

Regulating Gender in School Sports: An Overview of Legal Challenges to State Laws

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Public debate over the participation of transgender women in women’s sports has proliferated in recent years, raising questions of fairness in contexts ranging from [the Olympics](#) to [elementary school sports teams](#). School districts and athletics associations typically regulate who can participate in their sports leagues, and many have implemented policies that allow students to participate on teams that align with their gender identity at some levels of competition. In the past few years, however, [many states](#) have passed laws preventing transgender women and girls from participating in women’s interscholastic sports. These laws, which often state their purpose as protecting women’s sports, function by limiting participation on sports teams “based on the biological sex at birth of team members.” Proponents of this legislation argue that male physiology confers inherent physical benefits and that [“biological females”](#) have a competitive disadvantage if “biological males” are allowed to play with or against them on women’s teams. Transgender student-athletes and their parents have contested these laws and the underlying theories of fairness in a growing number of lawsuits across the country. Generally, these lawsuits claim that such laws violate Title IX of the Education Amendments Act of 1972 (Title IX) and the Equal Protection clause of the Fourteenth Amendment.

This Legal Sidebar begins by explaining the constitutional and statutory bases for the legal challenges to policies and laws regulating gender in school sports. It then summarizes the approaches federal district and appellate courts have taken to these lawsuits across the country and describes the potential for Supreme Court involvement. The Sidebar concludes by identifying several considerations for Congress.

Legal Context

Equal Protection Clause Claims for Sex Discrimination

The Fourteenth Amendment’s [Equal Protection Clause](#) provides that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” To withstand scrutiny under the Equal Protection Clause, a law may treat similarly situated persons differently only if there is a sufficient governmental reason to do so. Whether a governmental classification survives an equal protection challenge depends on the basis for the classification (i.e., who the law treats differently) and the

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government's rationale for the classification. Courts apply one of three tiers of scrutiny depending on the type of classification at issue. The first tier, known as *strict scrutiny*, applies to classifications on categories such as race, religion, alienage, and national origin, which the Court has described as "suspect" classifications. To withstand strict scrutiny, a law that involves a suspect classification must be "narrowly tailored to serve a compelling governmental interest." Under the second tier, called *intermediate scrutiny*, a so-called "quasi-suspect" classification, including sex-based distinctions, must be supported by an "exceedingly persuasive justification" that the classification is "substantially related" to "an important governmental interest." Laws that discriminate based on non-suspect classifications are subject to the third tier, *rational-basis scrutiny*, under which the government must show only that the discriminatory law is "rationally related" to a "legitimate government interest." In general, the more suspect the classification at issue discriminated against, the stronger the government's justification for that discrimination must be.

Title IX Claims for Sex Discrimination

[Title IX](#) bans sex discrimination in educational institutions that receive federal funding. Sex discrimination arises under Title IX when the following [elements](#) are met: (1) an individual must be excluded from, denied benefits of, or discriminated against under an educational program due to sex; (2) the educational program must receive federal funding at the time of the exclusion; and (3) the individual must be harmed by the treatment.

The Supreme Court has [consistently compared](#) Title IX to [Title VII of the Civil Rights Act of 1964](#) (Title VII), which prohibits making employment decisions on the basis of sex, among other things. The Court's Title IX jurisprudence has at times imported Title VII analysis, whereas at other times it has emphasized the differences between the two statutes. For this reason, developments in the Title VII landscape can be of significant importance to Title IX litigation. Notably, the Supreme Court's 2020 decision in [Bostock v. Clayton County](#) held that Title VII's prohibition on sex discrimination in employment includes discrimination on the basis of sexual orientation and gender identity. Because of the frequent overlap between Title VII and Title IX, some federal courts have read *Bostock* to apply to Title IX. The Supreme Court has not clarified this issue.

Legal Challenges to State Laws and School Policies

Permissive Policies

[Some lawsuits](#) challenge policies that permit transgender women to compete on sports teams that align with their gender identity. These lawsuits argue that such policies violate Title IX by reducing the odds of a cisgender woman's success in athletic competition. The argument in these claims is typically that biological males have inherent physical advantages over biological females and that transgender women retain those characteristics regardless of gender-affirming treatments.

