

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA STATE)
DEPARTMENT OF EDUCATION,)
a political subdivision of)
THE STATE OF OKLAHOMA)
Plaintiff,)

vs.)

Cause No.: _____

THE UNITED STATES OF AMERICA,)

MIGUEL CARDONA,)
in his official capacity as)
the Secretary of Education,)

UNITED STATES)
DEPARTMENT OF EDUCATION,)

CATHERINE LHAMON,)
in her official capacity as)
Assistant Secretary for Civil Rights,)
Department of Education,)

RANDOLPH WILLS,)
in his official capacity as)
Deputy Assistant Secretary)
for Enforcement,)
Department of Education,)
Defendants.)

OKLAHOMA STATE DEPARTMENT OF EDUCATION - ORIGINAL COMPLAINT

I. BACKGROUND

1. President Joe Biden, on January 20th, 2021, issued Executive Order 13988, which is titled “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” (“Executive Order”).
2. Pursuant to Executive Order 13988, the U.S. Department of Education (“Department”) engaged in notice-and-comment rulemaking. On June 22nd, 2021, the Department issued

a “Notice of Interpretation” (“Notice”). The Department’s Notice indicated that in the enforcement of Title IX’s prohibitions on sex discrimination the Department will interpret the term “sex” to include sexual orientation and gender identity.

3. Subsequent to the issuance of the Notice, the Department formally amended the Code of Federal Regulations (“CFR”). Specifically, on July 12th, 2022, the Department published in the Federal Register a notice of proposed rulemaking to amend the 2020 Regulations. See Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022).
4. Comments were received from various States and interested parties before the expiration of the sixty (60) day comment period. Some of the problems, or potential problems highlighted were the burdens the proposed regulations would impose on the States and its political subdivisions and schools and risk of degradation of constitutional rights that the regulations posed. As an example, the obligations of recipients to respond to sex discrimination are expanded; yet, the threshold of conduct falling within the newly redefined term of “sexual discrimination” was lowered. The clear, undeniable result is that recipients must be impossibly vigilant in policing interactions among students, parents, and faculty or risk noncompliance with Title IX.
5. This Final Rule requires States, and other regulated parties such as the Oklahoma State Department of Education (“OSDE”), to ignore biological sex or face enforcement actions and the loss of federal, education funding.

6. The Final Rule is a significant departure from the Departments’ past policies. Despite this departure the Department did not adequately explain the Final Rule in terms of the text, structure, or purpose of Title IX.
7. The Final Rule is all-encompassing and preempts all “State or local laws or other requirements” that conflict with its terms, 89 Fed. Reg. at 33,885, and it applies to any school “program or activity” regardless of whether the activity occurs within the school — or even within the United States. 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.11).
8. The Department, in its interpretation and actions, has relied on the decision in Bostock v. Clayton County, 590 U.S. 644 (2020) issued by the Supreme Court of the United States (“SCOTUS”). The Department’s reliance is misplaced.
9. Bostock does not require the interpretations promulgated by the Department. In Bostock, SCOTUS held, in relevant part, that terminating an employee “simply for being homosexual or transgender” constitutes discrimination “because of . . . sex” under Title VII. Id. at 649–51, 655 (quoting 42 U.S.C. § 2000e-2(a)(1)).
10. SCOTUS “assum[ed]” that the term “sex” means “biological distinctions between male and female,” Id. at 655, and limited its decision and was unambiguous that its decision did not “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination” or address other issues not before the Court such as “sexsegregated bathrooms, locker rooms, and dress codes.” Id. at 681.
11. The Final Rule rescinds, in whole or in part, constitutional safeguards issued by the Trump Administration. Such constitutional safeguards include, without limitation, (a) assurances that students accused of harassment have access to a fair hearing, and (b) redefines

harassment to include constitutionally protected, or previously constitutionally protected, conduct.

