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to suspend these privileges for the Outdoor Adventure Club.

Judge Sweeney said it was not necessary to address the GSA's constitutional arguments, since they were highly likely to win their argument under the EAA. Furthermore, since these privileges directly affected the ability of the GSA to communicate to the school's students, it was causing "irreparable harm," because the courts recognize that the loss of freedom of speech is an injury that can't be adequately compensated after the fact by monetary damages.

Furthermore, the court found that providing these privileges to the GSA would impose no significant burden on the school and, given GSA's concession that the school would not have to reprint the current student handbook to include them, so long as it added their listing to the on-line version, a preliminary injunction would impose so little expense that the court would waive the usual requirement that a plaintiff post a bond with the court to cover expenses incurred in complying with the injunction in case the court should ultimately rule in favor of the school on the merits of the case.

The Pendleton Height GSA is represented in this case by Indiana ACLU attorneys Kenneth J. Falk and Stevie J. Pactor. ■

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# Federal District Court Refuses to Dismiss Challenge to West Virginia Law Banning Trans Girls from Scholastic Athletic Competition

*By Arthur S. Leonard*

"On April 28, 2021, the State of West Virginia passed H.B. 3293, known as the 'Protect Women's Sports Act,' W. Va. Code § 18-2-25d," wrote U.S. District Judge Joseph R. Goodwin in his decision to grant a preliminary injunction against the Act on July 21, 2021. *P.B.J. v. West Virginia State Board of Education*, 2021 U.S. Dist. LEXIS 135943, 2021 WL 3081883 (S.D. W. Va.). "The Act requires that any sports team sponsored by a public secondary school or higher education institution be expressly designated as a male, female, or coed team. § 18-2-25d(c)(1). Teams designated as 'female' are not open to males, while teams designated as 'male' are open to either sex. § 18-2-25d(c)(2). The Act defines 'male' and 'female' as a person's 'biological sex determined at birth,'" wrote Judge Goodwin. On December 1, the judge issued two further decisions, denying defendants' motions to dismiss the case, and granting a motion by a cisgender West Virginia State University female athlete to intervene in defense of the statute on behalf of cisgender female athletes in the state. 2021 U.S. Dist. LEXIS 230011, 2012 WL 5711543, denying motions to dismiss; 2021 U.S. Dist. LEXIS 230010, 2021 WL 5711547, granting motion to intervene by Lainey Armistead.

The suit, brought by Lambda Legal and the ACLU on behalf of a transgender six-grade girl who wants to participate in school athletics, was filed shortly after the Act was passed. It names multiple defendants. In addition to the West Virginia State Board of Education, others defending the statute include the Harrison County Board of Education (locus of B.P.J.'s school), the West Virginia Secondary School Activities Commission, and the West Virginia Attorney General's Office. The U.S. Justice Department filed a statement of interest in the case, presumably in opposition to the statute in light of the Biden's Administration's stated policies on point.

In his July 21 decision, Judge Goodwin found that the plaintiff was likely to succeed on her claim that the Act violates her Equal Protection rights under the 14th Amendment as well as Title IX of the Education Amendments of 1972, which forbids sex discrimination by educational institutions that receive federal funding. He also found that denying relief and allowing the Act to go into effect would cause irreparable harm to plaintiff, a transgender girl who would have to compete on a boys' team if she wanted to participate in scholastic sports competition, and that the balance of equities favored plaintiff, stating, "It is clearly in the public interest to uphold B.P.J.'s constitutional right not to be treated any differently than her similarly situated peers because any harm to B.P.J.'s personal rights is a harm to the share of American rights that we all hold collectively."

Lainey Armistead, the proposed intervenor, claims to have been prompted by Judge Goodwin's decision granting the preliminary injunction to decide to join the lawsuit to protect the interest of cisgender girls and women who wish to participate in scholastic sports without having to compete with "men." Implicit here is the view held by opponents of transgender rights that male and female gender determined at birth is immutable, so transgender women are really men sailing under false colors, subjecting women to unfair and dangerous competition.

