Texas v. United States

United States District Court for the Northern District of Texas, Wichita Falls Division

August 21, 2016, Decided; August 21, 2016, Filed

Civil Action No. 7:16-cv-00054-O

Reporter
201 F. Supp. 3d 811 *; 2016 U.S. Dist. LEXIS 113459 **; 2016 WL 4426495

STATE OF TEXAS et al., Plaintiffs, v. UNITED STATES OF AMERICA et al., Defendants.

Subsequent History: Appeal dismissed by *Texas v. United States, 2017 U.S. App. LEXIS 2373 (5th Cir. Tex., Feb. 9, 2017)*

Core Terms

regulations, Guidelines, agency's action, sex, Injunction, facilities, requirements, preliminary injunction, Plaintiffs', transgender, ambiguous, notice, obligations, agencies', biological, policies, parties, deference, issues, statutes, gender, district court, interpretations, provides, binding, schools, showers, Memo, enforcement action, interpretive rule

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For American Civil Liberties Union Foundation, American Civil Liberties Union of Texas, GLBTQ Legal Advocates & Defenders, Lambda Legal Defense and Education Fund, Inc., National Center for Lesbian Rights, Transgender Law Center, Movants: Kenneth D Upton, Jr, LEAD ATTORNEY, Lambda Legal Defense & Education Fund, Dallas, TX; Paul David Castillo, Lambda Legal Defense and Education Fund Inc, Dallas, TX.

For Eagle Forum Education & Legal Defense Fund, Amicus: Karen Bryant Tripp, Karen B. Tripp, Attorney at Law, Houston, TX.

For Governor C. L. "Butch" Otter, Amicus: Cally Younger, LEAD ATTORNEY, Office of Governor C L "Butch" Otter, Boise, ID.

For State of Washington, Amicus States [Washington/New York] et al., Amicus: Alan D Copsey, PRO HAC VICE, Office of the Attorney General of Washington, Olympia, WA.

For Letitia James, Public Advocate for the City of New York, Amicus: Molly Thomas-Jensen, [**3] LEAD ATTORNEY, Office of the Public Advocate for the City of New York, New York, NY.

Judges: Reed C O'Connor, UNITED STATES DISTRICT JUDGE.

Opinion by: Reed C O'Connor

Opinion

[*815] **PRELIMINARY INJUNCTION ORDER**

Before the Court are Plaintiffs' Application for Preliminary Injunction (ECF No. 11), filed July 6, 2016; Defendants' Opposition to Plaintiffs Application for Preliminary Injunction (ECF No. 40), filed July 27, 2016; and Plaintiffs' Reply (ECF No. 52), filed August 3, 2016. The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties presented their arguments. *See* ECF No. 56.[1]

This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school. The sensitivity to this matter is heightened because Defendants' actions apply to the youngest child attending school and continues for every year throughout each child's educational career. The resolution of this difficult **[**4]** policy issue is not, however, the subject of this Order. Instead, the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs' Motion should be and is hereby **GRANTED**.

I. BACKGROUND

The following factual recitation is taken from Plaintiffs' Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13 **[**5]** states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona.[2] They have sued the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials (collectively "Defendants"), challenging Defendants' assertions that Title VII and Title IX require that all persons must be **[*816]** afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex.[3] Plaintiffs claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the "DOJ/DOE Letter") and told them that they must "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who "refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII." *Id.* Plaintiffs **[**6]** complain that Defendants' interpretation of the definition of "sex" in the various written directives (collectively "the Guidelines")[4] as

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[1] The Court also considers various amicus briefs filed by interested parties. *See* ECF Nos. 16, 28, 34, 36-1, 38-1.

[2] Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.

[3] Plaintiffs refer to a person's "biological sex" when discussing the differences between males and females, while Defendants refer to a person's sex based on the sex assigned to them at birth and reflected on their birth certificate *or* based on "gender identity" which is "an individual's internal sense of gender." *See* Am. Compl. 12, **[**7]** ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) ("Holder Memo 2014") App. 1 n.1, ECF No. 6-3 ("'[G]ender identity' [is defined] as an individual's internal senses of being male or female."); *Id.* at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants' Guidelines state "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth . . . ." Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. "For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man." *Id.* at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) ("OSHA Best Practice Guide"), App. 1, ECF No. 6-4. The Court attempts to use the parties' descriptions throughout this Order for the sake of clarity.

