No. 21–1365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SELINA SOULE, A MINOR BY BIANCA STANESCU, HER MOTHER, CHELSEA MITCHELL, A MINOR, BY CHRISTINA MITCHELL, HER MOTHER, ALANNA SMITH, A MINOR, BY CHERYL RADACHOWSKY, HER MOTHER, ASHLEY NICOLETTI, A MINOR, BY JENNIFER NICOLETTI, HER MOTHER,
PLAINTIFFS-APPELLANTS,
v.
CONNECTICUT ASSOCIATION OF SCHOOLS, INC, DBA CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE, BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION, CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION, GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION, CANTON PUBLIC SCHOOLS BOARD OF EDUCATION, DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,
DEFENDANTS-APPELLEES,
AND
ANDRAYA YEARWOOD, THANIA EDWARDS ON BEHALF OF HER DAUGHTER T.M., AND COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,
INTERVENOR DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the District of Connecticut
Docket No. 3:20–CV–00201 (Hon. Robert N. Chatigny)

BRIEF OF AMICUS CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS, THE NATIONAL CENTER FOR TRANSGENDER EQUALITY, AND THE NATIONAL CENTER FOR LESBIAN RIGHTS

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DATE: October 14, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae certify that GLBTQ Legal Advocates & Defenders (GLAD), The National Center for Transgender Equality, and the National Center for Lesbian Rights are nonprofit organizations, none of which has a parent corporation or issues public stock.

Dated: October 14, 2021

/s/ Karen L. Dowd
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GLBTQ Legal Advocates & Defenders, the National Center for Transgender Equality, and the National Center for Lesbian Rights

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici curiae are GLBTQ Legal Advocates & Defenders, The National Center for Transgender Equality, and the National Center for Lesbian Rights. All are organizations with strong interests and deep expertise in legal issues concerning the civil rights of LGBTQ+ people.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has worked on numerous cases on behalf of transgender students seeking equality and inclusion in schools, including advocating for them to be able to participate equally in school athletic programs.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people through litigation, public policy advocacy, and public education. Through its Transgender Youth Project, NCLR seeks to promote greater understanding and support for transgender children and their families.

NCLR has a particular interest in preventing all forms of sex-based discrimination, including discrimination against transgender women and girls.

The National Center for Transgender Equality is a non-profit organization that advocates to change policies and society to increase understanding and acceptance of transgender people. In Connecticut and throughout the country, NCTE works to replace disrespect, discrimination, and violence with empathy, opportunity, and justice. NCTE has an interest in the case before the court because a critical component of the organization's work is the creation of equity, equal opportunity, safety, health, and economic well-being for all people throughout their entire lifetimes, and the outcome of this case would help the young transgender people who the group serves to avoid some risks of discrimination, harassment, and even violence in participation in athletics.

All parties have consented to the filing of this amicus brief. See generally Fed. R. App. P. 29(a); Fed. R. App. P. 29(a) advisory committee's note to 1998 amendments (noting that Rule 29(a) permits the timely filing of an amicus curiae brief without leave of the court if all parties consent to the filing of the brief).

SUMMARY OF THE ARGUMENT

The Plaintiffs in this case, three female high school students (two of whom have since graduated), seek a judicial order that no transgender girls or young women may participate in school sports. The relief they seek would have the same force and effect of a state law banning transgender girls from school sports. Because such a rule would violate guarantees of equal protection, it may no more be ordered in this case than it could be enforced if passed by the Connecticut legislature.[1]

Amici agree with Defendants that Plaintiffs' claims were properly dismissed for reasons set forth by the district court: Plaintiffs' claims that they will race against transgender athletes in the future are purely speculative and unsupported by the facts; Plaintiffs' allegations that retroactive change in their track and field records will redress any injury are not plausible; and *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1 (1981), precludes any retroactive damage award. Amici urge this court to affirm the district court on those grounds.

Because the merits arguments were also fully briefed below and this court may affirm the district court on independent grounds, *CBF Industria de Gusa S/A v. AMCI Holdings*, 850 F.3d 58, 78 (2d Cir. 2017), amici submit this brief to highlight

[1] Fed. R. App. P. 29(a)(4)(E) Statement—No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel contributed money intended to fund the preparation of this brief.

the constitutional infirmities of the relief Plaintiffs seek and specifically to highlight the impermissible animus behind it.

ARGUMENT

A. THE RELIEF THE PLAINTIFFS SEEK IS UNCONSTITUTIONAL AND, THEREFORE, CANNOT BE GRANTED.

In 2013, the Defendant Connecticut Interscholastic Athletic Conference (the CIAC) adopted a policy that allows transgender students to play on sex-segregated sports teams based on the "gender identity of that student in current school records and daily life activities in the school." (JA 149). The policy permits transgender girls to play on girls' sports teams and transgender boys to play on boys' teams. Plaintiffs seek to reverse that CIAC policy and to secure a judicial order that categorically excludes all transgender girls and young women from participating on any interscholastic teams "designated for girls, women, or females." (JA176).

The relief Plaintiffs seek would have the same effect as a state law barring transgender girls from school sports and is subject to the same constitutional constraints as such a law would be. See *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); *Palmore v. Sidoti,* 466 U.S. 429 (1984). Just as a state law barring all transgender girls from school sports would violate the constitutional requirement of equal protection, so, too, would a judicial decree of that effect.

As other courts have held, a categorical ban of this type - excluding all transgender girls from school sports - discriminates based on sex and cannot pass

muster under the heightened scrutiny applied to sex-based classifications. *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020), *appeal filed sub nom. Hecox v. Kenyon*, Nos. 21-35813, 21-35815 (9th Cir. 2020) (granting preliminary injunction against state ban on transgender girls in sports); *B. P. J. v. W. Virginia State Bd. of Educ.,* No. 2:21-CV-00316, 2021 WL 3081883 (S.D.W. Va. July 21, 2021) (ban against all transgender female athletes from participating in school sports likely unconstitutional as applied to transgender female plaintiff). In addition to being impermissible because it discriminates on the basis of sex, the ban requested by Plaintiffs also violates the guarantees of equal protection because it is rooted in animus and therefore may not be ordered in this or any case.

1. The Supreme Court Has Long Held that Government Action that Discriminates Against a Disfavored Group Based on Animus Violates the Requirement of Equal Protection.

