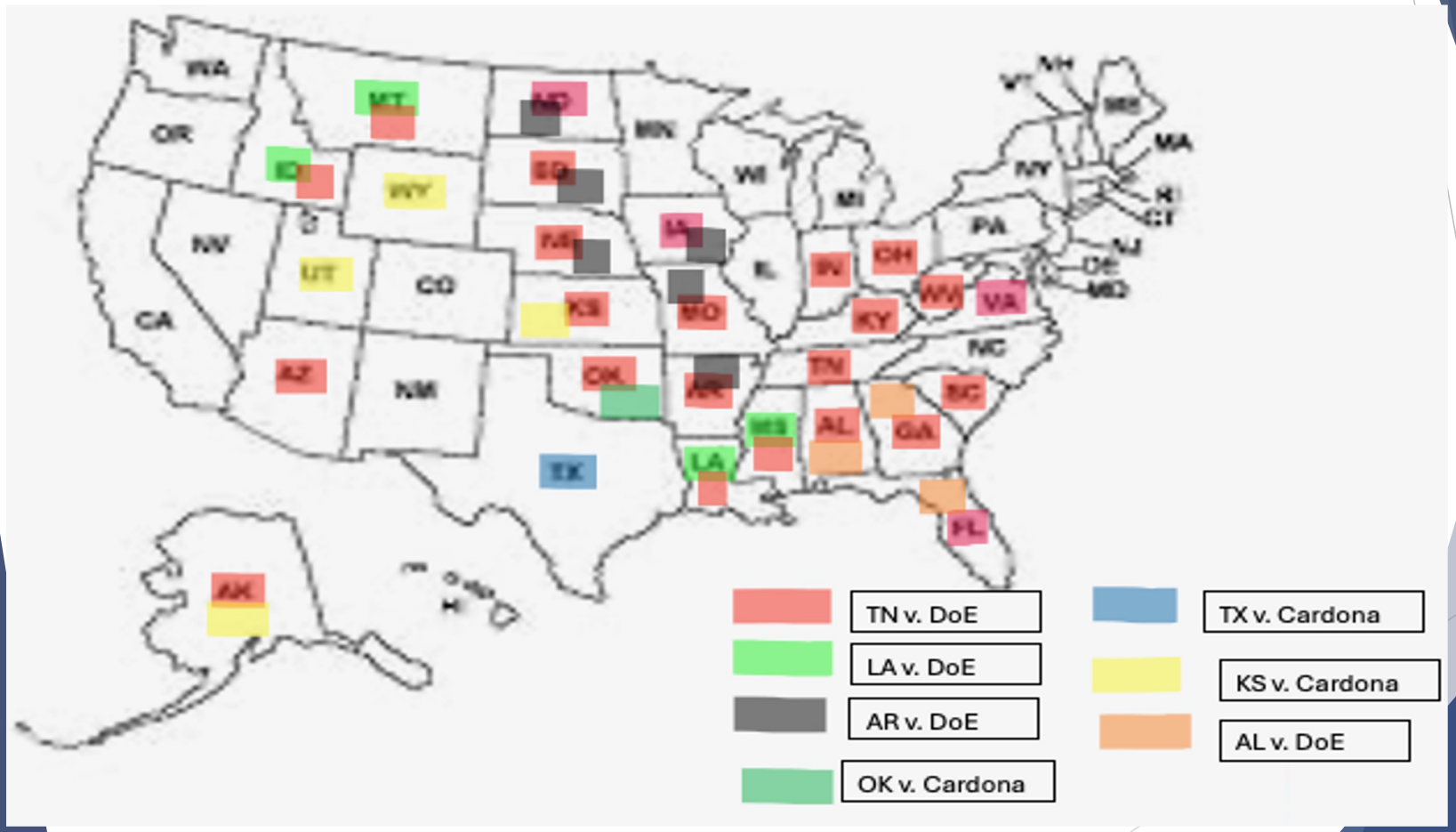
May 2020-Final rules issued by the U.S. Department of Education

January 2023-Executive Order 13988, “Interpretation” letter, “Dear Educator” Letter

April 2023- Notice of Proposed Rulemaking published

April 2024-Final rules published

The Decision Map



State of Texas v. Miguel Cardona et al.