Judge Goodwin rejected Armistead's argument that she could intervene "as of right," finding that when the government is defending its own statute, there is a strong presumption that it will mount an

adequate defense without the need for assistance from intervenors. On the other hand, Goodwin's discretionary power to allow intervention was exercised on Armistead's behalf, as she made the irrefutable argument that she would be presenting a point of view and interest separate from that of the government defendants. After finding that allowing intervention would not cause "undue delay or prejudice," Goodwin explained: "Ms. Armistead plans to defend H.B. 3293 as a member of the class of people for whom the law was written. She will add a perspective not represented by any of the current defendants." Armistead also represented that her intervention would not add to the parties' discovery burdens, and that she would abide by the existing scheduling order.

B.P.J. had protested that Armistead's counsel had and would continue to "gratuitously mis-gender" B.P.J. and "will delay proceedings further litigating that issue." Judge Goodwin rejected this argument. "While the parties should always be mindful to show the respect due other parties, the Court will not order any party to use specific language in this case," he wrote. "So long as the terminology used by the parties is properly defined, the parties may use the language they find necessary to support their respective positions. Further, concern that Ms. Armistead's counsel may seek to delay these proceedings is mere speculation that does not justify denying permissive intervention." Although Armistead's counsel is not named in the opinion granting the motion for intervention, she is apparently represented by attorneys from Alliance Defending Freedom (ADF), which has consistently opposed the participation of transgender girls and women on female sports teams, using the arguments noted above, and consistently referring to transgender litigants using pronouns consistent with their sex as identified at birth rather than their gender identity.

Judge Goodwin began his opinion on the motions to dismiss, under the title "Preliminary Matter," with a discussion of the pronouns he would be using throughout the case, making clear that he would use the terms "biological woman" and "biological man" when speaking of an individual as identified at birth, and transgender woman, transgender man, or cisgender woman or man, to refer to people based on their asserted gender identity. "I will use the pronouns associated with a person's gender identity," he wrote. "In doing so, I am not expressing any opinion, political, judicial, or otherwise about any issue in this case. I will not order any litigant to use the language that I use."

Turning to the substantive arguments by defendants, the judge rejected their claim that B.P.J. did not have standing to challenge the law or that her claims were not ripe for adjudication. "She has adequately alleged an injury-in-fact – that she will be treated differently on the basis of sex; she has asserted that under H.B. 3293, each defendant will take some action that will cause her asserted harm; and she has established that each defendant can redress her claims because a favorable ruling against each will prevent them from enforcing the Act as to B.P.J.," he wrote. He also found the claims to be ripe for adjudication, "because they do not require any future factual development. The question in this case is whether it is permissible under Title IX or the Equal Protection Clause to prevent B.P.J., a transgender girl, from playing on girls' sports teams." The statute mandates that the defendants exclude her from doing so.

As to defendants' alternative argument of failure to state a claim, they were fighting an uphill battle, because the 4th Circuit, whose precedents are controlling in the West Virginia district court, made clear in *Grimm v. Gloucester County School Board*, 972 F. 3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (U.S. 2021), that Title IX applies to a sex discrimination claim brought by a transgender student, and the Supreme Court held in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that "discrimination on the basis of a person's transgender status is discrimination on the basis of sex."

This denial of the defendants' motion to dismiss could not have been a surprise to them, in light of the court's reasoning in its July 21 grant of preliminary injunctive relief to the plaintiff. Now the case can proceed to discovery, unless, of course, the defendants take the prudent course of throwing in the towel, settling the case, and repealing the Act. One suspects that ADF's intervention was undertaken, at least in part, to prevent such a settlement from occurring.

There is a long list of plaintiff's counsel on the opinion, including lawyers from Lambda Legal, the ACLU (national) and ACLU of West Virginia, and cooperating attorneys from Cooley. Judge Goodwin was appointed to the court by President Bill Clinton. ■