

## YOU AND THE LAW

# Is Sport Ready to Transition? Navigating Transgender Issues in High School Sport

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BPJ, et al. v. West Virginia State Board Of Education, et al.  
United States District Court, Southern District of West Virginia  
550 F.Supp.3d 347 (S.D.W.Va. 2021)  
July 21, 2021

BPJ (Plaintiff) is an 11-year-old girl who will start middle school this fall. While in elementary school, BPJ participated on a cheer-leading team. She enjoyed the camaraderie of practicing, playing, and competing alongside a team comprised entirely of girls. This fall, BPJ wants to continue playing sports in middle school by participating on the girls' cross-country and track teams. BPJ comes from a family of runners, and she is excited for her chance to try out and compete. However, BPJ was informed by her school principal that because of a new statute (H.B. 3293), she will no longer be permitted to join either team because she is a transgender girl.

For a definition of terms such as “gender identity,” “gender dysphoria,” and “cisgender,” the Court referred to the opinion in *Grimm v. Gloucester County School Board* (2020). It adopted the definition of transgender used in that opinion. “Transgender is used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression” (Grimm, 596).

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“Cisgender is a term that is used to describe people whose gender identity matches the sex they were assigned at birth. For example, someone who was assigned female at birth (AFAB) and identifies as a woman is a cisgender woman” (Grimm at 596). “Gender dysphoria is a term that describes a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity” (Grimm at 596). This sense of unease or dissatisfaction may be so intense it can lead to depression and anxiety and have a harmful impact on daily life.

## **Complaint**

As part of a wave of similar legislation introduced across the country, West Virginia passed a new law in April 2021 that categorically bans BPJ and all other girls who are transgender in West Virginia from participating in school sports consistent with their gender identity. The new statute, which was passed by the legislature as H.B. 3293, is codified at W. Va. Code § 18-2-25d (H.B. 3293).

H.B. 3293 was prompted by unfounded stereotypes, false scientific claims, and baseless fear and misunderstanding of girls who are transgender. Proponents of H.B. 3293 made clear that its purpose is to exclude what they referred to as “transgender” from girls’ sports teams. Yet, as H.B. 3293’s sponsors and the Governor have acknowledged, there is no evidence of any “problem” caused by girls who are transgender participating on sports teams in West Virginia. By barring BPJ and other girls who are transgender from participating in school athletics, H.B. 3293 discriminates based on sex and transgender status in violation of the U.S. Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* If allowed to go into effect, H.B. 3293 will cause severe and entirely unnecessary harm and distress to BPJ and other girls who are transgender—an already vulnerable group of people subject to a history of discrimination that continues to this day. BPJ seeks declaratory and injunctive relief from this Court to allow her to experience the benefits of athletic participation consistent with her gender identity and without being singled out from other girls for different treatment simply because she is transgender.

## Background

This case involves a transgender middle school student-athlete (BPJ) and the West Virginia State Board of Education (WVSSAC). BPJ, who at the time was preparing to enter sixth grade at a new school, alleges that Defendants Burch, Stutler, the WVSSAC, and Attorney General Morrissey deprived her of equal protection under the Fourteenth Amendment. The claim goes on to indicate that the WVSSAC and Harrison County Board of Education are complicit in violating Title IX.

The catalyst for this case comes from a recently enacted state law that would prevent an 11-year-old from participating in high school athletics. House representatives in the West Virginia House of Delegates introduced House Bill 3293 on March 18, 2021, referred to as Save Women’s Sports Bill, and on April 28, 2021, West Virginia Governor, Jim Justice, signed it into law. This law was codified as Section 18-2-25d and entitled “Clarifying Participation for Sports Events to Be Based on Biological Sex of the Athlete at Birth.”

Framed by case law, Grimm, and the terms “gender identity” and “gender dysphoria,” “transgender” is an umbrella term that describes individuals who challenge conventional explanations or understandings of gender identity. BPJ is seeking a binding judgment that Section 18-2-25d of the West Virginia Code infringes upon Title IX of the Equal Protection Clause. This judicial order would prohibit the Defendants from imposing the Save Women’s Sports Bill against her. The request for an initial injunction accompanies BPJ’s complaint and seeks to protect her to the degree the law applies to her. If granted, the motion will only hinder the State and other Defendants from enforcing Section 18-2-25d against BPJ.

## Analysis

For a preliminary injunction to be granted, BPJ must satisfy four requirements related to her likelihood of success on the merits of her claims, the consequence of irreparable harm without the injunction, the balance of equities, and the public interest. With regard to the likelihood of success on the merits, BPJ has presented claims related to both the Equal Protection Clause of the Fourteenth Amendment and Title IX. Under the Equal Protection Clause of the Fourteenth Amendment, the state cannot deny to any person