Soule v. Connecticut Association of Schools, Inc.

The Connecticut Interscholastic Athletic Conference allows students to participate on sports teams consistent with their gender identity, regardless of the gender listed on their birth certificates. In [Soule v. Connecticut Association of Schools, Inc.](#), four cisgender girl student athletes on their high school's track team challenged the policy under Title IX, arguing that the policy limited the ability of students who were "born female" to succeed in athletics or obtain the benefits that come from excellent athletic ability, like scholarships. The student-plaintiffs sought to remove records set by transgender girls who had participated in the conference. In an opinion released on December 16, 2022, the U.S. Court of Appeals

for the Second Circuit rejected the claim, [holding](#) that the conference had reason to believe that allowing transgender girls to participate on girls sports teams was consistent with, rather than in violation of, federal law. Citing [guidance](#) from the Department of Education’s Office of Civil Rights, the Supreme Court’s decision in *Bostock*, and a number of [circuit court opinions](#), the court held that there was ample evidence for the conference to reasonably conclude that “discrimination based on transgender status is generally prohibited under federal law.” The court [concluded](#) that there was no evidence that the conference’s “facially neutral policy” was discriminatory or otherwise in violation of Title IX. On February 13, 2023, the Second Circuit announced that it would [rehear](#) *Soule* en banc. As of this writing, the rehearing has not been scheduled.

Restrictive Policies

A second, more common type of lawsuit involves challenges to policies that restrict transgender women from participating on women’s sports teams. [The facts](#) in these lawsuits tend to follow a consistent formula: a transgender woman plays on or plans to play on a women’s sports team but is prevented from doing so because of an intervening state law requiring women’s sports participants to be “biologically female.” Unlike lawsuits addressing permissive policies, lawsuits addressing restrictive policies tend to include claims for violations of both the Equal Protection Clause and Title IX. The additional Equal Protection Clause claim typically alleges that these policies wrongfully treat transgender students differently from their cisgender peers, requiring an analysis as to the government’s motivation for treating the two groups differently under the law.

Hecox v. Little

On August 17, 2020, the U.S. District Court for the District of Idaho granted a preliminary injunction against Idaho’s [Fairness in Women’s Sports Act](#), which (1) categorically bans transgender women from participation in women’s sports; (2) requires physical examinations in the event of a dispute as to an athlete’s sex; and (3) creates a private cause of action against a school for any student who suffers any harm due to the participation of a transgender woman on their team. *Hecox v. Little* involves a challenge to this law brought by two students: a transgender woman who intended to try out for her university’s track and cross country teams but was unable to due to her gender identity and a cisgender woman who played on her high school soccer team but was concerned that competitors may question her sex due to her “masculine” appearance. The students sought a preliminary injunction on the grounds that the act violated the Fourteenth Amendment’s Equal Protection Clause and Title IX. The district court agreed, holding that both plaintiffs had a strong likelihood of success under intermediate scrutiny on the merits of their Equal Protection claims.

The court [rejected](#) the state’s argument that the justification of promoting equality in women’s sports was “exceedingly persuasive” because transgender women make up less than one percent of the population and are therefore very unlikely to displace any cisgender women from sports participation. Furthermore, because the act specifically requires that testosterone levels absent medication be equal to those of a cisgender woman, the [court found](#) that the state’s purpose was less likely to be leveling the playing field for women than it was purely discriminatory: if the state’s true concern was the athletic advantage of higher testosterone levels, the court reasoned that the law would regulate an athlete’s *current* testosterone levels, rather than what they might have been in the past. The court [also held](#) that the act likely discriminates against cisgender women, as it singled out any “masculine” looking athletes on a women’s sports team for a potentially invasive physical or genetic test. The court explained that “it appears that the Act hinders those benefits [that flow from success in athletic endeavors] by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations.” The court did not address the Title IX claim, as it was not included in the original petition for initial relief.