12. Oklahoma schools are placed in a dilemma of bad options. Adhere to the Constitution and risk the loss of federal, school funding. In the alternative, both students and faculty risk damage to their respective futures for refusal to comply.
13. The Final Rule violates the Administrative Procedure Act (APA). 5 U.S.C. § 706. Specifically, the Final Rule is substantively unlawful because its purported “interpretations” of Title IX squarely conflict with the text of that statute. Title IX, by its plain meaning wording, defines the term “sex” as “one sex” that is male or female. 20 U.S.C. § 1681(a)(5) (describing those institutions which have a policy of admitting “only students of one sex”).
14. The Department of Education engaged in arbitrary-and-capricious decision making in its promulgation of the subject regulations because it failed to define the amorphous concepts of “gender identity” and “sexual orientation.” The Department also failed to adequately and properly consider all relevant factors (e.g. the interplay between Title IX and other federal and state laws). The Department also failed, or refused, to provide any significant explanation of its sudden reversal of its own prior policies.
15. It has yet to be determined whether Title IX applies to discrimination based on sexual orientation or gender identity. See Bostock at wherein SCOTUS specifically held “we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”
16. Assume arguendo, without conceding, that the concepts sexual orientation and gender identity were protected against discrimination by Title IX. Regardless, the Final Rule’s

provisions fail to faithfully implement such protections because the Rule makes unlawful school policies that do not discriminate based on those concepts. To the contrary, the clear effect of the Rule is discrimination based on sexual orientation and gender identity. The effect is accomplished by allowing single-sex programs and facilities, but simultaneously requiring opposite-sex access to those same programs and facilities, but only for those individuals who claim a transgender gender identity.

17. Title IX states, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).
18. Since the enactment of Title IX, the Department understood and interpreted the prohibition on sex discrimination to refer to the biological sex of an individual. In turn, all recipients understood and applied the prohibition according to the Departments’ interpretation.
19. The Final Rule now redefines Title IX’s prohibition on sex discrimination to include “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” 89 Fed. Reg. 33,886 (to be codified at 34 C.F.R. § 106.10).
20. Pursuant to the Final Rule, federal funding may be withheld from schools that do not allow students access to “restrooms and locker rooms” and comply with any “appearance codes (including dress and grooming codes)” based on gender identity. See, e.g., 89 Fed. Reg. at 33,816. In real terms, a violation now occurs under Title IX when a transgender student is denied access to a bathroom or locker room of the opposite biological sex. See, e.g., 89 Fed. Reg. at 33,818. 31. Such access clearly violates the rights of other non-transgender student and violates established law, to wit: “The Department cannot enforce Title IX in a

manner that requires recipients to restrict any rights protected under the First Amendment.”
85. Fed. Reg. 30,071.

21. The Final Rule further commands a lower standard for sexual harassment ... “[s]ex-based harassment, including harassment predicated on sex stereotyping or gender identity, is covered by Title IX if it is sex-based, unwelcome, subjectively and objectively offensive, and sufficiently severe or pervasive to limit or deny a student’s ability to participate in or benefit from a recipient’s education program or activity.” 89 Fed. Reg. at 33,516
22. The new, lower standard and definition of sexual harassment expands the prohibition previously found under Title IX and is contrary to established, legal precedent from the Supreme Court of the United States (“SCOTUS”). See Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649–50 (1999), which defined as conduct “that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” 526 U.S. at 650.
23. Another obvious result of the Final Rule and its enforcement is that students, faculty, and staff are subject onerous, unjustified investigations if they fail to use a transgender student’s preferred pronouns.
24. Prior 2020 Regulations purposefully adopted the standard of sexual harassment set forth in Davis “to ensure that speech and expression are prohibited only when their seriousness and impact avoid First Amendment concerns.” 85. Fed. Reg. 30142.
25. No justification may be found, or has been sufficiently articulated by, the Department in the departure from the Davis standard. Perhaps more important, the Department has failed or declined to explain how the lowered standard conforms to the Constitutional mandates. These facts are highlighted by the verbiage that the Department “believe[s] a broader

standard is appropriate.” 89 Fed. Reg. at 33,498. Remarkably, no basis, cogent or otherwise, is provided for the asserted belief.

26. The Final Rule lacks objective standards, which in turn, renders every complaint subjective. As an example, interpretation and enforcement of the Final Rule is subject to transient identification (i.e. those individuals that may not permanently identify as transgender). See Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th Ed. 2013) (defining “transgender” to include “individuals who transiently” identify one way). This places recipients in an untenable, if not impossible, position ... how to determine the true intentions or true identifications of an individual and how to respond to a given set of circumstances. It also places recipients and other students at unnecessary risk when faced with instances in which the true intent is to merely gain access to a female bathroom, locker room or other facility for predatory purposes.
27. Easily foreseeable examples make it clear that the Final Rule is fatally defective on the grounds that it is vague, ambiguous, and over broad.
28. The Final Rule is also fatally defective on the grounds that it fails to adequately notify recipients of the conduct that constitutes compliance sufficient to investigations withholding of funding.
29. Pursuant to 5 U.S.C. § 705, this Court should postpone the effective date of the Final Rule and preliminarily enjoin the implementation of the interpretation to cover discrimination on the basis of sexual orientation or gender identity.
30. Pursuant to 5 U.S.C. § 706(2)(A), this Court vacate and set aside the Final Rule and permanently enjoin the Defendants the implementation, enforcement and interpretation of Title IX as proposed by the Defendants.

