



# Court Report

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## **New Hampshire Federal Court Enjoins Enforcement of State Law on Sports Participation Against Transgender High School Girl**

A New Hampshire law went into effect last month which requires school sports teams to be designated based on biological sex and provides that “sports designated for females, women, or girls shall not be open to students of the male sex.” In other words, the law prohibits transgender girls from participating in girls’ school sports. A high school sophomore, who had transitioned gender identity with puberty blockers in eighth grade and hormone therapy in ninth grade, had previously participated on the school’s girls’ soccer team as a transgender girl. A student, through her parents, sought a temporary restraining order against state education officials and local school board members, seeking to prevent enforcement of the state law.

The United States District Court for the District of New Hampshire enjoined enforcement of the law, thus permitting the student’s continued participation on the girls’ soccer team. The court found a likelihood of success on the merits of both an Equal Protection challenge and a Title IX violation. On the Equal Protection claim, the court found that intermediate scrutiny applied, requiring the challenged law to substantially relate to achieving an important governmental objective. In response, the State proffered ensuring competitive fairness in girls’ sports as the important state interest. While recognizing competitive fairness as an important interest, the court concluded that the State failed to meet its heightened burden in justifying it as applied to the student, reasoning that since the student received treatment blocking male puberty, she did not enjoy testosterone-driven advantages. On the Title IX claim, the court found that the exclusion of the student from girls’ sports constitutes an exclusion on the basis of sex in violation of Title IX. The court relied on the Supreme Court’s opinion in *Bostock v. Clayton County* (2020), which held that employment discrimination based on transgender status amounts to discrimination on the basis of sex in violation of Title VII.

## **Virginia Federal Court Enjoins Enforcement of District Policy on Sports Participation Against Transgender Middle School Girl**

A Virginia school district’s policy states that for extracurricular school activities that are separated by biological sex, student participation will be determined by biological sex rather than gender or gender identity (with reasonable modifications permitted only as legally required). An 11-year-old middle schooler, through her parents, sent a request to the school board about the student’s participation on the middle school girls’ tennis team. The student, a transgender girl, has been undergoing puberty blocker treatment for two years. The school board denied the student’s request. In response, the student, through her parents, sought a preliminary injunction against the school board and the superintendent, challenging the denial as violative of the Equal Protection Clause and Title IX.

The United States District Court for the Eastern District of Virginia granted injunctive relief, permitting the student to try out for the middle school’s girls’ tennis team. On both claims, the court’s reasoning independently mirrored that of the New Hampshire court’s as described above. Moreover, the court noted that the school district’s policy was overbroad in that it forbid transgender boys from playing on boys’ teams (where the purported competitive advantage would then favor biological males), and underinclusive in that the policy does not ensure competitive fairness for transgender student-athletes in any way.

### Wisconsin Federal Court Enjoins School District from Enforcing Restrictive Bathroom Policy Against Transgender Middle School Girl

A Wisconsin school district requires any transgender student who wants their gender identity respected at school to enter into a written support plan. In response to public outcry and pressure on the district school board, the district superintendent and middle school principal unilaterally amended a transgender middle schooler's Gender Support Plan to authorize her to access several single-occupancy unisex restrooms at the middle school, constituting a restriction from the previously permitted use of girls' restrooms (consistent with the student's gender identity). The student (through her parents) sought a preliminary injunction against school officials denying the student's access to girls' restrooms at the middle school, challenging the denial as violative of the Equal Protection Clause and Title IX.

The United States District for the Eastern District of Wisconsin granted injunctive relief, ordering the student's access to girls' restrooms in the school district. On the Equal Protection challenge, the court found that the student experienced a sex-based classification and applied intermediate scrutiny. Against that, the school proffered protecting students' privacy interests as the important governmental objective. The court concluded that the school's policy was not substantially related to this objective, as nondiscriminatory alternatives are available that serve the governmental interest of student privacy, such as enhanced privacy guards on stalls or disciplinary action. On the Title IX claim, the court applied recent Seventh Circuit precedent regarding the restrictive use of bathrooms as violative of Title IX.

### Indiana Federal Court Dismisses Claim that Teaching Evolution Theory is Unconstitutional

Parents of a school-age child in Indiana sued the local school district and state education officials, claiming that the teaching of evolutionary theory in public schools violates the Establishment Clause of the First Amendment. While the child does not attend school in that district, the parents claimed that they intend to enroll the child "as soon as the school stops teaching the religion of atheism...." In that vein, the parents claimed that evolution promotes positions taken by atheists, and thus the teaching of evolution allegedly conveys a governmental message that students should subscribe to atheism. The United States District Court for the Southern District of Indiana dismissed the claim, concluding that the parents failed to allege an Establishment Clause violation. The court reasoned that despite the purported similarities between evolution and atheism, evolution is not a religion and thus cannot offend the First Amendment. Moreover, the court explained that the First Amendment does not prohibit government conduct that incidentally coincides with religious tenets.

### Idaho Governor Issues Executive Order Opposing Title IX Rule

Aside from the collection of injunctions against the Biden administration's Title IX rule, Idaho Governor Brad Little signed an executive order lambasting the rule as a "radical redefinition of gender" and directed the state department of education to "[w]ork to guarantee every female student in Idaho be provided equal opportunity in sports and school to the fullest extent as guaranteed to them under the original Title IX rules and Idaho law." Notably, Idaho was the first state to legislate student participation on athletic teams based on biological sex.

### **Pending U.S. Supreme Court Petitions to Watch:**

- Parents Protecting Our Children, UA v. Eau Claire Area School District – Whether parents subject to a school district's policy regarding parental decision-making authority over a major health-related decision have standing to challenge the policy.
- West Virginia Secondary School Activities Commission v. B.P.J., by next friend and mother, Heather Jackson – Whether Title IX or the Equal Protection Clause prevents a state from designating school sports teams based on biological sex determined at birth.
- Hile v. Michigan – Whether Michigan's constitutional amended barring direct and indirect public financial support for parochial (or other nonpublic) schools violates the Equal Protection Clause.
- L.W. v. Skrmetti – Whether Tennessee's Senate Bill 1, which categorically bans gender-affirming healthcare for transgender adolescents, likely violates the Fourteenth Amendment fundamental right of parents to make decisions concerning the medical care of their children.

- **Williams v. Washington** – Whether a plaintiff must first exhaust state administrative remedies before bringing a claim under Section 1983 claim in state court.
- **Lackey v. Stinnie** – (1) Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) whether a party must obtain an enduring change in the parties’ legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988.
- **E.M.D. Sales, Inc. v. Carrera** – Whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.
- **Stanley v. City of Sanford** – Whether, under the Americans with Disabilities Act, a former employee — who was qualified to perform her job and who earned post-employment benefits while employed — loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.
- **Wisconsin Bell, Inc. v. US ex rel. Heath** – Whether reimbursement requests submitted to the Federal Communications Commission’s E-rate program are “claims” under the False Claims Act.

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