After granting the preliminary injunction, the district court [determined](#) that the case did not become moot when one of the plaintiffs withdrew from her university before returning and planning to try out for the track and cross country teams again in fall 2023. The Ninth Circuit [upheld](#) the district court's decision on the mootness issue on January 30, 2023. On August 17, 2023, the Ninth Circuit also [upheld](#) the district court's grant of a preliminary injunction, holding that the plaintiffs were likely to succeed on the merits of their equal protection claims. The Ninth Circuit reasoned that, based on the pleadings, the state had categorically banned transgender girls and women from participating in school sports without evidence that the ban was substantially related to the state's interests in equal opportunity in women's sports. A trial on the merits remains pending.

D.N. v. DeSantis

D.N. v. DeSantis is a case in the U.S. District Court for the Southern District of Florida challenging Florida's "[Fairness in Women's Sports Act](#)," which limits participation on public secondary and post-secondary women's sports teams to cisgender women and creates a cause of action against a school for students who "suffer direct or indirect harm" as a result of a violation of the act. D.N., a transgender girl, filed claims against the State of Florida under the Equal Protection Clause and Title IX, alleging that the act discriminated against her on the basis of transgender status and would prevent her from playing soccer with the teams she has been playing with for years.

The district court stayed this case pending the Eleventh Circuit's decision in *Adams v. School Board of St. Johns County*. *Adams*, which involved a school policy that banned transgender students from using the bathroom matching their gender identity, held that the policy does not violate the [Equal Protection Clause](#) or [Title IX](#). On the Equal Protection question, the Eleventh Circuit held that the bathroom policy withstood intermediate scrutiny because it is related to an important privacy interest of students using the bathroom only with their same "biological sex" and is "clearly related" to that interest. On the Title IX question, the court did not find discrimination on the basis of sex because the court saw Title IX as banning discrimination on the basis of "biological sex," rather than gender identity. Thus, the court ruled that Title IX allowed for bathrooms to be segregated on the basis of gender identity. The Eleventh Circuit's decision in *Adams* may be determinative for the district court's decision in *D.N.* No decision has been made in this case.

A.M. v. Indianapolis Public Schools

In July 2022, the Indiana state legislature passed [a bill](#) that banned students who were determined to be male at birth from participating on sports teams designated for girls or women. The [Southern District of Indiana](#) addressed a Title IX claim brought by A.M., a ten-year-old transgender girl, who was told that the new law barred her from playing on her school's girls softball team. Applying the Supreme Court's Title VII analysis in *Bostock v. Clayton County* to Title IX in line with the Seventh Circuit's 2017 decision in *Whitaker v. Kenosha Unified School District*, the court [held](#) that laws treating students differently on the basis of transgender status are illegal under Title IX. While A.M. also raised an Equal Protection claim, the court [did not address](#) this claim in granting the preliminary injunction reserving that issue for discussion on the merits. The Seventh Circuit declined to hear an appeal brought by the school district. The district court has not yet resolved the merits of the case.

B.P.J. v. West Virginia Board of Education

B.P.J. v. West Virginia Board of Education is a challenge to the West Virginia "[Save Women's Sports Act](#)." The act, which became law on April 28, 2021, provides that only "biological females" can participate in women's sports in all public interscholastic, intercollegiate, intramural, or club sports teams at the secondary or post-secondary level, categorically barring transgender women. Like the other restrictive

policies discussed above, the act also creates a cause of action for any student who “suffers any direct or indirect harm as a result of a violation” of the act.