[4] The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), **[**8]** ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet),

applied to *Title IX of the Education Amendments of 1972* ("Title IX") and *Title VII of the Civil Rights Act of 1964* ("Title VII") is unlawful and has placed them in legal jeopardy.

Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties "believed that the law opened all bathrooms and other intimate facilities to members of both sexes." Mot. Injunction. 1, ECF No. 11. Instead, they argue one of Title IX's initial implementing regulations, *34 C.F.R. § 106.33* ("*§ 106.33*" or "*Section 106.33*"), expressly authorized separate restrooms on the basis of sex. *Section 106.33* provides: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." *34 C.F.R. § 106.33*. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11. Plaintiffs state that Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants' actions to enforce these new agency policies through investigations and compliance reviews, **[**9]** causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. *Id.* at 3-8; Pls.' Reply 3-7, ECF No. 54.

[*817] Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are "[c]onsistent with the nondiscrimination mandate of [Title IX]," and that "these guidance documents . . . are merely expressions of the agencies' views as to what the law requires." Defs.' Resp. 2-4, ECF No. 40. Defendants also contend that the Guidelines "are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements" because DOE "has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how it views new and emerging issues." *Id.* at 4-5.[5] Defendants also state that the "[g]uidance documents issued by [DOE] 'do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations'" and these documents expressly state that they do not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6-10, to clarify that "the best **[**10]** reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," but the memo "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case").

A. TITLE IX

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person "shall, on the basis of sex, . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." *20 USC § 1681*. The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights. Mot. Injunction at 2-4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, *§ 106.33*. *See G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016)* (stating that the Department of Health, Education, and Welfare ("HEW") **[**11]** adopted its Title IX regulations in 1975 pursuant to *40 Fed. Reg. 24,128 (June 4, 1975)*, and DOE implemented its regulations in 1980 pursuant to *45 Fed. Reg. 30802, 30955 (May 9, 1980))*. *Section 106.33*, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

II. LEGAL STANDARDS

A. The Administrative Procedure Act (the "APA")

"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Norton v. S. Utah Wilderness All., 542 U.S. 55, 61, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004)* (quoting *5 U.S.C. § 702*). "Where no other statute provides a private right of action, the 'agency action' complained of must be *final* agency action.'" *Id. at 61-62* (quoting *5 U.S.C. § 704*).[6] In the **[*818]** Fifth

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ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.

[5] Defendants cited to U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, *http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html* (last visited August 5, 2016) (discussing the purpose of guidance documents and providing links to guidance documents).

[6] Agency action is defined in ***5 U.S.C. § 551(13)*** to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004)* (quoting ***5 U.S.C. § 551(13)***). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: 'an **[**12]** agency statement of . . . future effect

Circuit, "final agency action" is a jurisdictional threshold, not a merits inquiry. *Texas v. Equal Employment Opportunity Comm'n, No. 14-10949, 827 F.3d 372, 2016 U.S. App. LEXIS 11735, 2016 WL 3524242 at *5 (5th Cir. June 27, 2016)* ("*EEOC*"); *see also Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States, 362 F.3d 333, 336 (5th Cir. 2004)* ("If there is no 'final agency action,' a federal court lacks subject matter jurisdiction." (citing *Am. Airlines, Inc. v. Herman, 176 F.3d 283, 287 (5th Cir. 1999)*)).

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)* (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948)*; and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 91 S. Ct. 203, 27 L. Ed. 2d 203 (1970)*). "In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *EEOC, 2016 U.S. App. LEXIS 11735, 2016 WL 3524242, at *5*; *Qureshi v. Holder, 663 F.3d 778, 781 (5th Cir. 2011)* (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 149-50, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)*). When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold **[**13]** unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-151, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991)*.

B. Preliminary Injunction

The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974)*. To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc., 532 F.3d 364, 372 (5th Cir. 2008)*.