As the Supreme Court has made clear, a law that singles out an unpopular group for disfavored treatment requires careful scrutiny to ensure that it is not based on impermissible animus, rather than a legitimate legislative purpose. The Constitution will not abide such a "bare congressional desire to harm a politically unpopular group. . . ." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

In applying the animus doctrine, the Supreme Court and lower federal courts have identified common hallmarks of laws that may reflect animus and, therefore,

warrant careful scrutiny. Animus need not reflect intentional bias or animosity toward a particular group. As Justice Stevens noted in his concurrence in *Railroad Ret v. Fritz*, "[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." 449 U.S. 166, 181 (1980). But as Justices Kennedy and O'Connor have also explained, impermissible prejudice "rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

In a concurring opinion in *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir. 2014), Judge Holmes similarly noted that animus can range from seeking to harm vulnerable groups to simply treating them as "others." The "types of legislative motives [that] may be equated with animus" . . . fall "on a continuum" from "hostility toward a particular group" to a simple desire to "exclude a particular group . . . for no reason other than an 'irrational prejudice.'" *Id*. at 1100 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985)).

> In this sense, animus may be present where the lawmaking authority is motivated solely by the urge to call one group "other," to separate those persons from the rest of the community (i.e., an "us versus them" legal construct). See *Romer [v. Evans]*, 517 U.S. [620] at 635, 116 S.Ct. 1620 [(1996)](invalidating "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit");

> *Cleburne*, 473 U.S. at 448, 105 S.Ct. 3249 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the [intellectually disabled] differently from apartment houses, multiple dwellings, and the like.")

Bishop, 760 F.3d at 1100.

When determining whether there is an improper discriminatory purpose at work, courts may consider a measure's historical context and background. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *Jana-Rock Const. v. New York State Dept. of Econ. Dev.*, 438 F.3d 195, 212 (2nd Cir. 2006) (quoting *Arlington Heights*, 429 U.S. at 266).

The most common hallmark of a law based on animus is that it expressly targets a disfavored group. The cases of *Romer*, *Cleburne*, and *Moreno* exemplify this principle. Each case reviewed a classification targeting a group to which the Court had not applied heightened scrutiny, but nonetheless was commonly held in disdain or misunderstood—gay people in *Romer*, those with developmental disabilities in *Cleburne*, and those living in nontraditional households in *Moreno*. In each case, the Court noted that the targeted group was widely disliked and after assessing and rejecting alternative explanations for each measure reached the

"inevitable inference that the disadvantage imposed is born of animosity. . . ." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

In addition, animus may be detected when government action seeks to eliminate existing protections for a vulnerable group and "imposes a special disability upon those persons alone." *Romer*, 517 U.S. at 631. For example, in *United States v. Windsor,* the Supreme Court struck down a federal law enacted to "deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages," finding that deprivation of rights to be "strong evidence of a law having the purpose and effect of disapproval of that class." 570 U.S. 744, 770 (2013). *See also Doe 1 v. Trump*, 275 F. Supp. 3d 167, 215 (D.D.C. 2017) (finding animus where a policy effected "a *revocation* from transgender people of a right they were previously given")(italics in original); *Perry v. Brown*, 671 F.3d 1052, 1080 (9th Cir. 2012) (finding animus where "the voters of a state have enacted an initiative constitutional amendment that reduces the rights of gays and lesbians under state law").

Relatedly, the Supreme Court has held that "[i]n determining whether a law is motived by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration." *Windsor*, 570 U.S. at 770 (quoting *Romer*, 517 U.S. at 633); *see also Windsor v. United States*, 699 F.3d 169, 186 (2nd Cir. 2012) (same). In *Romer*, the Court stressed the novelty of a state

constitutional amendment barring a particular group from legal protections: "The absence of precedent for Amendment 2 is itself instructive." *Romer*, 517 U.S. at 633. As the Court noted, "[i]t is not within our constitutional tradition to enact laws of this sort. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer*, 517 U.S. at 633 (internal citations and quotations omitted).

The Supreme Court also noted that a law is suspect when it inflicts "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635. In *Romer*, the state argued that excluding gay people from anti-discrimination protections at any level of state government furthered the state's interest in protecting freedom of association, particularly for "landlords or employers who have personal or religious objections to homosexuality." *Romer*, 517 U.S. at 635. The Court found that the disparity between those asserted interests and the sweeping breadth of the harms imposed was "so far removed from these particular justifications that we find it impossible to credit them." *Romer*, 517 U.S. at 635.

Similarly, in *Pedersen v. Off. of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012), the court found that the harms imposed by the federal Defense of Marriage Act (DOMA), which barred any federal recognition of same-sex couples' marriages, were so serious and far-reaching, depriving married same-sex couples of hundreds

of rights and protections, that they cast doubt on the credibility of the narrow justifications offered for them. As the court explained, "DOMA's sweeping scope belies any rational relationship to the purported objective of promoting dual-gendered parenting. Where, as here, the 'sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.'" *Pedersen*, 881 F. Supp. 2d at 341 (quoting *Romer*, 517 U.S. at 632).

Finally, government action that relies on class-based stereotyping may also evidence animus. In *Cleburne*, for example, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the [intellectually disabled] differently from apartment houses, multiple dwellings, and the like." 473 U.S. at 448. Similarly, in *Moreno*, the Court noted that the legislative history of the challenged law was based, in part, on disdain for "so-called 'hippies' and 'hippie communes,'" notwithstanding that those affected by the law included many other types of families. 413 U.S. at 534. *See also Harrington by Harrington v. City of Attleboro,* No. 15-CV-12769-DJC, 2018 WL 475000, at *7 (D. Mass. Jan. 17, 2018) (admissible evidence of "stereotyping animus"); *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (stating that bias against gay people often reflects "sex stereotyping animus").

2. Judicial Orders Are Subject to Constitutional Constraints.

This court can and should engage in an inquiry into whether animus infects requested judicial relief in a case brought by private parties asking a court to impose a targeted disability on a discrete group of individuals, just as it would in evaluating the constitutionality of a law seeking to do the same thing. It has been long settled that "[a] state acts by its legislative, its executive, *or its judicial authorities*." *Ex Parte Virginia,* 100 U.S. 339, 347 (1880) (emphasis added). Therefore, just as the legislature may not by passage of a law deny any person the equal protection of the laws, neither may a court do so in issuing requested relief. *Id.* *See also Shelley*, supra (in granting enforcement of a racially-restrictive covenant tied to the sale of real property, the state – via its courts – denies equal protection). "Such an illegal standard cannot be enforced by the courts." *GMM v. Kimpson*, 116 F.Supp.3d 126, 149 (E.D.N.Y. 2015) citing to *Palmore*, supra. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." *Palmore*, 466 U.S. at 433 (internal quotations and citations). In *Palmore,* the Supreme Court reviewed the actions of a judge who changed the custody of a child from her mother to her father based on the mother's entry into an interracial marriage and the asserted potential adverse impact of private bias on the child. In reversing the trial court's action as violative of the Fourteenth Amendment, the Court stated

> The Constitution cannot control such prejudices but neither can it tolerate them. Private bias may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore, 466 U.S. at 433.

