

Unique Landscapes of Addressing Constitutionality of Categorial Discrimination of Transgender Women and Girls in Sports

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Over the past two years, a cascade of states has proposed, and eighteen states have enacted, legislation that categorically prohibits transgender women and girls, as well as many people who are intersex, from competing on sports teams that align with their gender identity.¹ This prohibition is detrimental and absolute for transgender girls across the nation. In the face of the vitriol of nearly half of the nation’s legislatures, transgender, intersex, and gender non-conforming children and youth, along with their parents and advocates, tirelessly bring cases in response to the blatant infringement of their rights. To date, four courts—three federal and one state—have demonstrated their willingness to delay the enforcement of these discriminatory laws until the legal challenges to the Constitutionality of those laws can be fully heard on the merits.

Generally, a preliminary injunction has been described as an “extraordinary remedy” by both state and federal courts.² This remedy will only be granted when a moving party can prove “a likelihood of success on the merits, likely irreparable harm in [its] absence... that the balance of equities weighs in favor of an injunction, and that an injunction is in the public interest.”³ There are more similarities than differences in the purpose and language of the states’ respective laws and the Constitutional challenges brought by transgender students.⁴ Knowledge of these

¹ *Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Sept. 12, 2022), https://www.lgbtmap.org/equality-maps/sports_participation_bans.

² *See, e.g.*, *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *4 (D. Utah Aug. 19, 2022); *Hecox v. Little*, 479 F. Supp. 3d 930, 971 (D. Idaho 2020).

³ *Hecox*, 479 F. Supp. 3d at 971.

⁴ UTAH CODE ANN. § 53G-6-(901-904) (West 2022); IDAHO CODE ANN. § 33-(6201-6206) (West 2020); W. VA. CODE ANN. § 18-2-25d (West 2021); IND. CODE ANN. § 20-33-13-(1-7) (West 2022).

differences will certainly prove significant as more challenges to these laws inevitably arise and work their way through the state and federal courts.

	Utah (H.B. 11)	Idaho (H.B. 500)	West Virginia (H.B. 3293)	Indiana (H.B. 1041)
Title:	“Student Eligibility in Interscholastic Activities”	“Fairness in Women’s Sports Act”	“Clarifying participation for sports events to be based on biological sex of the athlete at birth.”	“Athletic Teams and Sports”
Type of Injunction	State	Federal	Federal	Federal
Prohibition Language:	“A student of the male sex may not compete, and a public school or LEA may not allow a student of the male sex to compete, with a team designated for students of the female sex in an interscholastic athletic activity.”	“Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.”	“Athletic 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.”	“A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport.”
Current Citation:	UTAH CODE ANN. § 53G-6-(901-904) (West 2022).	IDAHO CODE ANN. § 33-(6201-6206) (West 2020).	W. VA. CODE ANN. § 18-2-25d (West 2021).	IND. CODE ANN. § 20-33-13-(1-7) (West 2022).

Federal:

The three federal courts, which have imposed preliminary injunctions, are now tasked with determining whether it is permissible under Title IX and the Equal Protection Clause of the U.S. Constitution to prevent the individual transgender plaintiffs from participating in girl's and women's sports.⁵ Chronologically by filing date, these federal cases are: *Hecox v Little* (Idaho); *B.P.J. v. West Virginia State Board of Education*. (West Virginia); and *A.M. by E.M. v. Indianapolis Public Schools* (Indiana).⁶

A successful Title IX claim requires that an affected transgender student show “(1) that [she] was excluded from participation in an education program ‘on the basis of sex’; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused [her] harm.”⁷ The court in *B.P.J.* asserted that discrimination, in the context of Title IX, “means treating an individual worse than others who are similarly situated.”⁸ In each of the federal cases, the judges found that the plaintiffs were likely to succeed on the merits of their claims, looking toward Title VII protection of transgender status in its analysis.⁹

Turning to equal protection, the courts may be required to grapple with whether these laws discriminate based on sex or based on transgender status.¹⁰ These distinctions may inform the level of scrutiny that courts must apply when assessing the constitutionality of the laws under

⁵ *Hecox*, 479 F. Supp. 3d 930; *B. P. J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021); *A.M. by E.M. v. Indianapolis Pub. Sch.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430 (S.D. Ind. July 26, 2022).

