

2024 Transgender Sports and the Law – HB 1205

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Agenda

- HB 1205 – Ban on transgender females playing female sports
- Status of lawsuit challenging HB 1205
 - US District for the First Circuit
- Status of lawsuit challenging ban on protests during soccer games
 - US District for the First Circuit
- NHED and Commissioner's Actions and Responses
- What's Next?

HB 1205

- HB 1205 prohibits transgender females from participating in sports consistent with their gender identity, “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”
- The law does NOT prohibit transgender males from participating in sports consistent with their gender identity.
- ***This law does not apply if the team is designated male or co-ed.***
- Students must establish eligibility for female sports by producing a birth certificate that has not been modified except to correct a scrivener’s error.

NH Law – RSA 193:38

- **RSA 193:38 Discrimination in Public Schools.** – No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, **gender identity**, sexual orientation, race, color, marital status, familial status, disability, religion, or national origin, all as defined in RSA 354-A. Any person claiming to be aggrieved by a discriminatory practice prohibited under this section, including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief, or with the New Hampshire commission for human rights, as provided in RSA 354-A:27-28.

Overview of Title IX

- *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....” 20 U.S.C. § 1681 et seq.*
- School District’s receipt of federal funds is contingent upon the compliance with Title IX.
- Currently, the District is not subject to the federal injunctions which prevent the DOE and the DOJ from enforcing the new Title IX rules in 26 states across the country. New Hampshire is not one of those states.
- The US Supreme Court recently declined to lift the injunction as to certain portions of the law. Again, this applies only to those states that are subject to the injunctions to begin with, and not to New Hampshire.

Title IX's new regulations on sex-based separation

- Under Title IX, schools continue to be allowed to permit different treatment or separation on the basis of sex in limited circumstances (i.e. separate facilities based on sex, separate sports teams based on sex, etc.).
- However, even where the separation is permissible, schools cannot carry out that separation in a manner that discriminates on the basis of sex by subjecting a person to more than *de minimis* harm.
- “Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity ***consistent with the person's gender identity*** subjects a person to more than *de minimis* harm on the basis of sex.”

Title IX vs. HB 1205

- Title IX and HB 1205 are in direct conflict, with the federal law (Title IX) mandating that schools must allow a student to participate in a school activity (including sports) consistent with their gender identity and that failure to do so constitutes an automatic Title IX violation, and state law (HB 1205) prohibiting a transgender female from participating in school sports (in grades 5-12) consistent with their gender identity.

RSA 198:38 vs. HB 1205

- RSA 198:38 and HB 1205 are also in direct conflict, because RSA 198:38 prohibits schools prohibits discrimination based on gender identity, which means allowing transgender students to participate in a school activity (including sports) consistent with their gender identity...

NHIAA Bylaw II (Eligibility)

- Section 21 states *“In compliance with current New Hampshire anti-discrimination laws and federal Title IX guidance, the NHIAA is committed to providing transgender student-athletes with equal opportunities to participate in NHIAA athletic programs consistent with their gender identity. . .”* (emphasis added).
- “For the purposes of sports participation, the NHIAA shall defer to the determination of the student and his or her local school regarding gender identification.
 - Based on current school records and daily life activities in school and the community at the time that eligibility is determined for a particular season.
 - School district makes the determination that the expression of the student’s gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.
 - Determination shall remain consistent for the remainder of the student’s high school sports eligibility.

Tirrell, et al v. State of New Hampshire

- Federal court case filed in the US Dist. Ct. for Dist. of N.H.
- Two transgender females, filed claims against the State of New Hampshire and their respective school districts after their districts told them that they would not be able to play sports consistent with their gender identity.
 - Parker Tirrell (15 years old, attends Pemi-Baker Regional High School)
 - Iris Turmelle (14 years old, attends Pembroke High School)
- On August 9, 2024, Judge Landya McCafferty issued a Temporary Restraining Order (TRO) from the bench allowing one student to play on her school's soccer team (Plymouth).

August 10, 2024, Letter from Commissioner Edelblut to School Leaders

- *“This law, which went into effect yesterday, August 19, is currently being challenged in federal court by two families represented by the American Civil Liberties Union of New Hampshire Foundation and GLBTQ Legal Advocates and Defenders, among other attorneys.”*
- *Yesterday, a judge issued a temporary restraining order related to the civil lawsuit that prohibits the Pemi-Baker Regional School District from implementing the new law as it pertains to one of the plaintiffs. **This law, however, is still applicable to all other students in New Hampshire school districts.** A hearing on a broader injunction on the application of the law will be held in the near future.*
- *Once the New Hampshire Department of Education has further information to share, it will be communicated to the field.”*
- The Commissioner has not issued any updated communication regarding the Order on the preliminary injunctions.