To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 363 (5th Cir. 2003)*. If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women's Med. Ctr. of Nw. Hous. v. Bell, 248 F.3d 411, 419 n.15 (5th Cir. 2001)*. A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it **[*819]** suffers as a result of the injunction. *Fed. R. Civ. P. 65(c)*.

The decision to grant or deny preliminary injunctive relief is left to the sound **[**14]** discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)* (citing *Canal, 489 F.2d at 572*). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci, 862 F.2d 1209, 1211 (5th Cir. 1989)* (quoting *Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir. 1985)*). Even when a movant satisfies each of the four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co., 760 F.2d at 621*. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2-3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for **[**15]** review; (3) Defendants' Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not

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designed to implement, interpret, or prescribe law or policy' (rule); 'a final disposition . . . in a matter other than rule making' (order); a 'permit . . . or other form of permission' (license); a 'prohibition . . . or . . . taking [of] other compulsory or restrictive action' (sanction); or a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or 'taking of other action on the application or petition of, and beneficial to, a person' (relief)." *Id.* (quoting ***§ 551(4)***, ***(6)***, ***(8)***, ***(10)***, ***(11)***).

violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.' Resp. 1-3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to Plaintiffs in the Fifth Circuit. *Id.* The Court addresses these issues, beginning with Defendants' jurisdictional arguments.[7]

A. Jurisdiction

1. Standing

Defendants allege that "[P]laintiffs' suit fails the jurisdictional requirements of standing and ripeness . . . because they have not alleged a cognizable concrete or imminent injury." Defs.' Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous., 617 F.3d 336, 342 (5th Cir. 2015)*). Defendants allege "a plaintiff must demonstrate that it has 'suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 [*820] (1992)*). Defendants contend that "[t]he agencies have merely set forth their views as to what the law requires" regarding whether gender identity is included in the definition of sex, and "[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies' interpretation of the law," since "[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs' claims in terms of specific facts rather than abstract principles." *Id.* at 13-14.

Defendants also allege that Plaintiffs "have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its view of the law. As such, any injury alleged **[**17]** by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action . . . which may never occur." Defs.' Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hr'g Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants' Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities.[8] Hr'g Tr. at 77. Plaintiffs **[*821]**

[7] The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs' Spending Clause claim were raised at the hearing and require further briefing, the Court will not await that briefing at this time. *See* Hr'g Tr. 35, 44, 52-53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. *See* ECF Nos. 11-12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX **[**16]** because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 546, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982)*.

[8] Plaintiffs' motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and which the Guidelines will compel them to disregard. Texas cites to *Tex. Const. art 7 § 1* ("[I]t shall **[**18]** be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); *Tex. Educ. Code §§ 4.001(b)* (stating the objectives of public education, including Objective 8: "School campuses will maintain a safe and disciplined environment conducive to student learning."); *11.051* ("An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations."); *11.201* (listing the duties of the superintendent including "assuming administrative responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district . . . ."); and *46.008* ("The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality."); Pls.' Reply Ex. (Belew Decl.) 4, ECF No. 52-1 **[**19]** (stating the Texas Education Agency ("TEA") is responsible for "[t]he regulation and administration of physical buildings and facilities within Texas public schools" among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. *See* Mot. Injunction 9-11 n. 9-22, ECF No. 11 (quoting *Ala. Code §§ 16-3-11, 16-3-12, 16-8-8, 16-8-12* ("Alabama law authorizes state, county, and city boards of education to control school buildings and property."); *Wis. stat. chs. 115, 118* ("In Wisconsin, local school boards and officials govern public school operations and facilities . . . with the Legislature providing additional supervisory powers to a Department of Public Instruction."); *Wis. Stat. § 120.12(1)* ("School boards and local officials are vested with the 'possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities."); *Wis. Stat. § 120.13(17)* ("Wisconsin law also requires school boards to '[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for **[**20]** both sexes.'"); *W. Va. Const. art. XII, § 2*; *W.*

contend all of this confers standing according to the Fifth Circuit's opinion in *Texas v. Equal Employment Opportunity Commission, No. 14-10940, 827 F.3d 372, 2016 U.S. App. LEXIS 11735, 2016 WL 3524242 (5th Cir. June 27, 2016)*. Hr'g Tr. 78.

