

Tess O'Brien-Heinzen January 13, 2025

# Important Title IX Legal Update

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## Kentucky Federal District Court Opinion

On January 9, 2025, a federal district court in Kentucky struck down the 2024 Title IX regulations nationwide. *State of Tennessee et. al., v. Michael Cardona, et. al.*, Case: 2:24-cv-00072-DCR-CJS(E.D. Ky. Jan. 9, 2025). Specifically, the Kentucky court held that the U.S. Department of Education (DOE) exceeded its authority, engaged in arbitrary and capricious agency action, and violated constitutional free speech protections by expanding the definition of discrimination on the basis of sex to include gender identity and requiring school officials and employees to use “names and pronouns associated with a student’s asserted gender identity.” The Kentucky court utilized the legal remedy of “vacatur” to permanently set aside the 2024 regulations, barring reversal by an appellate court.

## What the Kentucky Decision Means For Wisconsin School Districts

In light of Wisconsin’s pupil nondiscrimination law and the Seventh Circuit Court of Appeals’ prior decisions related to gender identity and students’ rights under Title IX, the Kentucky decision means little more than a procedural shift and a return to the grievance procedures under the 2020 regulations.

Wisconsin’s pupil nondiscrimination law (Wis. Stat. § 118.13) continues to prohibit harassment on the basis of sexual orientation within Wisconsin educational institutions and Seventh Circuit Court of Appeals’ opinions including *Whitaker v. Kenosha Unified School District* and *A.C. v. Metropolitan School District of Martinsville*, and prohibit discrimination on the basis of gender identity within the same. In the 2017 *Whitaker* decision, the Seventh Circuit held that “[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” In 2023, in *A.C. v. Metro*, a case involving three transgender students, the Seventh Circuit confirmed its prior holding, stating, “*Whitaker* has been the governing decision in our circuit since 2017, and the school districts have not identified any substantial injuries it has caused.”

## Return to 2020 Regulations

In July 2024, when a Kansas court enjoined the DOE from implementing the regulations in various states and in schools attended by the children of the members of Moms for Liberty and other named organizations, the DOE advised schools that were no longer subject to the 2024 Title IX regulations, to follow the 2020 Title IX regulations. The same directive will likely apply to school districts nationwide as a result of the Kentucky decision.

While we have not yet heard from the DOE, we are encouraging school districts to rely on policies adopted in compliance with the 2020 Title IX regulations. If desired, school districts could also include extended benefits from the 2024 Title IX regulations into old policies, such as protections for students experiencing pregnancy and students with disabilities.

Finally, to avoid confusion and loss of vested rights (if applicable), school districts should process complaints initiated before the Kentucky decision in accordance with the 2024 Title IX regulations or contact legal counsel for guidance.

#### *Notable Differences in the 2020 and 2024 Title IX Regulations*

In processing complaints under the 2020 Title IX regulations, school districts are reminded of the following notable differences in the 2020 Title IX regulations, as compared with the 2024 Title IX regulations:

- The definition of “sexual harassment” is narrower than “sex-based harassment.” “Sexual harassment” is defined as:
  - Unwelcome conduct on the basis of sex that occurs in any education program or activity of the school in the U.S. that satisfies one or more of the following:
    - An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (quid pro quo); or
    - Unwelcome conduct determined by a reasonable person to be **so** severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution’s education program or activity; or
    - Sexual assault, dating violence, domestic violence, or stalking (as defined by law).
  - Title IX is only triggered when an employee has actual knowledge of conduct that could constitute sexual harassment under Title IX in an “education program or activity” of the school. In that case, the school must respond promptly in a manner that is not deliberately indifferent.
  - “Education program or activity” includes locations, events, or circumstances over which the school exercised substantial control over both the accused and the context in which the sexual harassment occurs.
  - The grievance process is no longer triggered by an oral report but requires a formal written complaint filed by the alleged victim or the Title IX coordinator.
  - The investigation, decision, appeal, and informal resolution once again must be siloed and conducted by different individuals.
  - Formal complaints must be dismissed if the allegations 1) would not constitute sexual harassment as defined under Title IX even if proved; 2) did not occur within the College’s program or activity; or 3) did not occur against a person in the United States.

#### *Notable Similarities in the 2020 and 2024 Title IX Regulations*

School districts should also be assured that not everything has changed as a result of the Kentucky court decision. The school district’s obligation remains to respond to reports of sexual harassment promptly and in a manner that is not deliberately indifferent. To this end, Title IX coordinators should:

- Contact the alleged victim to discuss the availability of supportive measures and consider the alleged victim’s wishes with respect to supportive measures;
- Explain to the alleged victim how to file a complaint to initiate the grievance procedure;
- Ensure provision of desired supportive services that do not unreasonably burden any party.
- Ensure both parties are treated equally and apply a presumption that the accused is not responsible for the conduct until a determination is made following the grievance process.
- Use the preponderance of the evidence standard of proof for determining whether sex discrimination occurred, unless the clear and convincing evidence standard is used in other comparable proceedings.

#### **Updated Training**

In the near future, the attorneys at Renning, Lewis & Lacy, s.c., will be offering a refresher Title IX training to assist districts in reinstating the 2020 Title IX grievance process for all Title IX complaints. In addition, our attorneys are available to assist with questions, individualized training, and policy work.



For questions regarding this article, please contact the author, or your Renning, Lewis & Lacy attorney.

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