within its jurisdiction the equal protection of the laws. Furthermore, *City of Cleburne v. Cleburne Living Ctr.* (1985) established that all people similarly situated should be treated alike. While the State in the present case contends that the law in question is not a violation, BPJ is being treated the same as all biological males in her situation. BPJ asserts that she is more like other girls than like cisgender boys and therefore is being treated differently than all other girls. As BPJ is the only girl in her school who would be prevented by the law from participating in sports, the judge has determined that the Save Women's Sports Bill discriminates based on transgender status. Therefore, increased scrutiny and justification of the law is therefore required, as discrimination against transgender individuals is based on sex and transgender people are a quasi-suspect class (Grimm at 597). Hence, the burden of proof rests with the State to demonstrate that the classification by sex (or transgender status) accomplishes a significant governmental objective and is not based on stereotypical generalizations (*Rowe Co. v. Tippet* at 242) regarding abilities and preferences of the different sexes. The judge finds in this case that the stated objective of the law in protecting the opportunities and safety of female athletes does not hold up against scrutiny, as BPJ's participating in school athletics will not prevent other female athletes from participating. Furthermore, BPJ has not and will not undergo endogenous puberty, and this reduces or eliminates the potential physical advantages biological males have over females. Moreover, the sports of interest to BPJ track and cross country are not contact sports and therefore the judge does not accept that barring BPJ from participating will affect the safety of other athletes. Consequently, the judge has determined that the merits of BPJ's Equal Protection claim are likely to succeed.

With regard to Title IX, the judge finds that BPJ is being excluded from a federally funded educational program (in this case athletics) on the basis of sex. For the Title IX claim to be successful, BPJ must also demonstrate harm as a result of this discrimination. The judge finds that the exclusion of BPJ is harmful to her in the form of stigma and isolation as the only girl required to join a boys' team in situating BPJ more similarly to cisgender girls than to cisgender boys, the judge finds a likelihood of succeeding on the merits of BPJ's Title IX claim.

Concerning irreparable harm, the judge finds that BPJ has a high likelihood of suffering this violation due to distress, stigma, and confusion created by forcing her to compete on an athletic team for boys. Moreover, BPJ would be excluded because of who she is: a transgender girl (BPJ at 362). Therefore, in consideration with the finding that the Save Women's Sports Bill likely violates both Title IX and the Equal Protection Clause, the judge has determined that the law will cause irreparable harm to BPJ.

## **Judgment**

Finally, the balance of equities and the public interest must be considered. In accounting for the effect of an injunction on the both the State and BPJ, as well as the public interest in upholding the constitutional right to equal protection, the judge has ruled in favor of BPJ's motion for a preliminary injunction. Consequently, the state is barred from enforcing Section 18-12-25d against BPJ while the case is being decided. With the granting of the preliminary injunction, BPJ may currently participate in athletics alongside other female classmates at her school.

## **Transgender Female Athletes and Future Challenges in the Sport World: Is Sport Ready to Transition?**

When a transgender female athlete wins a girls' sporting event, many members of the public and other sport participants raise questions about the fairness and integrity of the event. These questions of fairness, combined with the social and emotional well-being of transgender female student-athletes, are some of the issues facing secondary school administrators and school boards today and will continue.

At the national level, the National Federation of High Schools (NFHS) does not regulate the manner by which transgender athletes participate. Members of the NFHS are independent and establish their own policies and regulations. Some state associations (e.g., West Virginia) are bound by state statute, whereas others have a formal policy in place. Some associations entrust local leaders—such as the high school principals or school boards—to make an eligibility decision on the student-athlete, whereas others have no formal policy or procedure. Hence, the regulations surrounding the participation of transgender athletes in interscholastic athletics are highly complex

and vary widely by location and affiliation of the sports program. Furthermore, the politically charged nature of the issue along with the lack of uniform guidance from sporting authorities greatly complicates the situation and ensures that a swift and universally accepted resolution is unlikely.

Now and in the future, it is important to recognize the need to ensure that all students, irrespective of their gender identity, can practice sport in a safe, harassment-free, discrimination-free environment that respects their needs and identities. Equally, it is important to establish safe and fair competitions in which no participants have unfair and disproportionate advantages over others. Sport administrators and decision makers will need to follow closely all relevant legislation with regard to sport eligibility while creating a culture that respects all athletes as the sporting world addresses the challenges of creating meaningful experiences and competitions for all participants.

## References

- B.P.J., et al. v West Virginia State Board of Education, et al., 550 F.Supp. 3d 347 (S.D.W.Va. 2021). <https://casetext.com/case/b-p-j-west-virginia-state-board-of-education>
- City of Cleburne v. Cleburne Living Ctr. 473 U.S. 432, 439 (1985). <https://supreme.justia.com/cases/federal/us/474/432/>
- Grimm v. Gloucester County School Board, 972 F.3d 586, 594–597 (4th Cir. 2020). <https://casetext.com/case/grimm-v-gloucester-cnty-sch-bd-8>
- Rowe Co. v. Tippett, 615 F.3d 233, 242, 4th Cir. 2010. <https://caselaw.findlaw/us-4th-circuit/1532446.html>
- Title IX, 20 U.S.C. § 1681, *et seq.* <https://www.govinfo.gov/content/pkg/USCODE-2019-title20/html/USCODE-2019-title20-chap38-sec1681.htm>
- W. Va. Code § 18-2-25d (H.B. 3293). <https://code.wvlegislature.gov/18-2-25D/>