Tirrell, et al v. State of New Hampshire – Preliminary Injunction

- On September 10 , 2024, Judge McCafferty issued a Preliminary Injunction (PI), barring the State from enforcing or threatening to enforce HB 1205 with respect to both Parker Tirrell and Iris Turmelle.
- Rulings of Law:
 - (1) Equal Protection Clause of the 14th Amendment of the US Constitution: “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
 - (2) Title IX – excluded from participation from an educational program based on their sex or gender.

Some of the Court's Findings

- I. Students would suffer irreparable harm.
 - Being barred from playing with their peers would publicly stigmatize the students, run counter to their medical providers' recommendations, and would cause shame and humiliation.
- II. State presented no evidence that: “transgender girls’ participation in girls’ sports in New Hampshire has created a safety problem or has jeopardized the integrity of girls’ athletic competitions.”
- III. State suffers no harm if HB 1205 is temporarily enjoined.
- IV. The State “has no interest in enforcing an unconstitutional law, [and] the public interest is harmed by the enforcement of laws repugnant to the United States Constitution.”

Scope of the Order

- Plaintiffs only asked for the Court to enjoin HB 1205 as applied to them ... and did not ask for the law to be enjoined in its entirety or throughout NH.
- Decision is limited in scope as to the two students only.
- But ... these circumstances apply to nearly every situation across the State.

Double Bind Situation for School Districts

- School Districts cannot comply with both HB 1205 and Title IX/US Constitution.
- Circumstances in Plymouth SD and Pembroke SD exist elsewhere in NH.
- Federal Court already weighed in and said HB 1205 is discriminatory on its face.

Protests in Bow

- On September 17, 2024, Bow played Plymouth High School's girl's soccer team in Bow.
- Parents and community members in Bow discussed plans to protest at the game.
- Bow staff sent out reminder about Board Policy KFA – Public Conduct on School Property.
- Parents and members of the public showed up and put on colored wristbands with XX. Staff asked them to remove wristbands or leave. Most attendees complied, but some refused and were ejected from the fields. The incident caused a 15-minute delay during the middle of the game. One parent returned to the field to hold up a large sign so that it would be viewed as the Plymouth bus left Bow's campus

No Trespass Orders

- One parent was issued a no trespass order for 4 days (1 game) for organizing and participating in the protest and behavior targeted at a player on the other team, Parker Tirrell.
- One parent was issued a no trespass order for the remainder of the regular season for refusing to remove wristband, abusive language directed at staff (calling them “Nazis”), refusing to leave campus, and behavior targeted at a player on the other team, Parker Tirrell, on the field and the parking lot.

Designated Protest Area

- Bow created a designated area for protests that has been in place for the most recent games. Other school districts/high schools have done something similar.
- Allows parents and visitors to use designated area to protest for 30 minutes before and 30 minutes after the game. Protesters must continue to follow Policy KFA.
- Allows parents and members of the public to participate and attend games, to protest in a limited designated area, all subject to time, place, manner restrictions.

Fellers v. SAU 67

- Parents and visitors filed lawsuit in federal court alleging violation of free speech rights under the 1st Amendment.
- On Friday, October 4, 2024, the Plaintiff's filed a request for an TRO and PI to be issued before the games on Tuesday, October 8, 2024.
- Status of TRO?

What's next?

- Standards governing transgender participation in sports are evolving:
 - *Doe v. Horne*, Court of Appeals for the Ninth Circuit (Arizona, September 9, 2024) (finding similar law unconstitutional)
 - “States have important interests in inclusion, nondiscrimination, competitive fairness, student safety, and completing the still unfinished and important job of ensuring equal athletic opportunities for women and girls, who must have an equal opportunity not only to participate in sports but also to compete and win.”

The background of the slide is a close-up photograph of a computer keyboard. The keys are white with dark lettering. A single key, located in the lower right quadrant, is a vibrant red color and features a large, white question mark. The lighting is soft, creating subtle shadows between the keys.

Thoughts & Questions?

Thank you!



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