The case was brought by a transgender girl about to enter middle school who wanted to participate on her middle school’s girls cross country and track teams but was barred from participation by the act. The plaintiff alleged that the act violated the Equal Protection Clause and Title IX because it unlawfully discriminated based upon sex. The U.S. District Court for the Southern District of West Virginia decision, by Judge Joseph R. Goodwin, initially agreed and [granted a preliminary injunction](#) on July 21, 2021. On the constitutional issue, Judge Goodwin [applied](#) intermediate scrutiny and [found](#) that, as applied to B.P.J., the law “is not substantially related to providing equal athletic opportunity for girls.” Because B.P.J. was on puberty blockers and was participating in a non-contact sport, Judge Goodwin did not find the government’s alleged interest in keeping transgender girls out of sports to be valid. Judge Goodwin’s analysis of the Title IX claim also found B.P.J. likely to win on the merits because she was [clearly discriminated against](#) due to her biological sex and [harmed](#) in that she would not be able to participate on a sports teams that aligns with how she presents herself to and experiences the world.

That same court’s [decision on the merits](#), which it announced on January 5, 2023, reversed course and held that the West Virginia law did not violate either the Equal Protection Clause or Title IX. On the Equal Protection issue, Judge Goodwin applied intermediate scrutiny to the West Virginia law and [held](#) that the athletic advantage that testosterone gives biological males is substantially related to the state’s important interest in promoting fair women’s sports. Judge Goodwin also [held](#) that “Title IX used ‘sex’ in the biological sense because its purpose was to promote sex equality,” and therefore West Virginia’s law did not violate Title IX. On February 7, 2023, Judge Goodwin [denied a stay pending appeal](#), meaning that West Virginia could enforce the law against B.P.J. while the case awaited a hearing before the Fourth Circuit. The Fourth Circuit [overturned](#) the district court’s denial of a stay pending appeal on February 22, and the Supreme Court [denied](#) an application for review of that decision on April 6, leaving the Fourth Circuit’s ruling in place.

Potential Supreme Court Involvement

The Supreme Court has not expressly held whether transgender status is a quasi-suspect classification subject to intermediate scrutiny or whether transgender status is protected under Title IX. In June 2021, the Court [declined](#) to hear an appeal of *Grimm v. Gloucester County School Board*, a Fourth Circuit case holding that Title IX protects against discrimination on the basis of gender identity in the context of access to bathrooms and other gender-segregated facilities. The Court indicated that Justices Thomas and Alito would have granted the petition for certiorari, but neither Justice wrote a dissent. The decision not to hear *Grimm* aligned with the Court’s [denial](#) of a petition for certiorari in *Parents for Privacy v. Barr*, a Ninth Circuit case addressing a similar issue, in December 2020.

Most recently, the Court’s April 2023 denial in *B.P.J.* of a stay pending appeal drew a [dissent](#) from Justice Alito, joined by Justice Thomas. While the dissent was on procedural grounds, it suggests that there might be at least two future votes in favor of deciding whether Title IX or the Equal Protection Clause protect students against discrimination on the basis of gender identity.

Congressional Considerations

The statutory and legal landscape of regulating gender in sports is in flux. The various challenges to these state laws and policies have resulted in conflicting court decisions, and many of the cases remain pending decisions on the merits. The courts will likely have a role in determining which laws regulating sports participation based on gender identity are permissible, and the Department of Education has already [proposed amending](#) Title IX regulations to address this topic. Congress also has several options if it

wishes to shape this debate. The House’s recent passage of H.R. 734, which amends Title IX to require athletes on sports teams designated for females to be “biologically female,” represents one way federal legislation might address this issue. If H.R. 734 or another bill restricting sports participation on the basis of “biological sex” ultimately passes, it may be impacted by future Supreme Court decisions, as courts have not definitively addressed which level of scrutiny should apply when reviewing classifications based on gender identity. A future Supreme Court decision imposing intermediate scrutiny on such classifications would likely make it more difficult for H.R. 734 or like bills to survive an Equal Protection challenge. Alternatively, if Congress wishes to insulate transgender girls and women from state legislation like that discussed above, it could amend Title IX to explicitly require recipients to allow students to participate on the teams that match their gender identities. Such permissive legislation is less likely to face challenges under the Equal Protection Clause, though it could face other legal challenges. Congress could also let these issues proceed in the courts without taking legislative action, which may lead to a patchwork of permissive and restrictive policies across the country.

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