B. The Relief Plaintiffs Seek Bears the Hallmarks of Animus.

Because the relief Plaintiffs seek bears the hallmarks of an unconstitutional government action based on animus – by treating a vulnerable group as "others," reversing existing protections, imposing an unprecedented exclusion, inflicting serious continuing injuries, and perpetuating pernicious stereotypes -- the court may not issue it in this case.

1. The Context and Background of this Litigation Suggests the Relief Plaintiffs Seek Is Motivated By a Discriminatory Purpose.

This litigation takes place against a background of unprecedented efforts to pass state laws barring transgender girls from playing school sports. In considering whether the relief Plaintiffs seek reflect animus, two factors relating to this litigation particularly warrant consideration.

First, Plaintiffs rely heavily on the research of sports expert Doriane Lambelet Coleman. (JA142-43, ¶¶55-56 and JA146, ¶58). But Plaintiffs filed their second amended complaint on August 11, 2020, nearly five months after Professor Coleman took the extraordinary step of urging the Governor of Idaho to veto a bill that imposed a categorical ban such as the Plaintiffs seek through this litigation because the Idaho bill rested on a distortion of her work. While the bill was awaiting the

Governor's signature, she urged its veto, explaining that "Idaho [was] misusing" her scholarship and that the bill was "flawed." Letter from Doriane Lambelet Coleman & Nancy Hogshead-Maker to Brian Wonderlich, Gen. Counsel, State of Idaho (Mar. 19, 2020), https://bloximages.chicago2.vip.townnews.com/idahopress.com/content/tncms/assets/v3/editorial/1/c8/1c8ecfa5-cf97-5a48-b98c-3f8601997e70/5e742726c40f9.pdf.pdf. "To pass muster at the end of the day," Professor Coleman wrote, legislation must "draw lines intelligently based on the scientific evidence, and thoughtfully based on an ethic of care for all student-athletes." *Id* at page 2. Noting that the Idaho bill "violates those principles," she urged "Governor Little to veto it." *Id.* Notwithstanding Professor Coleman's clear rejection of the very same relief Plaintiffs seek in this lawsuit as resting upon a serious distortion of her work, Plaintiffs continue to cite Professor Coleman's research to support their claims.

Second, Plaintiffs' counsel in this litigation, the Alliance Defending Freedom ("ADF"), acknowledges that this litigation is part of a larger mission to oppose any recognition or protection of transgender individuals in general or of transgender students in particular. See https://www.adflegal.org. Consistent with that mission, ADF has endorsed a federal "Protection of Women and Girls in Sports Act of 2021" that would bar all transgender girls and women from participating as such in school

sports as part of a project to promote "model legislation" to legislators across the country to exclude transgender girls from playing girls' sports. *See For Policy Makers*, Promise to America's Children, https://promisetoamericaschildren.org/for-policy-makers/#model (last visited Oct. 10, 2021). These background factors, as well as the factors discussed below, strongly suggests that the relief sought by Plaintiffs in this case rests on animus and is improper for that reason.

2. Plaintiffs' Requested Relief Targets a Vulnerable Group of Individuals for Negative Treatment.

The requested relief targets a vulnerable group. Transgender students already face pervasive discrimination and harassment in school. A recent study by the Centers for Disease Control concluded that transgender students report bullying and mistreatment at disproportionately high rates. Michelle M. Johns *et al*., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts*, *2017*, Ctrs. for Disease Control and Prevention (2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf. Within the twelve months preceding the study, transgender students reported significantly higher incidents of being bullied, feeling unsafe traveling to or from school, being threatened with a weapon at school, experiencing suicidality, and being made to engage in unwanted sexual relations. *Id*.

Transgender girls who are Black are particularly vulnerable, both because they are already more likely to face harassment at school and because they are more likely to be stereotyped as "masculine" and to have their gender questioned. In a 2017 study, more than forty percent of Black transgender youth felt unsafe at school because of their gender expression, and nearly a third reported missing at least one day of school in the past month because they felt unsafe or uncomfortable. Historically, Black female athletes have been harmed by racist stereotypes that disparage Black women as insufficiently "feminine," and this invidious pattern continues today. *See, e.g.*, Maya A. Jones, *New Study Examines History of Black Women Fighting to Be Respected as Athletes*, The Undefeated (June 25, 2018), https://theundefeated.com/features/morgan-state-university-study-examines-history-of-black-women-fighting-to-be-respected-as-athletes/; GLSEN & National Black Justice Coalition, Erasure and Resilience: The Experience of LGBTQ Students of Color, https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-Black-2020.pdf (2020) (both referencing a study entitled "Beating Opponents, Battling Belittlement: How African-American Female Athletes Use Community to Navigate Negative Images"). In practice, even though Black transgender girls comprise a small percentage of transgender athletes, they have been disproportionately targeted by individuals and groups seeking to ban transgender girls from school sports.

A 2021 survey by the Trevor Project, an LGBTQ youth suicide prevention and crisis intervention organization, found that more than half of transgender youth seriously considered suicide last year. *National Survey on LGBTQ Youth Mental Health 2021*, The Trevor Project https://www.thetrevorproject.org/survey-2021/?section=Introduction (last visited Oct. 14, 2021). Fewer than one-third of LGBTQ youth reported that they had ever participated in school or community-based sports. *LGBTQ Youth Sports Participation*, The Trevor Project (Sept. 15, 2021), https://www.thetrevorproject.org/research-briefs/lgbtq-youth-sports-participation-2/. More than two-thirds reported never once taking part in any school or community sports. *Id*. Those who did participate in school sports reported significant benefits. According to one transgender student surveyed, playing sports "help me cope with gender dysphoria and depression." *Id*. Another transgender student reported, "I find that sports are a good way to distract me from negative thoughts." *Id*.