4:23-cv-00604-O

State of Texas v. Miguel Cardona et al.

4:23-cv-00606-O

- Filed by the State of Texas
- Filed in the Northern District of Texas
- Motion for Summary Judgement
- Judicial notice of similarly filed cases (p. 12)
- Deference to the 6th Circuit request not to issue a nationwide injunction (p. 12)

State of Texas v. Miguel Cardona et al.

4:23-cv-00606-O

- Plaintiffs (TX) contend
  - Conflict with state law
  - Final rules are subject to judicial review
  - No notice and comment period on the guidance documents
  - Injury due to enforcement
- Defendants (Cardona) contend
  - No final agency action
  - No Article III (U.S. Constitution) standing
  - Unripe claims
  - Alternative adequate opportunity for judicial review under Title IX
  - Title IX's exclusive review scheme

Substance of the Decision

State of Texas v. Miguel Cardona et al.

- "Guidance documents are considered final agency action in their own right." (p.16)
- "20 states "suffered immediate injury to their sovereign interests when Defendants issued the challenged guidance…"" (p.19)
- "Action "bind[ing]" an agency to a legal view "giv[ing] rise to 'direct and appreciable legal consequences'" is final action" (*U.S. Army Corps of Eng'rs v. Hawkes* (578 U.S. 590, 598 (2016)) (p. 20)
- "The documents speak with the force of law…" (p. 21)
- The Department of Education already started investigations into various Texas independent school districts under the interpretation of the now final rules. (p.31)
- Precedent supports the pre-enforcement judicial review of the guidance documents (p. 36)

Substance of the Decision

State of Texas v. Miguel Cardona et al.

- "The court is not explicitly prohibited from reviewing Title IX (p. 52)
- Major questions doctrine "required applying "common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue." (*West Virginia v. EPA* (597 U.S. 697, 722-23 (2022)) (pp. 75-76)
- "...courts "presume that Congress intends to make major policy decisions itself" and "not leave those decisions to agencies." (p.76)
- There is conflict between the definitions in Title VII (Civil Rights Act of 1964) and Title IX (Higher Education Amendments of 1972) (p. 79)
- The guidance documents violate the "Spending clause" (U.S. Const. I,8,1) (p. 86)
- "The guidance documents constitute a substantive rule requiring notice and comment rulemaking." (p.92)
- "The Guidance Documents are substantively and procedurally unlawful in violation of the APA." (p. 96)

Substance of the Decision

State of Texas v. Miguel Cardona et al.

- "Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition on the basis of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiation following the date of this order." (p 107)
- This decision does NOT extend to the final rule (p. 108)
- The decision grants summary judgement

Applicability of the Decision

Texas v. Miguel Cardona et al.

Only applicable in:

1. Texas

State of Louisiana et al. v. US Department of Education

3:24-CV-00563

State of Louisiana et al. v. US Department of Education 3:24-CV-00563

- Filed by State of Louisiana and multiple school boards
- Requested a preliminary injunction to prevent the Title IX final rules from taking effect on August 1, 2024
- 15 states and the District of Columbia filed amicus curiae briefs in opposition to the motion for the preliminary injunction
- Premise of the motion
  - Injury has or is likely to occur
    - Conflict with state law
    - Unfunded mandate
    - Interference with sovereign authority
    - Violation of free speech
  - Causation
    - Compliance with the final rules will cost the school districts money and failure to follow the rules will result in a loss of funding, rendering the school districts incapable of operation
  - Redressability
    - Plaintiffs believe that with a trial, the evidence presented will demonstrate injury

State of Louisiana et al. v. US Department of Education 3:24-CV-00563

- Plaintiffs (LA) contend
  - the harm without an injunction is irreparable
  - a violation of the “spending” clause
  - unconstitutional exercise of legislative power
  - violation of the First Amendment
  - arbitrary and capricious
- Reliance on *Bostock v. Clayton County, Georgia* (590 U.S. 644 (2020))