Defendants counter that *EEOC* was wrongly decided and, regardless, the facts here are distinguishable from that case.[9] *Id.* Defendants primarily distinguish *EEOC* from this case based on the *EEOC* majority's view that the "guidance [at issue] contained a 'safe harbor' [provision]" and "the [guidance at issue had] the immediate effect of altering the rights and obligations of the 'regulated community' . . . by offering them [] detailed and conclusive means to avoid an adverse EEOC finding." Defs.' Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that "the [transgender] guidance documents do not provide 'an exhaustive procedural framework,' [or] . . . a safe harbor, but merely express[] the agencies' opinion about the proper interpretation of Title VII and Title IX." *Id.* Thus, they argue, the Court lacks jurisdiction and should decline to enter a preliminary injunction. *Id.* [10]

The Court finds that Plaintiffs have standing. "The doctrine of standing **[*822]** asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Cibolo Waste, Inc. v. City of San Antonio, 718 F.3d 469, 473 (5th Cir. 2013)* (quoting *Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)*). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling. *Lujan, 504 U.S. at 560-61*. The injury in fact must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical." *Id. at 560*. When "a plaintiff can establish that it is an 'object' of the agency regulation at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.'" *EEOC, 2016 U.S. App. LEXIS 11735, 2016 WL 3524242 at *2*; *Lujan, 504 U.S. at 561-62*. The Fifth Circuit provided, "[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *2016 U.S. App. LEXIS 11735, [WL] at *6* (quoting *Contender Farms LLP v. U.S. Dep't of Agric., 779 F.3d 258, 265 (5th Cir. 2015)*).

In *EEOC*, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, **[**24]** the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC's guidance as the guidance applied to Texas as an employer. *2016 U.S. App. LEXIS 11735, [WL] at *4*.

This case is analogous. Defendants' Guidelines are clearly

Va. code § 18-5-1, 18-5-9(4) ("West Virginia law establishes state and local boards of education . . . and charges the latter to ensure the good order of the school grounds, buildings, and equipment."); *Tenn. Code Ann. §§ 49-2-203, 49-1-201* ("In Tennessee, the state board of education sets statewide academic policies, . . . and the department of education is responsible for implementing those polices[, while] [e]ach local board of education has the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction."); *Tenn. Code Ann. §§ 49-1-201(a)-(c)(5), 49-2-203(a)(2)* ("The State Board is also responsible for "implementation of law" established by the General Assembly, . . . and ensuring that the 'regulations of the state board of education are faithfully executed.'"); ***Ariz. Rev. Stat. §§ 15-203(A)(1)***, *15-341(A)(1), 15-341(A)(3)* ("Arizona law establishes state and local boards of education, . . . and empowers local school districts to '[m]anage and control the school property within its district.'"); *Me. Rev. Stat. tit. 20-A, §§ 201-406, 1001(2), 6501* ("Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] . . . [a]nd Maine law provides requirements related to school restrooms."); **[**21]** *Okla. Const. art. XIII, §§ 5, 5-117* ("Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings."); *La. Const. art VIII, § 3*, LSA-R. Stat. *§ 17:100.6* ("In Louisiana, a state board of education oversees public schools, . . .while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction."); *Utah Code §§ 53A-1-101, **53A-3-402(3)*** ("Utah law provides for state and local board of educations, . . . and authorizes the local boards to exercise control over school buildings and facilities."); *Ga. Code § 20-2-59, 520* ("Georgia places public schools under the control of a board of education, . . . and delegates control over local schools, including the management of school property, to county school boards govern local schools."); *Miss. Code Ann. § 37-7-301* ("In Mississippi, the state board of education oversees local school boards, which exercise control over local school property."); *Ky. Rev. Stat. §§ 156.070, 160.290* ("In Kentucky, the state board of education governs the state's public school system, . . . while local boards of education control "*all* public school property" within their jurisdictions, . . and can make and adopt rules applicable to such property."). **[**22]**

[9] *Id.* at 14 ("[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham's dissenting opinion, and . . . EEOC is distinguishable from this case in important respects."); Hr'g Tr. 53 ("Let me say at the outset . . . the **[**23]** Government disagrees with that decision."). 11

[10] The Court addresses Defendants' claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.