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Legal Sidebar

Courts Consider Recent Agency Regulations Prohibiting Gender Identity Discrimination Before and After *Loper Bright*

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In spring 2024, the Departments of Education (ED) and Health and Human Services (HHS) released new regulations interpreting sex discrimination to include gender identity discrimination under two federal laws. ED's regulations implement Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination "on the basis of sex" in federally funded education programs. HHS's regulations implement Section 1557 of the Patient Protection and Affordable Care Act (Section 1557), which, via a cross-reference to Title IX, prohibits sex discrimination in federal and federally funded health programs. Both rulemakings relied in large part on *Bostock v. Clayton County*, in which the Supreme Court held that Title VII of the Civil Rights Act of 1964's prohibition against sex discrimination in employment extends to gender identity and sexual orientation discrimination.

About two months after ED and HHS released their final rules, the Supreme Court held in *Loper Bright Enterprises v. Raimondo* that the Administrative Procedure Act (APA) requires that courts interpret federal statutes without deferring to federal agencies' reasonable interpretations of ambiguous provisions. In the short period between the publication of the rules and *Loper Bright*, two federal district courts ruled that, contrary to ED's position, Title IX does not prohibit gender identity discrimination. After *Loper Bright*, five federal district courts and one federal appellate court followed suit, and three federal district courts issued similar rulings under Section 1557. Examples of these cases can be found here and here. As a result of this litigation, both the Title IX and Section 1557 rules have been put on hold, in part or in full, in a large number of states. The Supreme Court recently allowed to remain in effect certain orders preliminarily enjoining (i.e., halting) the entire Title IX rule (the decision involved two appellate opinions that declined to issue stays of lower court injunctions). This Sidebar reviews the reasoning in the recent opinions addressing the Title IX and Section 1557 rules, their consequences, and the potential impact of *Loper Bright* in this area of law.

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Background

The Challenged Rules and *Bostock v. Clayton County*

Title IX prohibits covered entities from discriminating on the basis of sex, and Section 1557 prohibits covered entities from discriminating "on the ground prohibited under . . . title IX." Due to this cross-reference, "sex" has the same meaning under both laws. The 2024 Title IX and Section 1557 regulations reflect this symmetry. Both regulations define sex discrimination to include, among other things, gender identity discrimination. Both regulations also recognize that Title IX and Section 1557 allow for some circumstances in which covered entities can treat individuals differently or separate them on the basis of sex. In these circumstances, ED and HHS largely require covered entities to allow individuals to participate in programs and activities consistent with their gender identities. There are several statutory and regulatory exceptions to this principle, discussed further below.

The 2024 Section 1557 rule additionally prohibits covered health insurers from excluding or limiting coverage of "all health services related to gender transition or other gender-affirming care." It does not contain such a categorical prohibition for health care providers. Rather, providers may not refuse to provide such care if the refusal is based on a patient's sex or gender identity. Health insurers and health care providers need not provide or cover any service when the denial is based on a "legitimate, nondiscriminatory reason," including when a covered entity "reasonably determines" that the service is not "clinically appropriate" for a patient. (Further details on how the new Title IX and Section 1557 rules treat sex discrimination are explored in other CRS products.)

ED and HHS cited *Bostock v. Clayton County* to support their rulemakings, noting that courts often look to interpretations of Title VII to inform Title IX due to the laws' textual similarities. In *Bostock*, the Supreme Court ruled that Title VII prohibits sexual orientation and gender identity discrimination in the workplace. Title VII prohibits covered employers from discriminating "because of . . . sex." *Bostock* reasoned that the phrase "because of" means that sex (or other protected traits) must be a "but-for" cause of an adverse employment action. That is, an employer discriminates when it would have acted differently "but for" the targeted person's sex. The Court assumed, but did not decide, that the term "sex" in Title VII refers to biological distinctions between females and males. Even proceeding on that assumption, the Court held, an employer cannot discriminate based on gender identity without violating the statute. If an employer fires a person identified as female at birth for now identifying as male, the employer penalizes that person for traits that it would tolerate in a person identified as male at birth. In the Court's view, biological sex is thus a but-for cause of gender identity discrimination. The Court did not indicate how its reasoning would apply beyond Title VII or when a law prohibiting sex discrimination allows some sex-based differential treatment. It also did not address whether Title VII requires employers to always treat transgender individuals in accordance with their gender identities. The majority opinion explained that, even with respect to Title VII, it did "not purport to address bathrooms, locker rooms, or anything else of the kind."