Numerous federal decisions have found that transgender persons, including transgender students, have long been subjected to discrimination, harassment, and violence. *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."); *Flack*

v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018) ("[O]ne would be hard-pressed to identify a class of people more discriminated against historically . . . than transgender people."); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) ("[T]ransgender people have been the subject of a long history of discrimination that continues to this day."); *M.A.B. v. Bd. of Educ. of Talbot Cty*., 286 F. Supp. 3d 704, 720 (D. Md. 2018) ("[T]ransgender people have been historically subjected to discrimination."). The purpose and intended effect of the Plaintiffs' lawsuit is to exclude transgender women and girls from school sports, and the relief they seek would serve only to further marginalize an already vulnerable group.

3. Plaintiffs' Requested Relief Would Reverse Existing Protections.

The requested relief would reverse the current practice of inclusion and impose an unqualified ban that categorically excludes all transgender girls and women from playing on female teams in Connecticut interscholastic competition. A ban on transgender girls in school sports would be a dramatic reversal of protections that have been in place for Connecticut athletes since at least 2008. While the policy at issue in this case was finalized in 2013, it was not the first policy ensuring transgender inclusion in Connecticut school sports. As early as 2008, the CIAC had in place a policy to allow transgender students to participate in sports, including a policy to allow transgender girls to play girls' sports. The CIAC, as part

of its ongoing review and oversight of interscholastic sports programs, revisited that policy after passage of the state transgender nondiscrimination law in 2011. It adopted the current version of its policy as part of its "commit[ment] to provid[ing] transgender student-athletes with equal opportunities to participate in CIAC athletic programs consistent with their gender identity." *See Reference Guide for Transgender Policy*, CIAC, https://www.casciac.org/pdfs/Principal_Transgender_Discussion_Quick_Reference_Guide.pdf (last visited Oct. 14, 2021).

The relief requested by Plaintiffs would abruptly reverse these longstanding policies, excluding transgender girls from protections that have been in place in Connecticut for at least 13 years.

4. Plaintiffs' Requested Relief Is Unusual and Would Result in an Unprecedented Exclusion of an Entire Group of Students from School Sports.

The relief Plaintiffs' request is unprecedented: the exclusion of an entire group of students from school sports. Plaintiffs' request for such an "unusual discrimination," *Windsor*, 570 U.S. at 770, underscores that the relief they seek is rooted in prejudice against a disfavored group. "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Historically, courts have repeatedly struck down laws that sought to bar

vulnerable groups from full participation in our nation's schools. *See*, *e.g.*, *Brown v. Bd. of Ed.,* 347 U.S. 483 (1954) (holding that states may not bar children from public schools based on their race); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that states may not bar undocumented children from public schools); *Virginia*, 518 U.S. 515 (holding that the state of Virginia could not bar women from admission to the Virginia Military Institute).

Here, the relief Plaintiffs seek would be an unprecedented reversal of this deeply rooted constitutional and judicial commitment to ensuring that our nation's public schools remain open to all, not slamming the door on an entire class of children. The novelty of this proposed relief warrants careful scrutiny and weighs strongly against granting the relief Plaintiffs seek.

5. Plaintiffs' Requested Relief Would Inflict Real, Continuing, and Serious Harms Far Removed From Any Justifications for It.

The requested relief would impose a sweeping prohibition that would inflict real, continuing, and serious harms by excluding transgender girls from all school sports. Because most student teams are sex-segregated, if the relief Plaintiffs seek is granted and transgender girls cannot play on girls' teams, it would mean that transgender girls could not play school sports at all. The notion that transgender girls could renounce their identities and play on boys' teams is untenable. *See Hecox*, 479 F. Supp. 3d at 977 (forcing transgender girls to "[p]articipat[e] in sports on teams that contradict one's gender identity . . . entirely eliminates their opportunity to

participate in school sports."); *Grimm*, 972 F.3d at 624 (Wynn, J., concurring) (requiring transgender students to choose between using the wrong restroom or a single stall "is no choice at all because . . . the Board completely misses the reality of what it means to be a transgender boy").

This sweeping exclusion of transgender girls from school sports would entirely deny them the critical benefits that students reap from participating in sports programs. School sports provide a unique opportunity for students to develop self-esteem, sportsmanship, leadership, and self-discipline that fosters healthy adolescent development. Depriving transgender girls of the benefit of school sports – a benefit they currently have – takes away an important educational opportunity that is routinely provided to other students.

In addition, by singling out one group of girls uniquely to be deprived of the chance to participate on school teams and in athletic programs, the Plaintiffs' lawsuit seeks to mark them as a disfavored class and invites more discrimination and further harassment. It would cruelly stigmatize transgender girls and officially mark them as so inferior and unworthy that they may be entirely excluded from an integral part of school programming. It would make an already vulnerable group of students even more so. The negative impact of that exclusion is as harmful for transgender girls as it would be for any group of students.

6. A Ban on Transgender Girls in Sports Rests on, and Perpetuates, Pernicious Stereotypes

The requested relief perpetuates unfounded stereotypes about transgender girls. It would exclude transgender athletes because of the baseless presumption that all transgender women and girls are stronger and fitter than non-transgender women and girls simply because they were not identified as female at birth. However, the perceived "'absolute advantage' between transgender and cisgender women athletes is based on overbroad generalizations without factual justification." *Hecox*, 479 F. Supp. 3d at 982. The reality is that transgender girls, like non-transgender ones, have a range of athletic abilities and experience athletic successes and failures at rates comparable to those of non-transgender girls. Though some transgender girls may excel, most will be athletically typical doing their best on the field or track to contribute to their team or support teammates, if they play sports at all, just as most non-transgender girls do. Being transgender is not an accurate proxy for athletic ability. Excluding transgender girls and young women from school sports no more promotes sex equality than would an order excluding lesbian or bisexual girls and young women or any other subset of girls and women from playing on female teams. The justification of sex equality is not just far removed from the court order Plaintiffs seek; it is miles away from it.

CONCLUSION

For the reasons above, as well as for the reasons set forth in Defendants' briefs and those in the Intervenor's brief, this court should affirm the judgment below.

