

## YOU AND THE LAW

# Constitutional Right or Privilege to Participate

*Thomas H. Sawyer*

Doe v. Ladue Horton Watkins High School

United States District Court, E.D. Missouri, Eastern Division  
No. 4:18-CV-01637 JAR

John Doe is a junior at Ladue Horton Watkins High School (LHS) in the St. Louis suburb of Ladue, Missouri. As a sophomore, Doe played for the LHS junior varsity (JV) soccer team, netting five goals and assisting on two more. Ahead of the 2018 school year, Doe attended tryouts in the hope of securing a spot on the LHS varsity team. LHS fields three boys' teams: Varsity, JV, and Freshman. LHS Head Soccer Coach Dave Aronberg testified that some 90 students tried out.

## Background

John Doe was one of eight juniors not selected for any of LHS's three soccer teams. Upon learning that Doe had been cut, his stepfather asked Coach Aronberg why Doe had not made the varsity team. The coach emailed to explain that, despite Doe's apparent skill and coachability, he was "on the bubble" of making varsity due to a few holes in his game that put him behind a number of kids. In the end, Coach Aronberg concluded, there were just too many kids who had

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a little better soccer skill level and soccer IQ for him to make the team. The stepfather then asked why Doe could not play on the JV team. According to the stepfather, Coach Aronberg told him that the program had a policy of not putting juniors on the JV team. Doe's stepfather asserted that Coach Aronberg explained this rule was due to the prior year, when four juniors were placed on the JV team but saw very little game time and, in response, their parents complained to the coaching staff.

Believing that Coach Aronberg's policy of excluding juniors amounted to improper age-based discrimination (as well as gender-based discrimination because the girls' team does not have such a policy), Doe's stepfather wrote to the Ladue School District Board and advised them that Coach Aronberg's policy was discriminatory. Thereafter, he met with LHS's principal and athletic director. In the meantime, the District opened a formal investigation into the alleged discrimination. The District ultimately found no evidence of a discriminatory policy and refused the request for relief. The District noted that the coaching staff's decision to cut the eight juniors who did not make varsity was based on their belief that rostering juniors on the JV team was not best for the competitive development of the players or the program. Doe's stepfather appealed the District's decision. The Ladue School District Superintendent affirmed. Thereafter, Doe's mother, Jane Doe, filed suit in Court, alleging age-based discrimination in violation of the Age Discrimination Act (42 U.S.C. § 6101 et seq.), gender-based discrimination in violation of Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681), and violations of the District's policies against discrimination. Plaintiff named LHS, the Ladue School District, and the seven members of the Ladue Board of Education. The next day, Jane Doe moved the Court to enter a temporary restraining order (TRO) ordering the District to place John Doe on the JV team and to terminate its policy of prohibiting junior boys from playing JV soccer.

The Court set a hearing on Plaintiff's TRO motion and both parties presented oral argument. In addition, Defendants called Coach Aronberg to testify. Coach Aronberg testified that there was no blanket policy of precluding juniors from the JV team. Instead, the coaching staff rostered teams based on a number of individual, external, and practical considerations. At tryouts, Coach Aronberg

and his staff evaluated and scored each student on a variety of metrics, such as endurance, passing ability, decision making, and coachability. Those scores were averaged and the players were ranked. Coach Aronberg testified that while the rankings were relevant to the selections, a number of external factors affected the final decisions. Chief among those factors, according to Coach Aronberg, were the number of students trying out and each student's ability and opportunity to develop. Coach Aronberg also stated that the JV coach preferred a smaller team and that, in any event, the program simply could not accommodate every student who tried out, due to practical restrictions such as the number of uniforms available. Ultimately, the goal was to fill out the teams' rosters in a manner that maximized the competitiveness of the program by devoting its limited time and resources to the players most likely to be or become significant contributors to the varsity team. Because freshman and sophomores had more remaining years of eligibility—and therefore greater opportunity to improve—than did the juniors, the younger players' development was prioritized. To that end, Coach Aronberg testified that the same philosophy and evaluation dictated his decision making for the girls' program.

Coach Aronberg testified that he was being sincere when he wrote that Doe was “on the bubble” of making varsity, even after he testified that Doe lacked the skill to start for JV. When the Court asked Coach Aronberg to explain how Doe could simultaneously be “on the bubble” of making varsity but not good enough to start for JV, the coach explained that the JV team was a developmental squad designed to provide the maximum amount of practice and playing time for players who were likely to play varsity in future years. With this in mind, the coaching staff routinely placed on the JV team players who had the skill level to play varsity but were unlikely to start, opting to give those players significant playing time with the JV team as opposed to offering them a reserve role on the varsity team. As a result, Coach Aronberg testified, the JV team included enough higher-skilled players such that Doe was unlikely to see significant playing time, even on JV. In other words, Doe was “on the bubble” of making a reserve role on the varsity team and, once he missed that cut, he did not have a viable opportunity to contribute meaningfully to the LHS soccer program, even as a member of the JV team. Coach

Aronberg testified that placing Doe on the JV team would have a detrimental effect on the development of the higher-skilled players insofar as doing so would reduce the amount of practice and playing time those players received.

## Complaint

Jane Doe, Plaintiff's mother, filed suit alleging age-based discrimination in violation of the Age Discrimination Act (42 U.S.C. § 6101 et seq.), gender-based discrimination in violation of Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681), and violations of the District's policies against discrimination.

## Court's Analysis

According to the Court,

The *Dataphase* factors weigh against the issuance of a TRO. Notably, Doe lacks a legal interest in participation, the evidence suggests that there is no policy of excluding juniors, and Plaintiff is unlikely to succeed on the merits.

Accordingly, IT IS HEREBY ORDERED that Plaintiff Jane Doe's, next friend of John Doe, Motion for Temporary Restraining Order, is DENIED.

## Risk Management Implication

Athletic directors need to make it clear to student-athletes, coaches, and parents or guardians that athletics is an extracurricular activity and as such is not a required activity of the school. Therefore, these activities are not a right but rather a privilege to participate in if the student is selected by the coach or sponsor. It is an optional activity for students to be involved in if they meet all the eligibility requirements established by the school, athletic department, and coaches. It is not a constitutional right provided to students.

## References

Age Discrimination Act, 42 U.S.C. § 6101 *et seq.*

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Title XI of the Educational Amendment Act of 1972, 20 U.S.C. § 1681.