- Defendants (DoE) contend
  - no irreparable harm
  - the final rules are a “clarification” not a change in the law

Substance of the Decision

Louisiana et al. v. U.S. Department of Education

- The final rules violate the spending clause because the requirements are effectively compulsory, not voluntary
- There is no "true intelligible principle guiding the DOE's discretion…" (p. 30)
- Reasonable interpretation (reliance on Chevron deference) (*Chevron U.S.A., Inc v. National Resources Defense Council, Inc.* (467 U.S. 837, 842-43 (1984))
- Failure of the DoE to address relevant issues
  - Requirements to change gender identity and non-binary students
  - Lack of attention to detail that males and females are physically different (clothing *(morality)*
  - Additional costs
  - Lack of detail on exceptions to the rule
  - The final rule should have been more representative of the comments provided (p. 34)
  - Failure to address the effects of cisgender females

Applicability of the Decision

Louisiana et al. v. U.S. Department of Education

Only applicable in

1. Idaho
2. Louisiana
3. Mississippi
4. Montana

State of Tennessee et al. v. Department of Education

22-5807 (6th Cir)

State of Tennessee et al. v. Department of Education

22-5807

Filed by the State of Tennessee and…

1. Alabama
2. Alaska
3. Arkansas
4. Arizona
5. Georgia
6. Idaho
7. Indiana
8. Kansas
9. Kentucky
10. Louisiana
11. Mississippi
12. Missouri
13. Montana
14. Nebraska
15. Ohio
16. Oklahoma
17. South Carolina
18. South Dakota
19. West Virginia
20. Multiple school boards in Tennessee

State of Tennessee et al. v. Department of Education 22-5807

- Plaintiffs (TN) contend
  - the harm from Title IX enforcement (of the new rules) will come at the expense of state sovereignty
  - the harm from Title IX enforcement (of the new rules) will come with an impossible financial decision
  - the rules were purported outside of the authority of the Administrative Procedures Act (5 U.S.C. § 553
  - The final rules were not issued with the proper “Notice and Comment” period
- Defendants (DoE) contend
  - the final rules are a “clarification” not a change in the law
  - the final rules are not subject to judicial review in accordance with the Administrative Procedures Act
  - The judicial review is preemptive

Substance of the Decision

Majority opinion-Tennessee et al. v. U.S. Department of Education

- The final rules are considersidered “final agency action” (p. 17)
- The published rules are subject to judicial review, and need not wait until enforcement (p. 18)
- The final rules do not provide an alternative remedy other than judicial review (p. 18)
- The final rules do not preclude pre-enforcement challenges (p. 18)
- By issuing this preliminary injunction, the court is proactively protecting states from harm, that should a court make an adverse finding in the enforcement period, the decision might not fully rectify the harm caused (p. 20)
- The states are likely to succeed on their claims (p. 21)

Substance of the Decision

Dissent-

Tennessee et al. v. U.S. Department of Education

- Dear Educator letter and Fact sheet are “interpretive rules” (p. 25)
- Action generally entails the opening of an investigation, not punishment (p. 26)
- There may be comparable precedent
  - Kentucky v. Biden, 23 F. 4th 585, 594-95 (6th Cir. 2022)
  - Biden v. Nebraska (- U.S.-, 143 S. Ct. 2355, 2366-67, 216 L.Ed.2d 1063 (2023)
  - School of the Ozarks v. Biden (41 F.4th 992, 996 (8th Cir. 2022)
- The final rules do not address all issues related to transgender matters (p. 28)
- “The documents explain legal obligations; they do not create them.” (p. 29)

Applicability of the Decision

Tennessee et al. v. U.S. Department of Education

Only applicable in:

1. Alabama
2. Alaska
3. Arkansas
4. Arizona
5. Georgia
6. Idaho
7. Indiana
8. Kansas
9. Kentucky
10. Louisiana
11. Mississippi
12. Missouri
13. Montana
14. Nebraska
15. Ohio
16. Oklahoma
17. South Carolina
18. South Dakota
19. Tennessee
20. West Virginia

State of Arkansas v. United States Department of Education et al.