Respectfully submitted,

Dated: October 14, 2021

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October 14, 2021

/s/ Karen L. Dowd
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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2021, I electronically filed the foregoing and attached addendum of unpublished cases with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system

October 14, 2021

/s/ Karen L. Dowd_____
Karen L. Dowd
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ADDENDUM OF UNPUBLISHED CASES

2021 WL 3081883
Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia, Charleston Division.

B. P. J., et al., Plaintiffs,
v.
WEST VIRGINIA STATE BOARD OF EDUCATION, et al., Defendants.

CIVIL ACTION NO. 2:21-cv-00316
|
Signed 07/21/2021

Synopsis

Background: Transgender female student brought action against West Virginia State Board of Education, West Virginia Secondary Schools Activities Commission (WVSSAC), state school superintendent, and other defendants alleging that state law, which required athletic teams be designated based on biological sex, and addressed who may participate on each team, violated Equal Protection Clause and Title IX. Student filed motion for preliminary injunction.

Holdings: The District Court, Joseph R. Goodwin, J., held that:

student had likelihood of success on merits of her equal protection claim;

student had likelihood of success on merits of her Title IX claim;

student would likely suffer irreparable harm absent preliminary injunction;

balance of equities and public interested weighed in favor of preliminary injunction.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

West Codenotes

Validity Called into Doubt
W. Va. Code Ann. § 18-2-25d

Attorneys and Law Firms

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MEMORANDUM OPINION & ORDER

JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE

***1** A fear of the unknown and discomfort with the unfamiliar have motivated many of the most malignant harms committed by our country's governments on their own citizens. Out of fear of those less like them, the powerful have made laws that restricted who could attend what schools, who could work certain jobs, who could marry whom, and even how people can practice their religions. Recognizing that classifying human beings in ways that officially sanction harm is antithetical to democracy, the states ratified the Fourteenth Amendment. It ensures that no state may "deny to any person within its jurisdiction the equal protection of the laws." Accordingly, the courts are most juberous of any law —state or federal—that treats groups of people differently.

The matter before me today is a motion to preliminarily enjoin a recently passed state law. Those standing in opposition to this law assert that it was enacted to incite fear and exclude

certain persons rather than to address a legitimate government interest. At this point, I have been provided with scant evidence that this law addresses any problem at all, let alone an important problem. When the government distinguishes between different groups of people, those distinctions must be supported by compelling reasons. Having determined that Plaintiff has a likelihood of success in demonstrating that this statute is unconstitutional as it applies to her and that it violates Title IX, Plaintiff's Motion for a Preliminary Injunction is **GRANTED**.

I. Plaintiff and Her Claims

B.P.J. is an eleven-year-old girl preparing to begin the sixth grade at a new school. Like many of her peers, B.P.J. intends to participate in school athletics. She hopes to join both the girls' cross country and track teams. However, B.P.J. was informed by her school that because of a new statute, she will no longer be permitted to join either team because she is a transgender girl.

For a definition of terms such as gender identity, [1] gender dysphoria, [2] cisgender, [3] etc., I refer to the meticulously researched and written opinion in *Grimm v. Gloucester County School Board*, 972 F.3d 586, 594–597 (4th Cir. 2020). I adopt the definition of transgender used in that opinion. " 'Transgender' is ... 'used as an umbrella term to describe groups of people who transcend conventional expectations of gender identity or expression.' " *Grimm*, 972 F.3d at 596 (quoting *PFLAG, PFLAG National Glossary of Terms* (July 2019), http://pflag.org/glossary).

1 One's "deeply felt, inherent sense" of one's gender. *Grimm*, 972 F.3d at 594.

2 "[A] condition that is characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex." *Grimm*, 972 F.3d at 594–95.

3 A person whose gender identity aligns with her sex-assigned-at-birth. *Grimm*, 972 F.3d at 594.

B.P.J. writes in depth about her history—revealing publicly what are inherently private details—to educate both the court and public. B.P.J. is a transgender girl who, while assigned the sex of male at birth, knew from a young age that she is a girl. [ECF No. 64, ¶ 31]. By the third grade, B.P.J. was living as a girl at home but dressing as a boy at school. *Id.* B.P.J. then asked to change her name to a name commonly associated with girls and began living as a girl in both public and private. *Id.* B.P.J. also joined her elementary school's all-girl cheerleading team. *Id.* at ¶ 36. B.P.J. practiced and competed with this team without incident.

***2** B.P.J. was diagnosed with gender dysphoria in 2019. *Id.* at ¶ 33. She began puberty-delaying treatment on June 15, 2020, to treat that condition. [4] Plaintiff avers that this treatment, which prevents endogenous puberty and therefore any physiological changes caused by increased testosterone circulation, prevents her from developing any physiological advantage over other girl athletes. [5]

4 "The medical treatment for gender dysphoria is to eliminate [ ] clinically significant distress by helping a transgender person live in alignment with their gender identity." [ECF No. 2-1, Adkins Decl., at 5]. For some transgender youth, the distress from gender dysphoria is addressed through puberty blocking treatment. *Id.* at 6. "Puberty blocking treatment allows transgender youth to avoid going through their endogenous puberty thereby avoiding the heightened gender dysphoria and permanent physical changes that puberty would cause." *Id.* The State cites to experts who question when social transition and puberty blocking treatment are appropriate for young people. *See*, [ECF No. 49, Ex. E]. But what is or should be the default treatment for transgender youth is not the question before the court.

5 The NCAA and the International Olympic Committee, which both permit transgender women to compete as women in athletic events, require that the athletes suppress their testosterone for a certain period of time or that it be suppressed below a particular threshold.

B.P.J., through her mother, filed this lawsuit against the West Virginia State Board of Education, the Harrison County Board of Education, the West Virginia Secondary Schools Activities Commission ("WVSSAC"), State Superintendent W. Clayton Burch, and Harrison County Superintendent Dora Stutler. The State of West Virginia moved to intervene, and that motion was granted. Plaintiff then amended her complaint, [ECF No. 64], naming both the State and Attorney General Patrick Morrisey as defendants.

In her complaint, B.P.J. alleges that Defendants Burch, Stutler, the WVSSAC, and Attorney General Morrisey deprived her of the equal protection guaranteed to her by the Fourteenth Amendment and that the State, the State Board of Education, the Harrison County Board of Education, and the WVSSAC have violated Title IX. [ECF No. 64, at 20–23]. B.P.J. seeks a declaratory judgment that Section 18-2-25d of the West Virginia Code violates Title IX and the Equal Protection Clause; an injunction preventing Defendants from enforcing the law against her; a waiver of the requirement of a surety bond for preliminary injunctive relief; nominal damages; and reasonable attorneys' fees.

The motion for a preliminary injunction that accompanies her complaint seeks relief only insofar as this law applies to her. That is, granting this motion will only prevent the State and other Defendants from enforcing Section 18-2-25d against B.P.J. Whether the law is facially unconstitutional is an issue raised in the Complaint and will be resolved at a later stage of litigation.