Challenges to Agency Action

The APA allows individuals to challenge agency regulations in court. Courts may set aside or hold unlawful regulations for various reasons, including that they are "arbitrary, capricious . . . or otherwise not in accordance with law." Agency action may be arbitrary or capricious if the agency failed to engage in reasoned decisionmaking, for example, by failing to appropriately consider certain facts or facets of a problem. Agency action may be unlawful if it exceeds or contradicts an agency's statutory authority. Previously, under the doctrine established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts generally deferred to an agency's interpretation of a statute the agency was authorized to

administer if the statute was ambiguous and the agency's interpretation was reasonable, irrespective of whether it was the best interpretation. The Supreme Court overruled *Chevron* in *Loper Bright* and held that the APA is unambiguous in its requirement that courts are to interpret federal statutes without deferring to agency interpretations. Every statute, the Court held, has one "best" interpretation, and ultimately the APA requires the judiciary to determine the statute's meaning.

Courts Consider the 2024 Title IX and Section 1557 Rules

Before ED and HHS issued the 2024 rules, courts reached different conclusions regarding the scope of sex discrimination under Title IX and Section 1557. Some federal appellate courts, applying the reasoning of *Bostock*, concluded that discrimination against transgender individuals is sex discrimination under Title IX. Another appellate court went the other way, ruling that sex discrimination under Title IX does not include gender identity discrimination. Each of these courts relied entirely on Title IX's statutory text, without deferring to an ED interpretation. Courts similarly diverged when interpreting Section 1557's plain text before the 2024 rule, with some holding that Section 1557 does not prohibit gender identity discrimination and others (including one appellate court) holding that it does.

Courts considering challenges to the 2024 regulations, before and after *Loper Bright*, have largely ruled that Title IX and Section 1557 do not forbid gender identity discrimination. Noting that *Bostock* was decided under a different law and did not purport to go further than the facts of that case, courts ruling on the 2024 Title IX and Section 1557 regulations have distinguished *Bostock* in a number of ways. The below addresses arguments courts have invoked against the regulations, beginning with approaches that courts have taken to both the Section 1557 and Title IX regulations and moving on to some that (so far) are specific to the Title IX regulations.

Original Meaning and Textual Distinctions: Courts considering the 2024 regulations have opined that the ordinary meaning of "sex" in 1972, when Title IX was enacted, was "biological sex." While the *Bostock* Court assumed (without deciding) that "sex" under Title VII meant "biological distinctions between male and female," some courts have further distinguished *Bostock* from Title IX by focusing on differences in the statutory language: Title IX prohibits discrimination "on the basis of sex," while Title VII prohibits discrimination "because of . . . sex." Different language, courts have stated, leads to a different causation analysis.

Statutory Exceptions: Another textual difference that has been significant in recent court decisions are Title IX's statutory and regulatory allowances for certain sex-based distinctions. In the statutory text, Title IX allows, among other things, certain single-sex educational institutions and social clubs and youth service organizations to use sex-specific admissions or membership criteria. It also allows educational institutions to operate sex-separated "living facilities." Long-standing regulations implementing the statute allow for sex-separated bathrooms. Regulations also permit separate athletics teams based on sex, as well as single-sex classes in certain circumstances. In enjoining the 2024 Title IX and Section 1557 regulations, courts have interpreted these and other carve-outs to mean that Congress intended to allow funding recipients to treat students in accordance with their biological sex. Some courts have opined that requiring schools to treat people in accordance with their gender identities would undermine Title IX's exemptions by allowing transgender people to choose which programs or facilities to access.

Constitutional Authority: The different constitutional authorities underpinning Title VII versus Title IX and Section 1557 have also influenced judicial rulings. Congress passed Title VII pursuant to its Commerce Clause and Fourteenth Amendment powers. It enacted Title IX and Section 1557 under its Spending Clause authority. The Supreme Court has characterized Spending Clause legislation as akin to a contract: in exchange for funds, recipients promise not to discriminate. Because a recipient must voluntarily and knowingly accept the terms of this "contract," the Court requires that the terms set forth in legislation be "clear" and "unambiguous[]." Courts addressing the 2024 Title IX and Section 1557 rules

have held that these statutes do not clearly notify funding recipients that sex discrimination includes gender identity discrimination.

Context: Courts have also opined that employment, the context in which Title VII operates, is different than education and health care, the domains of Title IX and Section 1557. The latter contexts, some judges have held, are ones in which decisions may legitimately turn on sex, whereas that will rarely be the case in the workplace. With regard to education, courts have concluded that prohibiting gender identity discrimination undercuts the purpose of Title IX, which, they argue, is "to protect biological women from discrimination in education." In the health care context, courts have focused particularly on HHS regulations that, they say, may require health care providers or insurers to engage in or cover gender-affirming care. Courts have expressed skepticism that patients seeking treatment for gender dysphoria are similarly situated to patients seeking the same treatment for different reasons. Thus, they conclude, a refusal to provide or cover such care for a patient with gender dysphoria treats patients differently on the basis of a diagnosis, not sex. Put another way, for these courts, firing an employee for being transgender is not akin to refusing to offer certain medical services for gender-affirming care.