4:24-cv-00636

State of Arkansas v. United States Department of Education et al. 4:24-cv-00636

Filed by the States of:

- Arkansas
- Missouri
- Iowa
- Nebraska
- North Dakota
- South Dakota
- A.F.-minor individual

Filed in the Eastern District of Missouri

State of Arkansas v. United States Department of Education 4:24-cv-00636

- Plaintiffs (AR…) contend
  - "violate the Administrative Procedures Act (APA)
  - "exceeds the department's statutory authority"
  - arbitrary and capricious
  - "...impermissibly expands the definition of sex-based harassment and contravenes…*Davis v. Monroe Cnty. Bd. of Educ.* (526 U.S. 629 (1999))"
  - Conflicts with state laws

- Defendants contend
  - Application of *Bostock v. Clayton County* (590 U.S. 644 (2020))

Substance of the Decision

State of Arkansas v. United States Department of Education et al.

- "The Supreme Court accepted the premise that "homosexuality and transgender status are distinct concepts from sex," *Bostock*, 590 U.S. at 669, but nevertheless concluded that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id." (p. 28)*

- "The Supreme Court rejected the idea of a "'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id." (p. 28)*

- Circuit support for the application of *Bostock v. Clayton County*
  - 4th Circuit (*Grimm v. Glouster Cnty. Sch. Bd.* 972 F. 3d. 586, 616 (4th Cir, 2020))
  - 7th Circuit (*A.C. by M.C. v. Metro Sch. Dist. of Martinsville* 75 F. 4th 760, 769 (7th Cir. 2023))
  - 9th Circuit (*Grabowski v. Ariz. Bd. of Regents* (69 F 4th 1110, 1116 (9th Cir. 2023))

Substance of the Decision

State of Arkansas v. United States Department of Education et al.

- "The Supreme Court cautioned that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on- student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Id.* at 651-52." (p. 31)

- Reference to *Loper Bright* decision (p. 42)

- The court declined to issue a nationwide injunction, even though the plaintiffs asked for one (p. 50)

Applicability of the Decision

Arkansas v. United States Department of Education et al.

Only applicable in:

1. Arkansas
2. Missouri
3. Iowa
4. Nebraska
5. North Dakota
6. South Dakota
7. To the individual (A.F.)

State of Kansas v. Miguel Cardona et al.

5:24-cv-04041

State of Kansas v. Miguel Cardona et al.

5:24-cv-04041

Filed by the States of:

- Kansas
- Alaska
- Utah
- Wyoming

Filed in the District of Kansas

State of Kansas v. Miguel Cardona et al.

5:24-cv-04041

- Plaintiffs (KS…) contend
  - "violate the text of Title IX…
  - "attempts to unilaterally settle matters subject to profound debate without authorization from Title IX or Congress,"
  - "violates the Constitution's Spending Clause, and the First, Fifth, Tenth, and Fourteenth Amendments,"
  - "arbitrary and capricious"
- Defendants (Cardona) contend
  - *Bostock* allows for the expansion of the definition of "sex."
  - Title IX's updates are within Congressional authority and comport with the Constitution

Substance of the Decision

Majority opinion-State of Kansas v. Miguel Cardona et al.

- The Plaintiff's have standing to sue, including the individual student and organizations.
  - "Parents have standing to sue when the practices and policies of a school threaten the rights and interests of their minor children." (at 7).
  - Plaintiff organizations have a purpose related "the interests at stake" in this case.

- Court agreed that the final regulations were "contrary to the statute and historical context of Title IX." (at 11).
  - Court found the legislative history of Title IX supported the definition of "sex" as biological sex and that sex consisted of "males and females." (at 9).
  - Defendants relied on *Bostock* when contending that "gender identity is discrimination on the basis of biological sex." (at 9).
  - Court concluded that *Bostock* and Title VII are distinct from Title IX and that *Bostock*'s "sex" definition does not apply to Title IX. (at 11).

- Court did not address the arguments related to athletics because of the proposed athletics rule. (at 11).

Substance of the Decision

Majority opinion-State of Kansas v. Miguel Cardona et al.