II. The Law

On March 18, 2021, ten delegates in the West Virginia House of Delegates introduced House Bill 3293, strategically referred to as the "Save Women's Sports Bill." West Virginia Governor Jim Justice signed the bill into law on April 28, 2021, and it was codified as West Virginia Code, Section 18-2-25d, entitled "Clarifying participation for sports events to be based on biological sex of the athlete at birth."

***3** The statute begins by noting that "[t]here are inherent differences between biological males and biological females, and that these differences are cause for celebration, as determined by the Supreme Court of the United States in United States v. Virginia (1996)." § 18-2-25d(a)(1). The statute then provides a series of definitions, all at issue here:

> (1) "Biological sex" means an individual's physical form as a male or female based solely on the individual's reproductive biology and genetics at birth.
>
> (2) "Female" means an individual whose biological sex determined at birth is female. As used in this section, "women" or "girls" refers to biological females.
>
> (3) "Male" means an individual whose biological sex determined at birth is male. As used in this section, "men" or "boys" refers to biological males.

§ 18-2-25d(b)(1)–(3).

Using these definitions, the gravamen of the statute requires that "[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by any public secondary school or a state institution of higher education," "shall be expressly designated as one of the following based on biological sex: (A) Males, men, or boys; (B) Females, women, or girls; or (C) Coed or mixed." § 18-2-25d(c)(1). Once those teams are properly designated, the statute goes on to address who may participate on which teams. "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." § 18-2-25d(c)(1).

According to the statute's text, its definition of "biological sex" has nothing to do with gender identity. "Gender identity is separate and distinct from biological sex to the extent that an individual's biological sex is not determinative or indicative of the individual's gender identity. Classifications based on gender identity serve no legitimate relationship to the State of West Virginia's interest in promoting equal athletic opportunities for the female sex." § 18-2-25d(a)(4).

The State asserts that the objective of the statute is to provide equal athletic opportunities for female athletes and to protect the physical safety of female athletes when competing. [ECF No. 49, at 7]. Plaintiff argues that the State's assertion is a façade concealing the true objective: to exclude transgender girls and women from participating in sports.

III. The Preliminary Injunction

The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have provided district courts with a precise analytical framework for determining whether to grant preliminary injunctive relief. First, B.P.J. must make a clear showing that she will likely succeed on the merits. Second, she must make a clear showing that she is likely to be irreparably harmed absent preliminary relief. Third, she must show that the balance of equities tips in her favor. Finally, B.P.J. must show that an injunction is in the public interest. All four requirements must be satisfied. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089, 130 S. Ct. 2371, 176 L.Ed.2d 764 (2010).

a. Likelihood of Success on the Merits

*4 As required by *Natural Resource Defense Counsel*, I must first determine if B.P.J. has demonstrated a clear likelihood of success on the merits of either her Equal Protection Claim or her Title IX Claim. I will address each in turn.

i. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

The first step in an equal protection analysis is to determine what level of scrutiny I must apply to Section 18-2-25d. The answer to this question turns on what classifications are created by the law. Plaintiff argues that this law discriminates against transgender girls and only transgender girls because cisgender boys, cisgender girls, and transgender boys are all unaffected by the law's central tenet: non-cisgender girls may not participate on a girls' sports team. [ECF No. 19, at 19]. The State responded that this law does not treat transgender girls differently than other groups because this law is premised on "biological sex," and it treats all "biological males" similarly by prohibiting them from participating on girls' sports teams.

Essentially, the State contends that the Equal Protection Clause is not being violated because B.P.J. is being treated the same under this law as those she is similarly situated with: "biological males" as defined by West Virginia Code § 18-2-25d(b)(3). But this is misleading. Plaintiff is not most similarly situated with cisgender boys; she is similarly situated to other girls. *Accord Grimm*, 972 F.3d at 610 ("The overwhelming thrust of everything in the record ... is that Grimm was similarly situated to other boys"). Plaintiff has lived as a girl for years. She has competed on the all-girls cheerleading team at her school. She changed her name to a name more commonly associated with girls. And of the girls at her middle school, B.P.J. is the only girl who will be prevented from participating in school-sponsored athletics. Here, there is an inescapable conclusion that Section 18-2-25d discriminates on the basis of transgender status. *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) ("while the physiological differences the Defendants suggest support the categorical bar on transgender women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status"). The question then is what level of scrutiny applies to classifications based on transgender status.

The Fourth Circuit answered that question in *Grimm*. *Stare decisis* requires that I apply intermediate, or heightened, scrutiny to laws that classify people according to transgender status. *Grimm* arrived at this conclusion from two different directions. First, *Grimm* finds that discrimination against transgender people is inherently based in sex, and therefore the level of scrutiny applicable to sex discrimination applies to transgender discrimination. 972 F.3d at 607. In the alternative, *Grimm* finds that transgender people are a quasi-suspect class and therefore entitled to intermediate scrutiny of laws that treat them differently than non-transgender people. *Id.*

*5 To survive a review under intermediate scrutiny, the government must provide an "exceedingly persuasive justification" for the classification created by a law or policy. *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). At a minimum, the government must show that "the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* A law discriminating against a quasi-suspect class "must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975)).

"Under intermediate scrutiny, the government bears the burden of establishing a reasonable fit between the challenged statute and a substantial governmental objective." *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012) (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)). The party defending the statute must "present[ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, i.e., ... the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical

generalizations." *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010) (quoting *Eng'g Contractors Ass'n of S. Fla. v. Metropolitan Dade Cnty.*, 122 F.3d 895, 910 (11th Cir. 1997)); *Concrete Works of Colorado, Inc. v. City and Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003) ("[T]he gender-based measures ... [must be] based on 'reasoned analysis rather than [on] the mechanical application of traditional, often inaccurate, assumptions.' " (quoting *Mississippi Univ. for Women*, 458 U.S. at 726, 102 S.Ct. 3331)).

In this preliminary matter, my inquiry is constrained to whether this statute is unconstitutional *as applied* to B.P.J. An as-applied challenge is "based on a developed factual record and the application of a statute to a specific person[.]" *Educational Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir. 2013) (quoting *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (en banc)). "It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.' " *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, 42 S.Ct. 106, 66 L.Ed. 239 (1921)).