II. PARTIES

31. The Plaintiff incorporates ¶¶ 1 through 31 as if fully set forth herein.
32. The Plaintiff, the Oklahoma State Department of Education (“OSDE”), is a political subdivision of the State of Oklahoma charged with overseeing all schools and school districts within the State and ensuring compliance with Title IX. The OSDE is bound by the Oklahoma Constitution, Oklahoma laws, and applicable federal laws, including without limitation, Title IX. The State of Oklahoma is a sovereign State of the United States.
33. The United States of America is the federal sovereign and is sued pursuant to 5 U.S.C §§ 702–03 and is also sued pursuant to 28 U.S.C. § 1346. 9.
34. Miguel Cardona is the Secretary of the Department of Education and is sued in his official capacity.
35. The Department of Education (“Department”) is an executive branch department of the United States. The Department is responsible for administering most federal assistance for education to the States. The Department also administers and enforces Title IX.
36. Catherine Lhamon is the Assistant Secretary for Civil Rights at the Department of Education and is sued in her official capacity.
37. Randolph Wills is the Deputy Assistant Secretary for Enforcement at the Department of Education and is sued in his official capacity.

III. JURISDICTION AND VENUE

38. The Plaintiff incorporates fully by reference ¶¶ 1 through 37 as if set forth at length herein.

39. This Court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331 on the grounds that this lawsuit involves the breadth and scope of the Department’s authority under Title IX. This lawsuit also arises under the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 702–703.
40. Venue is proper before this Court pursuant to 28 U.S.C. § 1391(e)(1) on the grounds that the agencies of the United States and officers of the United States in their official capacities.
41. The OSDE “resides” and/or is constituted in this district. Moreover, a substantial part of the acts, omissions or conduct which gives rise to the claims levied herein arose in this district.

IV. CLAIMS

COUNT I THE FINAL RULE EXCEEDS STATUTORY AUTHORITY AND VIOLATES THE LAW 5 U.S.C. § 706 110.

42. The Plaintiff incorporates fully by reference ¶¶ 1 through 241 as if fully set forth herein.
43. Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory ... authority, or limitations, or short of statutory right.” See 5 U.S.C. § 706(2)(A), (C).
44. The Final Rule violates § 706(2)(A), (C) and exceeds the Department’s statutory authority on the grounds that the Department, in its interpretation of Title VII has erroneously relied upon, and improperly extended, the SCOTUS decision on Bostock as stated above. The Department’s interpretation ignores significant textual and structural differences between Title VII and Title IX ... as well as the disparate subject matter covered by the respective statutes ... as well as the express disclaimer and limitation noted in Bostock i.e. that the holding did not apply to other federal or state laws.

45. The Final Rule violates the law and exceeds the Department’s statutory authority. Title, IX, in plain, unambiguous wording, allows recipients of federal education funding, such as the OSDE, to distinguish between biological males and biological females in situations the Final Rule condemns.
46. The correct interpretation of Title IX’s prohibition on discrimination “on the basis of sex” does not include protections based upon concepts of sexual orientation or gender identity.
47. The Final Rule violates the law and exceeds the Department’s statutory authority on the grounds that it compels recipients of federal school funding to violate the First Amendment in order to remain compliant with Title IX. More particularly, the Final Rule abandons the previous definition of sexual harassment articulated in Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649–50 (1999), which was adopted by the Department via its 2020 rulemaking. The Final Rule now embraces a significantly weaker standard that encompasses constitutionally protected activity.
48. By reinterpreting the word “sex” to include sexual orientation and gender identity the Department has impermissibly expanded the liability, or potential liability, of recipients of federal, school funding beyond what the liability traditionally permitted under Title IX. As an example, the Final Rule fundamentally rewrites Title IX’s prohibition on sex-based discrimination. Now, the failure to affirm a student’s gender identity would constitute “sex-based harassment.” See, e.g., 89 Fed. Reg. at 33,884. 116. Recipients have an obligation under the Final Rule to “take specific actions ... to promptly and effectively prevent sex discrimination,” including what the Final Rule now redefines as sex-based harassment. 89 Fed. Reg. at 33,887. An obvious consequence is that recipients would have an obligation under the Final Rule to confront, and possibly discipline, students and

employees who refuse to affirm another's gender identity. Failure to do so risks noncompliance with Title IX as now interpreted.