- "The DoE's reinterpretation of Title IX to place gender identity on equal footing with (or in some instances arguably stronger footing than) biological sex would subvert Congress' goals of protecting biological women in education." (at 11).

- Court found the Final Rule "involves issues of both vast economic and political significance and therefore involves a major question." (at 11).
  - Court cites *Louisiana*, *Tennessee*, and *Texas*.

- DoE violated the Spending Clause "because it introduces conditions for spending that were not unambiguously clear in Title IX." (at 13).
  - Prohibition of gender identity discrimination is a ambiguous condition to impose under Title IX considering its Congressional history.

Substance of the Decision

Majority opinion-State of Kansas v. Miguel Cardona et al.

- The Court found the Final Rule "violates the First Amendment by chilling speech through vague and overbroad language." (at 13).
  - Plaintiff's speech is chilled because anyone wishing to speak to "sex is immutable and binary, explain their beliefs as to the differences between men and women, refer to individuals with biologically accurate pronouns, and speak in opposition to sharing bathrooms and other intimate space switch individuals who do not share their biological sex." (at 14).
  - Also stating these beliefs would amount to a harassment claim under the Final Rule. (at 14).
- Vague and overbroad because the definition of sex-based harassment and hostile environment harassment "is entirely fact dependent and there is no guidance as to how a recipient is to determine what constitutes hostile environment harassment." (at 14).

Substance of the Decision

Majority opinion-State of Kansas v. Miguel Cardona et al.

- The court found the Final Rule was arbitrary and capricious. (at 15).
  - One student Plaintiff claiming "she avoided using school restrooms and that biological males who do not even identify as females went into the female restroom because they knew that they would get away with it and wanted to go into the female restroom with the girls." (at 15).
  - This is enough to counter DoE's claims that they "fully addressed privacy concerns and determined that there was a lack of evidence that transgender students posed a risk to non-transgender students in a single-sex space and asserted that such generalized concerns have been unsubstantiated." (at 15).
  - One Plaintiff to counter an agency's research is enough to find the rule arbitrary and capricious, in addition to DoE failing "to consider several important aspects of the problems raised by the Final Rule." (at 16).

Applicability of the Decision

Kansas v. Miguel Cardona et al.

Only applicable in:

1. Kansas
2. Alaska
3. Utah
4. Wyoming
5. K.R.'s school
6. Schools attended by members of:
    a. Young America's Foundation or Female Athletes United
    b. By children of members of Mom's for Liberty.

"Granting a nationwide injunction in this case would effectively give Plaintiffs all the relief they might ultimately hope to obtain at the completion of this litigation - a decision better made with a fully developed record." (at 20).

- Still enforced against over 700 colleges and universities and over 400 K-12 schools.

State of Alabama, et. al. v. Miguel Cardona, et. al.

7:24-cv-533-ACA

State of Alabama, et. al. v. Miguel Cardona, et. al.

Filed by:

- Alabama
- Florida
- Georgia
- South Carolina
- Independent Women's Law Center
- Independent Women's Network
- Parents Defending Education
- Speech First, Inc.

Filed in:

- Northern District of Alabama, Western Division

State of Alabama, et. al. v. Miguel Cardona, et. al.

- Plaintiffs asked for a preliminary injunction against enforcement of all of the 2024 Final Regulations, nationwide.
- This request was based on:
  - DoE's redefinition of "sex," and "sex-based harassment."
  - Recipient's obligations under Title IX, including:
    - The grievance process
    - Live hearing and cross-examination
    - Single-investigator model
    - Notice and access to evidence
    - Oral complaints
    - Burden of proof

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- A female, Trump-appointed judge rejected the plaintiffs' arguments entirely.
  - Only Title IX case where DoE prevailed and the plaintiffs did not.

- For the majority of plaintiffs' arguments, the court found the arguments to be "conclusory" and based off an "undeveloped record."
  - Conclusory arguments: reaching a legal conclusion without providing any evidence to back up that claim.

