

West Virginia v. B.P.J.: Impacts on Title IX

With Eric Butler, Melissa Carleton, Kasey Havekost,
and Sarah Stovall



Meet Today's Speakers

- Sarah Stovall
- Eric Butler
- Kasey Havekost
- Melissa Carleton

Find us on LinkedIn!

Disclaimers

- This is not legal advice.
- Information is current as of now, but future case law will certainly continue to shape this discussion.
- Consult with competent legal counsel in your jurisdiction for how best to handle a particular situation under your state's laws.

Little v. Hecox and West Virginia v. B.P.J.

- Little v. Hecox (Idaho)
 - Intercollegiate athletics
- West Virginia v. B.P.J.
 - Interscholastic (K-12) athletics
- Both states prohibited "biological males" from participating in sports intended for females based on legislature's finding that the policy is necessary to promote equal athletic opportunities for women and girls.
 - Idaho legislature further found that the benefit "that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones."
- 27 States have similar laws

Procedural History – Little v. Hecox

- Two students, Hecox and Doe, filed suit, challenged Idaho law under Equal Protection Clause
- District Court permitted the claims to go forward "as applied"
 - District Court also determined transgender athletes are a quasi-suspect class entitled to immediate scrutiny.
- District Court found the law excluded consideration of circulating testosterone levels
- With respect to Hecox, concluded Idaho "had not identified a legitimate interest...that the preexisting rules did not already address..."
- Found the athletes were likely to succeed on EP claims and issued a preliminary injunction
- Ninth Circuit affirmed the injunction but vacated and remanded to District Court
- Appealed to SCOTUS before District Court could act

Procedural History – West Virginia v. B.P.J.

- B.P.J. filed suit, challenged West Virginia law under Equal Protection Clause and Title IX
- District Court applied immediate scrutiny and found the law, as applied to B.P.J., was "not substantially related to providing equal athletic opportunities for girls..."
- With respect to Title IX, concluded B.P.J. was discriminated against on the basis of sex
- Initially granted a preliminary injunction on both grounds but later granted summary judgment for defendants, finding the law largely mirrored Title IX and therefore did not violate it
- Fourth Circuit disagreed and stayed the case
- SCOTUS decided the cases together

Title IX Background: The Javits Amendment

- The Javits Amendment directed the then-Department of Health, Education, and Welfare (HEW) to promptly issue "regulations implementing the provisions of" Title IX with respect to "the prohibition of sex discrimination."
- The amendment further specified that the regulations "shall include with respect to" "athletic activities reasonable provisions considering the nature of particular sports."
- The regulations required that schools provide "equal athletic opportunity for members of both sexes" and authorized "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."

Majority Opinion: Title IX

- Congressional intent in the underlying statutory text of Title IX, the subsequent Javits Amendment, and regulations only contemplated biological sex.
- Title IX guarantees equal opportunity to participate in athletics; not a spot on any particular roster.
 - Plaintiff's argument that hormone treatment excludes transgender students from both rosters was not persuasive.
- Court found that the context of sex-segregated athletics under Title IX is unique from the employment context considered by *Bostock* under Title VII.

Majority Opinion: Equal Protection (1 of 2)

- Intermediate scrutiny
 - Sex-based classifications are permissible only when the classification is "substantially related" to achieving an "important" government objective.
 - Court found that safety and fairness in female sports is a sufficient government interest.
- Declined to resolve the question of whether discrimination based on gender identity should be subject to intermediate scrutiny or the lesser “rational basis” standard.

Majority Opinion: Equal Protection (2 of 2)

- As-applied exception
 - Plaintiffs argued that the government interest in safety and fairness is inapplicable to transgender women using hormone treatment.
 - “The ‘validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case.’”
 - Court ruled that this would be nearly impossible for judges to apply on a case-by-case basis; described the “as-applied” argument as a “backdoor argument for strict scrutiny.”
- Deference to the judgment of state legislatures on questions of fact regarding whether hormone treatment mitigates physiological advantage.

Open Questions

- Whether states may *permit* student-athletes to participate on the basis of gender identity under Title IX (case footnote 1).
- Scope of the application to other areas, such as facilities.
- Findings of fact regarding whether similar laws serve a sufficient government interest.

Practical Implications

- Current administration has adopted a broad reading of SCOTUS opinions that support its policy priorities.
 - E.g. Former Dear Colleague Letter on Title VI interpreting SFFA v. Harvard
- Facilities
 - Sex-segregated housing, locker rooms, etc.
- Conflicts with state laws?
 - Court held that there are distinctions under Title IX and Equal Protection between classifications based on sex and classifications based on gender identity (p. 23).
 - Some states, such as the Colorado Anti-discrimination Act, define “sex” to include gender identity.

Impact on Pending Cases

- These cases may show how lower courts apply this decision to higher ed institutions operating under state laws or policies that permit transgender athlete participation
 - *Slusser et al. v. Mountain West Conference et al.*, No. 24-cv-03155, D. Colo.
 - Plaintiffs allege that allowing a transgender woman to compete on the San Jose State women's volleyball team denied female athletes equal athletic opportunities under Title IX
 - District court ordered briefing on how *West Virginia v. B.P.J* decision affects the remaining claim
 - *Parts v. Swarthmore College*, No. 25-cv-04702, E.D. Pennsylvania
 - Plaintiff alleges that the College's adoption of the NCAA's February 2025 updated transgender participation policy, which did not allow transgender women to participate on women's teams, violated Title IX
 - District court stayed the case until the Supreme Court's resolution of these cases.

New Regulatory Agenda

- The 2026 Regulatory Agenda was released
- Two final regulations may be issued on Title IX this month:
 - Procedures for investigations and enforcement – 1870-AA21
 - Define sex as biological sex – 1870-AA23

Upcoming In-Person Training

- July 15th – In-person Compliance Boot Camp (Columbus, Ohio) (\$100)
- August 4th:
 - In-person AI and Student Conduct workshop (Columbus, Ohio) (\$100) (morning)
 - In-person HR Boot Camp (Columbus, Ohio) (\$100) (afternoon)
- August 6th:
 - Full Day In-person Title IX Training (Kenyon College, Gambier, Ohio) (\$100)

Register at <https://www.bricker.com/events>

Upcoming Title IX Sessions

- Level 2 trainings kick off on July 21st – www.bricker.com/events
- Title IX in Focus **Free** Monthly Webinar Series starts on August 27th at 1:00 ET - "What HR Needs to Understand About Title IX" - www.bricker.com/t9if
- On-Demand trainings include:
 - Title IX Level 1
 - Annual Clery Training (for Title IX team members)
 - Pregnancy and Parenting
 - Title VI Compliance
 - See <https://brickergraydon.mykajabi.com/store>

Thank You

