



CLASHING TIMES: DEVELOPMENTS CONCERNING TRANSGENDER STUDENT ATHLETES

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On April 6, 2023, the U.S. Supreme Court denied the State of West Virginia's application to vacate an injunction imposed by the Fourth Circuit Court of Appeals on the State's enforcement of its version of the "Save Women's Sports Act," which was enacted in West Virginia in 2021. West Virginia's version of the "Save Women's Sports Act" prohibits transgender athletes from competing in female-only sports from middle school through collegiate level. The West Virginia case concerns a 12-year-old transgender girl's participation on the girls' track and cross-country teams. The girl's mother sued, claiming West Virginia's Save Women's Sports Act violates Title IX and the equal protection clause of the 14th Amendment of the United States Constitution. As a result of the U.S. Supreme Court's denial issued April 6, 2023, the injunction on the enforcement of West Virginia's "Save Women's Sports Act" will remain in effect, at least for the time-being.

On the same day the U.S. Supreme Court issued the denial of the State of West Virginia's application, the United States Department of Education, Office for Civil Rights issued notice of proposed rulemaking on eligibility for male and female athletic teams under Title IX of the Education Amendments of 1972. Under the proposed regulations, schools may use criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity "if those criteria are substantially related to the achievement of an important educational objective." The criteria "would have to account for the sport, level of competition, and grade or education level to which they apply." Thus, the proposed regulations would allow schools to enforce some restrictions on transgender student athletes while simultaneously precluding policies that "categorically" ban transgender students from participating on sports teams consistent with their gender identity. The proposed Title IX regulations will be open for public comment for 30 days from the date of publication.

In Ohio, during the prior General Assembly (2021-2022), a version of the Save Women's Sports Act was introduced in the House (HB 61). The Bill did not make it out of House Committee in the prior General Assembly. In the current General Assembly, a revised version of the Save Women's Sports Act has been introduced in the House (HB 6) and is currently pending in the House Higher Education Committee. HB 6 would prohibit transgender women and girls from participating in women's and girls' sports in K-12 schools and higher education institutions in Ohio.

The Ohio High School Athletic Association's ("OHSAA") guideline for transgender student participation currently provides a step-by-step process for transgender students to request OHSAA participation. The step-by-step process takes age, biological gender, and whether or not the student has undergone medical treatment into consideration. OHSAA maintains that its current guidelines give transgender students an "equal opportunity to participate in sports" while preserving "the integrity of women's sports." While the current guidelines may be appropriate under the proposed Title IX rules, the guidelines may violate the version of the Save Women's Sports Act currently pending in the Ohio legislature.

It appears as if a clash may be coming. Quoting Justice Alito's dissent in the U.S. Supreme Court's denial issued April 6, 2023, in the West Virginia case: "[t]his application concerns an important issue that this Court is likely to be required to address in the near future, namely, whether either Title IX of the Education Amendments...or the Fourteenth Amendment's Equal Protection Clause prohibits a State" from imposing these types of restrictions. This is perhaps even more so the case in light of the U.S. Department of Education, Office for Civil Rights', proposed rules addressing this very issue, which may go into effect sometime this summer.

If you have any questions or concerns, please contact any of the listed Roetzel attorneys.

Justin P. Markey

Shareholder, Shareholder-in-Charge of Akron Office

330.849.6632 | jmarkey@ralaw.com