- After deciding the plaintiffs had standing, the court addressed the plaintiffs' failure to address the Final Rule's severability.
  - "This effectively puts the onus on this court to research and determine what test the Eleventh Circuit uses to evaluate the severability of regulations and whether the district court conducted a similar analysis. The court declines to undertake that task when the party seeking relief has not done so first." (at 31 - 32).

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- Plaintiffs challenge the redefinition of "sex," to include gender identity, but the court rejects this argument.
  - DoE relying on *Bostock*, Plaintiffs relying on *Adams* (11th Cir).
    - Plaintiffs incorrectly claiming *Adams* held *Bostock* decision limited the "sex" interpretation to Title VII and did not extend to Title IX.
    - "...the issue presented in *Adams* was whether the word 'sex' included 'gender identity,' not whether sex discrimination includes discrimination based on sexual oreitnation or transgender status…Because the Department does not claim 'sex' means anything other than biological sex, § 106.10 is not contrary to *Adams*." (at 44).

- Court rejects plaintiffs' arguments that the Final Rule misapplies *Bostock*.
  - Related to the permission of sex-separate bathrooms, locker rooms, and shower facilities, but recipients "must permit students to use the facility corresponding to their gender identity." (at 48).
  - Only referred to "regulations that the Final Rules does not change" and doesn't discuss how this misapplication impacts 106.33 (permits separate toilets, locker rooms, and shower facilities on the basis of sex, must be comparable facilities.)

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- No Spending Clause issue: plaintiffs never addressed the percentage of their total budget at issue with adherence to new Title IX regulations, required for court's analysis of the "unduly coercive" element. (at 48 - 52).

- No Major Questions doctrine issue: plaintiffs don't support their arguments that education is a state sovereign issue and that Congress "tried and failed to add gender identity and sexual orientation to Title IX." (at 52 - 55).
  - Plaintiffs also argued that the Final Rule regulates controversial subject matter: the political significance, the volume and "mostly negative" comments, and the "personal and emotionally charged nature of the subject matter." (at 54).
  - "a regulation related to a controversial subject, without more, does not mean it is a major policy decision or an extraordinary case." (at 54).

- Overall, adoption of § 106.10 (Title IX scope) is not arbitrary or capricious.

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- No First Amendment issue: arbitrary and capricious challenge isn't the proper venue to raise a constitutional complaint, so court only address if DoE reasonably considered *Cartwright*.
  - *Cartwright* is raised in the other injunction cases, but this is an Eleventh Circuit case.
  - DoE properly analyzed and addressed *Cartwright* issues and how "the amended regulations are materially distinguishable from *Cartwright* as well as other First Amendment concerns." (at 82).

- Plaintiffs took issue with harassment language that "could require schools to punish students for misgendering another person." (at 83).
  - Court found DoE addressed these concerns and that a "stray remark, such as a misuse of language, would not constitute harassment." (at 83).
  - Court highlighted other factors that "would guide a Title IX coordinator" in making a decision on a hostile environment. (at 83).
  - "In short, although Plaintiffs may dislike the Department's rules, they have failed to show a substantial likelihood of success in proving the Department's rulemaking was unreasonable or not reasonably explained under APA's deferential arbitrary-or-capricious standard." (at 84).

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- Court also declines to allow plaintiffs to raise due process/unconstitutional claims about the removal of certain procedural elements as it is inappropriate to raise this under an arbitrary and capricious standard. (at 84 - 85).

- The removal of a live hearing and advisor cross-examination was sufficiently explained and reasoned by DoE (at 93).
  - "The Department's new position is not so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (at 94).

- Single-investigator model allowance is also not arbitrary and capricious.
  - "Again, the findings it cites are not evidence-based factual findings, but instead the Department's previous belief about the best practice. Accordingly, all the Department needed to do was show that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequate indicates." (at 100).
  - DoE adequately explained why it made this change, including that single-investigator models "supports qualify grievance procedures and decision-making." (at 100).