Here, the State's proffered objective for the statute is to provide equal athletic opportunities for female athletes and to protect female athletes while they participate in athletics. [ECF No. 49, at 7]. B.P.J. argues that I should reject this offered objective and instead find that the State's true objective is to exclude transgender women and girls from participating in state-sponsored athletics. While I need not do so, *Virginia*, 518 U.S. at 536, 116 S.Ct. 2264, I will proceed as if the State's offered objective is genuine. Regardless, I find that this statute as applied to B.P.J. is not substantially related to providing equal athletic opportunities for girls.

As described at length in her memorandum in support of her motion for a preliminary injunction, B.P.J. has been living publicly as a girl for over a year at this point. As part of treating her gender dysphoria, B.P.J. has been on puberty delaying drugs for over a year. As a result, B.P.J. has not undergone and will not undergo endogenous puberty, the process that most young boys undergo that creates the physical advantages warned about by the State.

***6** B.P.J. has provided evidence that any physical advantages that men and boys enjoy are derived from higher concentrations of circulating testosterone. This is supported by both the NCAA policy[6] and the International Olympic Committee's policy[7] that permit transgender women to compete on teams that align with their gender identity so long as those athletes receive testosterone suppressing treatment. According to B.P.J.'s experts, "there is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes." [ECF No. 2-1, Safer Decl., at 6–7].

6 *NCAA Inclusion of Transgender Student-Athletes*, NCAA (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

7 *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, Int'l Olympic Comm. (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_en.pdf.

The Defendant cites to an expert who asserts that for transgender athletes who have undergone endogenous puberty, later suppression of testosterone does not eradicate all competitive advantage. [ECF No. 49, Ex. G]. Like Judge Nye in the District of Idaho, I find this opinion unpersuasive. *See Hecox v. Little*, 479 F. Supp. 3d 930, 980 (D. Idaho 2020). While that argument may be relevant to a facial challenge of the statute, it is irrelevant to this as-applied analysis. B.P.J. has not undergone endogenous puberty and will not so long as she remains on her prescribed puberty blocking drugs. At this preliminary stage, B.P.J. has shown that she will not have any inherent physical advantage over the girls she would compete against on the girls' cross country and track teams.

Further, permitting B.P.J. to participate on the girls' teams would not take away athletic opportunities from other girls. Transgender people make up a small percentage of the population: 0.6% of the adult population generally, and 0.7% of thirteen-to seventeen-year-olds. Herman, Flores, Brown, et al., *Age of Individuals Who Identify as Transgender in the United States*, The Williams Institute (Jan. 2017), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf. The number of transgender people who wish to participate in school-sponsored athletics is even smaller. Insofar as I am aware, B.P.J. is the only transgender student at her school interested in school-sponsored athletics. Therefore, I cannot find that permitting B.P.J. to participate on the girls' cross country and

track teams would significantly, if at all, prevent other girl athletes from participating.

Finally, as applied to B.P.J., this law cannot possibly protect the physical safety of other girl athletes. Cross country and track are not contact sports. The physical ability of one athlete does not put another in danger in the way it might in another sport like football or hockey.

As applied to B.P.J., Section 18-2-25d is not substantially related to protecting girls' opportunities in athletics or their physical safety when participating in athletics. I find that B.P.J. is likely to succeed on the merits of her equal protection claim.

ii. Title IX

Success on her Title IX claim would require B.P.J. to 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." *Grimm*, 972 F.3d at 616 (citing *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994)). There is no question that Defendants named in this case received federal funding or that the athletic programs run by Harrison County are part of an education program. Recognizing this, what remains to be determined is whether B.P.J has demonstrated that she will likely succeed in proving that she is being excluded on the basis of sex and that she was harmed by unlawful discrimination.

***7** That B.P.J. is being excluded from school athletics on the basis of her sex is clear. Like the Fourth Circuit's decision in *Grimm*, I "have little difficulty holding" that Section 18-2-25d discriminates against her "on the basis of sex." *Grimm*, 972 F.3d at 616; *accord Bostock v. Clayton County*, —— U.S. ——, 140 S. Ct. 1731, 1741, 207 L.Ed.2d 218 (2020) (holding that discrimination against a person for being transgender is discrimination "on the basis of sex" under Title VII). The law could not exclude B.P.J. from a girls' athletics team without referencing her "biological sex" as defined in the statute. Her sex "remains a but-for cause" of her exclusion under the law. *Grimm*, 972 F.3d at 616.

Again, as in *Grimm*, I also have little difficulty finding that B.P.J. is harmed by this law. All other students in West Virginia secondary schools—cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys' teams—are permitted to play on sports teams that best fit their gender identity. Under this law, B.P.J. would be the only girl at her school, as far as I am aware, that is forbidden from playing on a girls' team and must join the boys' team. Like the discriminatory policy in *Grimm*, this law both stigmatizes and isolates B.P.J.

The final question is whether the law unlawfully discriminates against B.P.J. In the Title IX context, discrimination "mean[s] treating that individual worse than others who are similarly situated." *Grimm*, 972 F.3d at 618 (quoting *Bostock*, 140 S. Ct. at 1740). Here, as I have stated above, B.P.J. will be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity. Considering all of this, I find that B.P.J. has demonstrated a likelihood of success on the merits for her Title IX claim.

b. Irreparable Harm

When a party has shown a likelihood of a constitutional violation, the party has shown an irreparable harm. *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960). Forcing a girl to compete on the boys' team when there is a girls' team available would cause her unnecessary distress and stigma. In addition to the harm to B.P.J., requiring her to compete on the boys' team would also be confusing to coaches and teammates. And not only would B.P.J. be excluded from girls' sports completely; she would be excluded because of who she is: a transgender girl. Having found above that her exclusion is likely to be in violation of the Equal Protection Clause and Title IX, I find that B.P.J. has demonstrated that she will be irreparably harmed if this law were to take full effect.

c. Balance of Equities and the Public Interest

Where, as here, the government is a party, the "balance of the equities" and "public interest" prongs of the preliminary injunction test merge. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). In evaluating the balance of the equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365. It is always in the public interest to

uphold constitutional rights. *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013).

