Kansas Federal Court Enjoins New Department of Education Rules

Client Alert
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The Department of Education adopted Title IX regulations (the "final rule") to be effective on August 1, 2024. We discussed the changes to Title IX in a previous Client Alert, but the final rule emphasized:

- Title IX will now recognize as protected statuses LGBTQ and pregnant students, a significant expansion.
- There are fewer adversarial procedures compared to Trump Administration rules. The objective appears to be providing a less intimidating environment for an alleged victim.
- Separate meetings/hearings for alleged victims and accusers are permitted.
- The alleged victim will have the opportunity to attend the hearing remotely.
- The new regulations indicate that cross-examination is no longer required, but the Federal 6th Circuit Court of Appeals has found in *Doe v. Baum* that cross examination is part of required due process, so this will have to be reconciled. For now, educational institutions within the 6th Circuit Court of Appeals territory (Michigan, Ohio, Tennessee, and Kentucky) are advised to retain cross-examination.
- The definition of sexual harassment has been expanded, allowing more subjectivity. The Trump Administration rule emphasized objectively offensive behavior.

However, this final rule has faced significant challenges in court, throwing the future of the rule into doubt. Among other things, the challengers objected to the final rule's requirement that students be permitted to use the bathroom and locker room associated with their gender identity. Additionally, the challengers complained that the final rule would prevent individuals from expressing their deeply held religious beliefs regarding gender identity. For example, challengers have

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alleged the final rule would potentially expose students to discipline for using pronouns, based on their religious beliefs, that align with the individual's biological sex.

Injunction: In *State of Kansas v. U.S. Department of Education*, the court recently enjoined the enforcement of the Title IX regulations, finding that the final rule is an unconstitutional exercise of legislative power under the Spending Clause, violates the First Amendment, and is arbitrary and capricious. According to Judge Broomes, the final rule's sexual harassment definition will chill speech of students "who want to articulate that 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 spaces with individuals who do not share their biological sex." Additionally, the final rule is arbitrary and capricious–because the rule is "implausible" and was a significant departure from the Department of Education's (DoE) past practice without reasonable explanation. The Court also noted that the term "sex" is unambiguous as used in Title IX. But even if the term were ambiguous, the DoE's interpretation of the term "sex" under Title IX would no longer be entitled to deference given the Supreme Court's decision under *Loper Bright Enterprises v. Raimondo*, 603 U.S. _ (2024). For a more detailed discussion of *Loper* and the overruling of "*Chevron* deference," see Butzel's recent Client Alert.

The Courts of Appeals for the Fifth and Sixth Circuits are currently examining injunctions relating to the new Title IX final rule. His decision may or may not be followed, but Judge Broomes concluded that the "impermissible definition [of sex discrimination] permeates the entire rule and, as such, it is difficult to excise the remaining regulations without also eliminating those regulations that involve sex discrimination."

Other Challenges: The final rule is currently under siege, with challenges throughout the country. In addition to the decision discussed in this Alert, injunctions have also been issued by the U.S. District Courts for the Western District of Louisiana and the Eastern District of Kentucky. There are also cases pending in Northern District of Alabama, the Northern District of Texas (one in the Fort Worth Division and one in the Amarillo Division), the Western District of Oklahoma, and the Eastern District of Missouri. While it is impossible to predict the outcome of these cases, the early success for challengers of the final rule suggests additional injunctions may be coming.

What is on the Horizon? The U.S. Supreme Court will clearly be deciding whether the Department of Education final rule is constitutional. Among other possible bases for challenge, the court will almost certainly have to deal with the First Amendment and spending clause challenges such as those addressed in Judge Broomes' decision. Additionally, the Supreme Court may have to decide whether the DoE's regulation is entitled to deference under its new *Loper* decision.

Recommended Steps: As always, educational institutions must prepare for a potential enforcement of the final rule, but be extremely attentive to the decisions that follow. It remains to be seen whether the U.S. Supreme Court will view this regulatory change as so far beyond the authority of the DoE as to be unconstitutional. Until there is a Supreme Court decision or the final rule is changed or withdrawn by another administration, educational institutions should prepare to amend policies, rules, and

procedures to bring them into compliance with the U.S. Department of Education final rule.

Butzel's Education Industry Group will be diligently monitoring the litigation surrounding the DoE's final rule and will provide further updates. While we await further clarity, please contact a Butzel Education Industry Group attorney for help with preparing, revising, and implementing thoughtful changes to your policies and procedures for handling allegations of sex-based mistreatment and for preventing same.

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