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- Notice and access to evidence: plaintiffs contend that DoE failed to provide a reasonable explanation for why it is requiring students to *request* access to evidence, rather than automatically providing access.
  - Plaintiffs are taking issue with respondents only accessing "relevant and not otherwise impermissible" evidence, rather than evidence "directly related" to the allegations. (at 103).
  - Court noted that the plaintiffs "made no attempt" to explain the differences in these terms describing the access to evidence, nor did they address DoE's response to these comments in the preamble.

- Oral complaints: plaintiffs argue that this change is arbitrary and capricious because "the Department failed to reasonably address the extraordinary implications of these changes or reasonably explain why a formal written complaint is unfair, impractical, or unwise." (at 104).
  - Court found that plaintiffs didn't explain "why this court should substitute its judgement about fairness, practicality, or wisdom of permitting investigations based on oral complaints instead of formal written complaints. Nor have Plaintiffs address the Department's detailed comments about its reasons for making this change." (at 104).
  - Plaintiffs also failed to address the Title IX coordinator's role in initiating complaints largely hasn't changed, including acting on behalf of a complainant. (at 105).

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- Burden of proof: plaintiffs were closer to winning on this claim because the DoE didn't provide a clear definition about what is a "comparable proceeding" justifying the use of clear and convincing evidence standing in Title IX cases. (see 105 - 108).
  - "However, the Plaintiffs have cited no authority in support of their contention that the lack of clarity makes the rule arbitrary or capricious. And in similar circumstances, the Eleventh Circuit has declined to address a party's argument than an ambiguous regulation was arbitrary or capricious." (at 107 - 108).

- Cumulative effect: plaintiffs argue the DoE "failed to consider the cumulative effect" of the Final Rule changes on the grievance procedures as a whole. (at 108).
  - "Plaintiffs do not address that almost all of the changes made by the Final Rule are optional and they do not address how the mandatory changes, considered cumulatively, make the Final Rule arbitrary or capricious." (at 108).

- Court also took issue with plaintiffs delaying proceedings, but claiming "irreparable harm" by the regulations.
  - Even if failed to comply with new regulations, DoE has a "detailed scheme for compliance actions…Accordingly, denial of funding is not imminent and cannot support a finding of irreparable injury at this stage." (at 111).

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- State law issues: plaintiff states argue they can't enforce their state laws because of Title IX
  - Sex-separation in sports: court finds that the Final Rule permits this separation. (at 114).
    - "the States have not shown an irreparable injury from being unable to enforce their state laws about sex-separation in sports."

- Georgia points to "Parents' Bill of Rights" in their state law, but "it is not immediately apparent what part of [this law] conflicts with the Final Rule." (at 115).
  - "The court declines to make Plaintiffs' arguments about the effect of this state statute for them." (at 115).

- Alabama and Florida did not cite any state laws that conflict with the grievance procedures. (at 115 -116).
  - Did highlight state laws "related to sex-separated bathrooms at school, parents' rights to information about their children, and the definition of harassment at school." (at 116).
  - "Alabama provides no argument about what part of the Final Rule conflicts with this statute" (supporting a minor from withholding info about identity from parents, withholding information from minor's parents about gender identity). (at 117).
  - Title IX specifically allows for these parental rights (at 117 - 118).

Substance of the Decision

Majority opinion-State of Alabama, et. al. v. Miguel Cardona, et. al.

- Court DID find that Alabama and Florida's bathroom statues "appear to conflict with § 106.31(a)(2)'s instruction that preventing a person from participating in a program or activity activity consistent with the person's gender identity subjects the person to more than a de minimis harm, when considered in connect with § 106.33." (at 119).
  - Irreparable harm stems from "some parts of the Final Rule are unlawful and would preempt the state statues, infringing on state sovereignty." (at 119).
  - "This court has already determined that the Plaintiffs have not shown a substantial likelihood of success on the merits of their argument that the relevant parts of the Finale Rule are unlawful." (at 119).

- Court also agreed that Alabama's harassment definition conflicts with sex-based hostile environment harassment, due to "and" vs "or." (at 121).
  - "Alabama's only argument is that the rule is unlawful, so allowing it to preempt state laws would inflict an irreparable harm. But Alabama has not made a showing of substantial likelihood of success on the merits of its challenge to the definition." (at 121).

