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U.S. Supreme Court Sides with Transgender School Athlete, Upholds Preliminary Injunction Permitting Team Participation

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On Thursday April 6, 2023, the U.S. Supreme Court affirmed a preliminary injunction allowing a transgender middle school student to compete on the girls' cross country and track teams at her school, signaling that a majority of the justices may not yet be ready to address this hot-button social issue.

The case concerns Section 18-2-25d of the West Virginia Code, which the West Virginia Governor signed into law in April 2021.

This statute begins by noting that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration[.]" The key provision of the statute requires that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a statute institution of higher education," "shall be expressly designated as one of the following based on biological sex: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." Under the law, "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."

Becky Pepper-Jackson, a transgender middle-school girl, filed a lawsuit seeking to prevent Section 18-2-25d from being enforced against her. The State of West Virginia defended the law, arguing that its objective was to provide equal opportunities for female athletes and to protect the physical safety of female athletes when competing. Becky's lawyers, however, argued that the State's justifications were a façade concealing the law's true objective: to systematically exclude transgender women and girls from participating in school sports.

The U.S. District Court for the Southern District of West Virginia agreed with Becky. Back in 2021, the court ruled that Becky had demonstrated a "clear likelihood" that the law violated Title IX of the Education Amendments of 1974 and the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the court forbade the State from enforcing the law against Becky during the pendency of her lawsuit.

Ultimately, the same court granted summary judgment in the government's favor on both the Equal Protection and Title IX counts, ruling that the statute was lawful. But Becky appealed that decision, and the U.S. Court of Appeals for the Fourth Circuit issued an order enjoining enforcement of the law against her while her appeal is pending.

The State then applied to the U.S. Supreme Court, asking the Supreme Court to vacate the appeals court's injunction. But the Court refused.

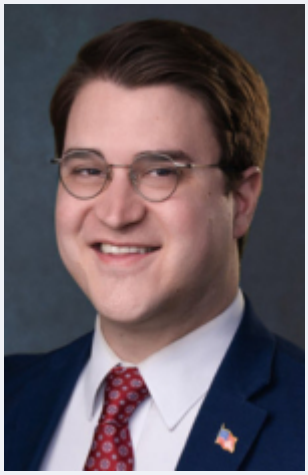
The Supreme Court handed down its decision on the same day the Biden Administration announced a new proposed rule regarding transgender sports-team participation under Title IX. If adopted in current form, the federal regulation would read as follows:

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

According to the Administration, "[t]he proposed rule would establish that policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity[.]"

The Education Department's proposed Title IX regulation will be open for public comment for 30 days from the date of publication in the *Federal Register*.

Knox Law is following these developments closely. If you would like to discuss these issues further, please contact Knox Law's Government Practice Department.



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