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## In a Flurry of Title IX Lawsuits, One Stands Out to Challenge Rollback of Students' Rights

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Education Law

By Colleen Murphy | May 01, 2024 at 03:56 PM

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A flurry of lawsuits were filed this week by state attorneys general in response to the Biden administration's recent changes to Title IX of the Education Amendments Act, but experts say one suit challenging the rollback in protections for those accused of sexual assault may bring additional litigation.

Over the past week, four separate lawsuits have been filed by state attorneys general from Alabama, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, South Carolina, Tennessee, Texas, Virginia and West Virginia, after the Department of Education released the [final version of Title XI regulations](#) April 19. The regulations, which are set to take effect Aug. 1, expand protections for pregnant individuals and students who identify as lesbian, gay, bisexual, transgender, queer and intersex, but it also allows schools to return to the single-investigator model, offer an informal resolution procedure, and eliminate a live hearing requirement in instances of handling sexual assault claims.

Federal lawsuits have been filed in Alabama, Texas, Louisiana and Kentucky, and they collectively challenge the inclusion of gender identity in the definition of discrimination based on sex.

But only one case, *State of Alabama v. Cardona*, filed April 29 in the U.S. District Court for the Northern District of Alabama, addressed the issue of due process rights and a person's rights being revoked under the new Title XI rules—which could bring additional litigation, legal and historical experts anticipate.

"The Alabama lawsuit is much more interesting to me than the Texas or Louisiana ones, which are almost cookie cutter, anti-gender identity lawsuits," said Brooklyn College history and legal affairs professor KC Johnson. "It is just very hard for me to imagine that the U.S. Supreme Court, with *Bostock v. Clayton County* on the books,

is going to say Title IX does not apply to harassment on the basis of gender identity.”

The Alabama suit challenges the elimination of the right to a live hearing at postsecondary institutions, the lack of a right to cross-examine an accuser or witnesses, that accused students no longer have the right to be represented by counsel, and that parties can present fact witnesses that are “relevant and not otherwise impermissible” but may no longer present expert witnesses.

“The challenged rule states that college students accused of misconduct—charges that could ruin their academic and professional careers if they are found guilty—no longer have a right to be accompanied by counsel at all proceedings,” the complaint said.

“The argument made in the complaint is that the new regulations were arbitrary in this regard,” Johnson said. “They probably are not going to win on this issue, but it is not a frivolous argument. ... The question is, ‘What was the justification that the Office on Civil Rights had to take these rights away?’”

Patricia Hamill, a member and co-chair of the Title IX and campus discipline practice at Clark Hill, said many due process advocates have been concerned about changes to the current regulations since the proposed regulations came out in 2022. She added that the Alabama lawsuit targets the most significant aspects of the rollback of rights, challenges them as arbitrary changes, and alleges that the department has exceeded its statutory authority.

“The concern, of course, is that institutions, given a choice, will offer processes that are less robust,” Hamill said. “But this could be shortsighted on the part of institutions as fewer protections for accused students will inevitably lead to more litigation, which could lead to greater cost for institutions.”

The suit was brought by attorneys general from Alabama, Georgia and South Carolina, as well as the Independent Women’s Law Center, the Independent Women’s Network, Parents Defending Education, and Speech First.

“I am pleased to be among the first to challenge this ill-conceived rule that would infringe on the constitutional rights of students, parents, faculty, and the state of Alabama itself,” Alabama Attorney General Steve Marshall said in a statement.

While the Alabama suit was the only one to target the rollback of due process rights, it also hit on gender identity questions like others filed in Texas, Louisiana and Kentucky. Several defendants, like Secretary of Education Miguel Cardona, Assistant Secretary for Civil Rights Catherine Lhamon, and Deputy Assistant Secretary for Enforcement Randolph Wills, have been named in the lawsuits.

Texas Attorney General Ken Paxton and Ryan D. Walters, chief of the special litigation division, filed suit in *State of Texas v. United States of America* in the U.S. District Court for the Northern District of Texas, alleging that the final rule tells states and others that they must “ignore biological sex or face enforcement actions and the loss of federal education funding.”

A second suit, filed by attorneys general from Louisiana, Montana, Mississippi and Idaho along with the Louisiana Department of Education, in *State of Louisiana v. U.S. Department of Education*, alleges that the final rule “drives a dagger through the heart of Title IX’s mandate.”

“The central feature of the final rule is the department’s extraordinary move to transform Title IX’s prohibition of discrimination based on ‘sex’ to include discrimination based on ‘gender identity’—a wildly ambiguous term that itself is never fully defined in the final rule but that the department describes as a student’s subjective and internal ‘sense’ of his or her gender,” the complaint said. “And based on that key move, the department sets out to remake our educational system and our children.”

A fourth suit was filed in the U.S. District Court for the Eastern District of Kentucky by attorneys general from Tennessee, Kentucky, Ohio, Indiana, Virginia and West Virginia, who also sought to enjoin and invalidate the new Title IX regulations. The suit, *State of Tennessee v. Cardona*, was filed April 30.

Hamill said she was not surprised at how quickly the lawsuits were filed.

“This has been a long time coming,” Hamill said. “The proposed regulations have been in play for the last two years, and the final regulations are not that different from what was proposed. Given the Aug. 1 implementation date, it was important that the plaintiffs move quickly if they expect to have the runway needed to prosecute their case at least on a preliminary basis in order to get the injunction they seek.”

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