Major Questions: A lack of clear notification has also been an issue for courts that have held that the 2024 Title IX rule violates the "major questions doctrine." Under that judicial test, courts require agencies to point to clear congressional authorization when they regulate on an issue of great "economic and political significance." Courts have reasoned that the updated Title IX regulations decide a major question without such authorization because they require all federally funded schools to allow bathroom access consistent with a student's gender identity while prohibiting schools from requiring documentation of a student's gender identity.

First Amendment Concerns: Courts have ruled that the Title IX regulations' adoption of gender identity discrimination as a form of sex discrimination, combined with their definition of prohibited sexual harassment, violates the First Amendment. The Supreme Court has interpreted Title IX to require schools to take appropriate action to address sex-based harassment. Courts have ruled that ED's updated regulations governing prohibited harassment are vague and overbroad in a manner that impermissibly chills speech. These courts have concluded that the rule generates confusion as to expectations, particularly with respect to pronoun usage.

Analysis and Considerations for Congress

The Uncertain Impact of *Loper Bright*

Less than two months after *Loper Bright*, at least nine federal courts have held that Title IX and Section 1557 regulations interpreting sex discrimination to include gender identity discrimination are unlawful. Notwithstanding the similar results emerging in these cases, it is difficult to say what role, if any, *Loper Bright* played in these decisions. Many of these rulings acknowledged *Loper Bright*, but none stated that the court would have deferred to ED or HHS absent that decision. Courts before *Loper Bright* also issued rulings holding the 2024 Title IX rule unlawful, declining to defer to ED. Later cases cite these authorities and rely on much the same reasoning. The post-*Loper Bright* decisions may be part of a longer trend of courts reviewing regulations without extending deference to federal agencies. If Congress intends to confer discretionary interpretive authority on federal agencies engaging in rulemaking around sex discrimination, it may provide so explicitly.

Besides finding that ED and HHS misinterpreted Title IX and Section 1557, courts before and after *Loper Bright* enjoined ED's and HHS's Title IX and Section 1557 regulations relating to gender identity discrimination as arbitrary and capricious. While *Loper Bright* narrows the circumstances in which agencies may use their judgment to decisively interpret statutes, it does not speak to how courts review

challenges that an agency has exercised that judgment arbitrarily by failing to adequately support its decisionmaking.

The Reach, and Limits, of Recent Decisions

The courts that have ruled on recent direct challenges to ED's and HHS's regulations do not necessarily have the final say on what constitutes sex discrimination under Title IX and Section 1557. These laws provide a private right of action to individuals claiming a covered entity has discriminated against them. Courts can rule on the meaning of sex discrimination when faced with these private lawsuits. In these cases, courts are not bound by district court decisions on the lawfulness of the agency regulations (though they may be bound by controlling appellate authority), nor do they need the regulations to be in force to determine whether sex discrimination under these laws includes gender identity discrimination. After *Loper Bright* and decisions enjoining the 2024 Title IX regulations, a district court issued a temporary restraining order against a state law barring transgender girls from participating in sports consistent with their gender identity, holding the law likely violated Title IX. Further, as mentioned above, some federal appellate courts previously applied *Bostock*'s reasoning to Title IX and Section 1557. Nothing at this stage of litigation disturbs those decisions. Likewise, after *Loper Bright*, and after the three district court decisions invalidating parts of the 2024 Section 1557 rule, at least one federal district court held that Section 1557 may require health insurance companies to cover certain gender-affirming care.

At the same time, the decisions discussed above have a far-reaching impact. Several courts have put enforcement of the entire Title IX rule on hold in certain states, and the Supreme Court has, for now, allowed certain of these injunctions to remain in effect. The Title IX rule goes beyond the question of whether gender identity discrimination is sex discrimination. It addresses, among other things, procedures schools must use to respond to allegations of sex discrimination, annual training for all school employees, and protections for pregnant students and employees. In many states, these provisions are now also on hold, leaving the status of much of the law governing covered entities in limbo. Congress may provide further guidance on whether any portions of the agency regulations on Title IX (or Section 1557) are severable, just as it could establish requirements by substantively amending either law.

While gender identity discrimination may take different forms, courts appear to be particularly focused on a few areas. Courts appear principally concerned by those portions of the Section 1557 rule they interpret to require health care providers and health insurers to provide or cover gender-affirming care. Courts have also emphasized their skepticism toward the sections of the Title IX rule that require schools to allow students to access sex-specific activities in accordance with their gender identities and inasmuch as the rule may require students and staff to use others' preferred pronouns. In halting enforcement of any part of the rules prohibiting gender identity discrimination, however, courts have also blocked the rules' application against entities that, for example, refuse to admit or serve transgender individuals or that harass them because of their gender expression. These forms of discrimination are similar to the kind of discrimination the *Bostock* court definitively ruled constitutes sex discrimination under Title VII. Congress may clarify the meaning of prohibited sex discrimination under these statutes, for instance, by expressly covering all, none, or some forms of gender identity discrimination.

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