49. Defendants violate the law as cited above and exceed their statutory and regulatory authority not only in the promulgation of the Final Rule, but in the enforcement of the same.

Count II Promulgation and Enforcement of the Final Rule Constitutes Arbitrary and Capricious Agency Action in Violation of 5 U.S.C. § 706 118.

50. The Plaintiff incorporates by fully by reference ¶¶ 1 through 49 as if fully set forth herein.
51. The Final Rule is a final agency action subject to review under the APA.
52. “[A], an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).
53. “[A]gency action” is “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13).
54. An agency rule is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” *Id.* at § 551(4).
55. An agency action is arbitrary or capricious if it fails to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

56. Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary and capricious.” 5 U.S.C. § 706(2)(A).
57. Here, the Defendants acted arbitrarily and capriciously in issuing the Final Rule. Furthermore, the Defendants failed or refused to engage in reasoned decision making
58. Defendants willfully ignored the limitation set forth in Bostock itself (i.e. limited to the issue presented under Title VI) as well as case law that recognized that “Bostock ... was limited only to Title VII itself” and “does not stretch to [other statutes].” See e.g. Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021); See also, Neese v. Becerra, 640 F. Supp. 3d 668 (N.D. Tex. 2022) (Kacsmaryk, J.); compare 89 Fed. Reg. at 33,806.
59. The Final Rule also fails to adequately consider the effects of its terms on the States and affected political subdivisions of the States such as the OSDE. See generally 89 Fed. Reg. 33,474–33,896.
60. The Defendants were obliged to “adequately assess reliance interests” or “reasonably consider [...] the relevant issues and reasonably explain [...] the decision.” See Texas v. Biden, 10 F.4th 538, 552, 555 (5th Cir. 2021). Yet, despite their legal obligation(s), the Defendant’s expressly “decline[d] to opine on how [the Final Rule] interacts or conflicts with any specific State laws because it would require a fact-specific analysis.” 89 Fed. Reg. 33,822. Rather, the Defendant’s merely “refer[red] the public to § 106.6(b), which affirms that a [school’s] obligation to comply with Title IX and the regulations is not obviated or alleviated by any State or local law.” 89 Fed. Reg. 33,822.

61. The Defendants' actions fail to comply with their legal obligations and constitute arbitrary and capricious action.
62. Finally, the Final Rule fails to properly articulate the basis for its departure from established SCOTUS precedent related to sex-based harassment definition and policies previously adopted by the Department itself, as well as prior Department rulemaking.

V. DEMAND FOR RELIEF

63. The Plaintiff incorporates full by reference ¶¶ 1 through 44 supra as if set forth at length herein.
64. This Court is authorized to award the requested vacatur and declaratory and injunctive relief. See APA, 5 U.S.C. §§ 702, 705, and 706. See also 28 U.S.C. § 1361, commonly referenced as the Declaratory Judgment Act; 28 U.S.C. §§ 2201–2202 (Federal Rules of Civil Procedure 57 and 65) and the general and legal equitable powers of the Court.
65. The OSDE respectfully requests that the following relief from this Court:
 - a. Pursuant to 5 U.S.C. § 705, postponement of the effective date of the Final Rule.
 - b. Pursuant to 5 U.S.C. § 706(2), a finding and holding that the Final Rule is unlawful and that the same be set aside, vacated and held for naught.
 - c. A Declaratory Judgment holding that the Final Rule is contrary to Title IX and exceeds agency authority.
 - d. A Declaratory Judgment holding that the Final Rule is arbitrary and capricious, both in its wording and enforcement as well as in the process which brought the Final Rule into being.
 - e. That the Plaintiff be awarded preliminary (temporary) and permanent injunctive relief prohibiting the Defendants from interpreting and/or enforcing Title IX as

barring discrimination based on sexual orientation or gender identity. The instant request for relief includes, without limitation, the denial of federal financial assistance or the pursuit, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions. The instant request for relief also includes, without limitation, the enforcement, implementation or other reliance on the Final Rule, in any form, against the OSDE or any Oklahoma school.

- f. An award of such other relief as the Court may deem warranted and proper, whether in equity or in law.