⁶ *Id.*

⁷ *B. P. J.*, 550 F. Supp. 3d at 356 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020)).

⁸ *Id.* at 357 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020)).

⁹ *Id.* at 356; *A.M. by E.M.*, 2022 WL 2951430, at *11; *Hecox*, 479 F. Supp. 3d at 962.

¹⁰ *A.M. by E.M.*, 2022 WL 2951430, at *14.

the Fourteenth Amendment’s Equal Protection Clause. Alternatively, the courts may also interpret the distinction to be immaterial and apply an identical standard to both.¹¹

State:

In Utah, plaintiffs chose to bring their claims under the Utah Constitution.¹² The challenge is under its “Uniform Operation Laws Clause” (UOL) which reads, “All laws of a general nature shall have uniform operation.”¹³ This law is interpreted as a state law counterpart to the Equal Protection Clause, and Utah Supreme Court holds that the UOL is “at least as exacting” as the federal Equal Protection Clause.¹⁴ This interpretation may also suggest a possibility of greater protection in Utah, and potentially in other states, depending on their respective state constitutions. Leaning heavily on the three previously discussed federal cases to guide and support their conclusions of constitutionality under Utah state law, the court grants the preliminary injunction with a unique state caveat.¹⁵

A preliminary injunction is granted under Utah state law similarly to federal law, although an aspect of the ban will remain during the injunction’s effect.¹⁶ The ban was enacted alongside § 53G-6-1006, which would go into effect “if any provision... is held invalid by a final decision of a court of competent jurisdiction,” at which time “the remainder of the part shall be given effect without the invalidated provision or application.”¹⁷ The remainder of the part establishes a “School Activity Eligibility Commission” tasked with deciding, on a case-by-case

¹¹ *B. P. J.*, 550 F. Supp. 3d at 354.

¹² *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *4 (D. Utah Aug. 19, 2022).

¹³ *Id.*; UTAH CONST. art. I, § 24.

¹⁴ *Utah High School Activities Ass'n*, 2022 WL 3907182, at *7.

¹⁵ *Id.* at *7.

¹⁶ *Id.* at *4.

¹⁷ UTAH CODE ANN. § 53G-6-1006(1) (West 2022).

basis, if a particular transgender child is able to participate.¹⁸ While not a total ban, the lack of transparency in such a commission could easily have the same effect as a total ban, but, as the court states, “individualized eligibility inquiry is inherently less restrictive than..... a categorical ban.”¹⁹ The Utah plaintiffs do not challenge the constitutionality of this commission, and if they were to do so, there would be less direct federal guidance since none of the other states discussed have such a contingency for invalidation of their statute.²⁰ Should the commission be accepted as a constitutional method to work around the categorical bans, other states may look to Utah and amend their own states’ statutes accordingly.

Although these cases are still in their infancy, we will see continued litigation regarding not only bans on transgender children and youth in sports, but also other statutory attacks on transgender people overall. The nation’s collective ignorance on the expansiveness of gender will continue to fuel these types of fear-based laws until there are clear and explicit protections in place that will allow transgender people equal protection under the laws of the United States.

¹⁸ UTAH CODE ANN. § 53G-6-1003 (West 2022).

¹⁹ *Utah School Activities Ass’n*, 2022 WL 3907182, at *9.

²⁰ IDAHO CODE ANN. § 33-(6201-6206) (West 2020); W. VA. CODE ANN. § 18-2-25d (West 2021); IND. CODE ANN. § 20-33-13-(1-7) (West 2022).