Applicability of the Decision

State of Alabama, et. al. v. Miguel Cardona, et. al.

Only applicable in:

1. Alabama
2. Florida
3. Georgia
4. South Carolina

Case is currently on appeal to the 11th Circuit Court of Appeals, which applies a preliminary injunction pending further order from the 11th Circuit.

Biggest Concerns of the Title IX Injunctions

- First Amendment issues
- State sovereignty
- Original legislative purpose of Title IX
- Existing sex separation approved by Title IX
- Commerce clause
- Sufficient notice
- Difference between Title VII and Title IX

Biggest Concerns of the Title IX Injunctions

- Penalty-Threat of the complete loss of Federal funding for education
- Disparity between K-12 and higher education funding (and the penalty thereof)

1. Complete loss of all Title IV funding
2. Administrative fine of 1% of university operating budget
3. Administrative fine based on the Administrative Law Judge

What are the next steps in the process?

- All preliminary injunction cases will get a hearing
- Decision(s) issued
- Appeals

- The U.S. Dept of Education “asked” the U.S. Supreme Court to step in and make a ruling
  - Three (3) issues here

- This will take time

What do these injunctions mean moving forward?

- **Questions to ask?**
  - What can my institution do now to enact the spirit of the law?
  - Can my institution make changes as part of a yearly review to our policies/codes?
  - What population does my institution's non-discrimination statement cover, now?

- **Action steps**
  - Take steps to streamline your current policies and procedures (Title IX and non-Title IX)
  - What training can I start providing to our community members about our policies?
  - Talk to legal counsel about what actions you can take or not take
  - Frequently monitor the list of affected institutions (Kansas decision) (link on the resources page)

Coming Soon:

TITLE IX©

ASCA Sexual Misconduct Institute

October 14-15, 2024

Vanderbilt University

Nashville, TN

ASCA
Association for Student Conduct Administration

Thank you for attending!

Questions?

ascatix@theasca.org

ASCA
Association for Student Conduct Administration

Resources

Parents Defending Education v. Olentangy School District (23-3630) 6th Cir (2024)

Beard v. Falkenrath (22-2893) 8th Cir (2024)

Bostock v. Clayton County, GA (590 U.S. 644) (2020)

Brief Overview of Key Provisions of the Department of Education's 2024 Title IX Final Rule, which summarizes key provisions that were amended in the 2024 Title IX Regulations.

2024 Title IX Regulations: Pointers for Implementation, which supports schools by listing key components of the 2024 Title IX regulations to assist schools with implementation.

Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures, which is designed to help schools draft policies and procedures that comply with these new regulations.

List of K-12 schools enjoined from enforcing the 2024 Title IX regulations

List of Colleges and Universities enjoined from enforcing the 2024 Title IX regulations.

Resources

State of Texas v. Miguel Cardona et al. (4:23-cv-00604-O) N.D. TX (2024)

- Texas OAG Comment Letter on the NPRM
- Advisory on Application of Title IX in Texas Schools issued by the Texas OAG following the decision issued on June 11, 2024

State of Louisiana v. Department of Education W.D. LA (3:24-cv-00563) (2024)

State of Tennessee v. Department of Education (22-5807) 6th Cir (2024)

State of Arkansas v. Department of Education D. AR (4:24-cv-00636) (2024)

State of Kansas v. Miguel Cardona D. KS (5:24-cv-04041) (2024)

State of Oklahoma v. Miguel Cardona (5:24-cv-00461-JD) D. OK (2024)

State of Alabama v. Miguel Cardona (7:24-cv-00533-ACA) N.D. AL (2024)

L.M. v. Town of Middleborough Massachusetts (23-1535, 23-1645) 1st Cir (2024)

References

Bostock v. Clayton County, GA (590 U.S. 644) (2020)

State of Texas v. Miguel Cardona et al. (4:23-cv-00604-O) N.D. TX (2024)

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State of Alabama v. Miguel Cardona (7:24-cv-00533-ACA) N.D. AL (2024)

United States Department of Education. (2024). Title IX webinar, given August 1, 2024, via Zoom.