It is clearly in the public interest to uphold B.P.J.'s constitutional right to not 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. The right not to be discriminated against by the government belongs to all of us in equal measure. It is that communal and shared ownership of freedom that makes up the American ideal. The American ideal is one "that never has been yet—And yet must be—the land where *every* man is free." *Let America be America Again, Langston Hughes.*

***8** Plaintiff B.P.J.'s Motion for a Preliminary Injunction is **GRANTED.**

IV. Bond Requirement

Plaintiff also seeks to waive the bond required by Federal Rule of Civil Procedure 65(c). "Where the district court determines that the risk of harm [to the enjoined party] is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). This bond can even be waived entirely when the defendant would not suffer any harm from the injunction. *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch.*, No. Civ. A. AW-05-1994, 2005 WL 1075634, at *12 (D. Md. May 5, 2005). I find that a bond is unnecessary and waive its requirement in this case.

V. Conclusion

For the reasons stated above, Plaintiff's Motion for a Preliminary Injunction [ECF No. 2] is **GRANTED.** While this case is pending, Defendants are enjoined from enforcing Section 18-2-25d against B.P.J. She will be permitted to sign up for and participate in school athletics in the same way as her girl classmates.

All Citations

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End of Document

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Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Noelle-Marie HARRINGTON, BY her mother and next friend, Corrine HARRINGTON, Plaintiffs,
v.
CITY OF ATTLEBORO, Richard George, Douglas Satran, Patricia Knox, Mark Donnelly, Jeffrey Newman and Elizabeth York, Defendants.

Case No: 15-cv-12769-DJC
|
Filed 01/17/2018

Attorneys and Law Firms

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MEMORANDUM AND ORDER

Denise J. Casper, United States District Judge

I. Introduction

***1** Plaintiff Noelle-Marie Harrington ("Noelle"), by her mother and next friend Corrine Harrington ("Corrine"), has filed this lawsuit against Defendants City of Attleboro ("Attleboro"), Richard George ("George"), principal of Brennan Middle School, Douglas Satran ("Satran"), principal of Brennan Middle School, Patricia Knox ("Knox"), an assistant principal of Brennan Middle School, Mark Donnelly ("Donnelly"), an assistant principal of Brennan Middle School, Jeffrey Newman ("Newman"), principal of Attleboro High School, and Elizabeth York ("York"), an assistant principal of Attleboro High School. Plaintiff's remaining claim alleges a violation of Title IX, 20 U.S.C. § 1681 against Attleboro (Count I). D. 8. Attleboro has moved for summary judgment. D. 54. For the reasons stated below, the Court DENIES the motion for summary judgment.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.' " Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

The following material facts are undisputed unless otherwise noted. Noelle attended Brennan Middle School in Attleboro ("BMS") for sixth through eighth grades. D. 62, ¶ 33. [1] Noelle is 5'11" and weighs over 200 pounds, making her one of the biggest students in her class. D. 62, ¶ 34. In seventh grade, Noelle began telling certain friends that she "like[d] girls." D. 62, ¶ 35. Noelle attests that her sexual preference became well-known by her classmates at that time. D. 62, ¶ 36.

1 The Court hereinafter refers to the material facts asserted by Attleboro, D. 56, and Plaintiff, D. 62, by referring to the reproduction of Attleboro's statement of material facts and Plaintiff's responses thereto in D. 62.

A. Seventh Grade

***2** In seventh grade, two brothers in Noelle's class ("Chris H. and Cam H.") asked her out on a date. D. 62, ¶¶ 37-41. When she declined, explaining that she did not like boys, they called her a "dyke" and "fag." Id. The parties dispute whether Noelle reported this and other harassment. Attleboro state that Noelle never reported the incidents, and Plaintiff offers deposition testimony by Knox, as well as Noelle's testimony that she told a teacher, who told her to ignore it, and that this and other

events were known to George, Satran, Knox, Donnelly and other individuals at BMS. D. 62, ¶¶ 43, 51, 53, 62, 65.

Noelle faced verbal and physical harassment by another boy in seventh grade ("Tommy C."), who on multiple instances punched and tripped her. D. 62, ¶¶ 44-45, 54-55, 61-64, 66-67. Noelle testified that on at least one of these instances, Tommy C. punched her after she refused his "sarcastic" requests that she date him, calling her a "dyke" when she declined. D. 62, ¶ 45. Knox investigated one of these punching incidents, first meeting with Noelle and Corinne, and after Tommy C. denied the allegations, referring the dispute to the school psychologist for peer-to-peer mediation. D. 62, ¶¶ 46-50. Noelle was also referred to the school psychologist for similar peer-to-peer mediation when Tommy C. twisted her arm, possibly breaking it, and then in ninth grade when they were again placed in the same class, poked her during class and resumed his verbal harassment. D. 62, ¶¶ 82-84. Knox also investigated an allegation that Tommy C. had tripped Noelle, causing her to break or otherwise injure her wrist, though the nature and extent of the injury is in dispute. D. 62, ¶¶ 56-59. While BMS administrators said that evidence of such an injury would have resulted in a serious response, D. 62, ¶ 59, documents showing that Noelle had either broken or severely sprained her wrist, requiring a cast, were a part of Noelle's school records, D. 62, ¶¶ 58-60. Knox later investigated another allegation that Tommy C. pushed Noelle down the stairs, but testified that when other school administrators did not know anything about the event, the investigation did not proceed further or result in any punishment. D. 62, ¶ 69. Plaintiff offers Noelle's testimony that she told the school nurse on at least one occasion about the tripping, as well as Knox's testimony and nursing records showing that Noelle had told the school nurse the source of her injuries. D. 62, ¶¶ 65, 68.

Corinne met with Knox several times to discuss the bullying, who told Corinne that she would handle the incidents but could not provide particular details on disciplinary outcomes for privacy reasons. D. 62, ¶ 79. The BMS teachers knew bullying is not allowed generally and Corinne was told they would "keep an eye out if they saw anything." D. 62, ¶ 80.

Noelle asked her seventh-grade teachers to change her seat assignment to keep her away from Tommy C., explaining that he was harassing her. D. 62, ¶ 71. Some of Noelle's teachers changed her seating, but others refused. D. 62, ¶ 72. Despite being spoken to by BMS administrators, Corinne testified that Tommy C. continued to harass Noelle verbally, though no subsequent event was witnessed by any teachers. D. 62, ¶ 81. BMS ultimately changed Noelle's schedule so that Tommy C. was no longer in the same class as her. D. 62, ¶ 86. Plaintiff offers Knox's testimony that Tommy C. was never disciplined. D. 62, ¶ 88.

B. Eighth Grade

The next school year, BMS did not place Noelle in the same class as Tommy C. D. 62, ¶ 90. However, on at least two instances in eighth grade, Corinne reported verbal harassment, including Noelle again being called "dyke," "faggot" and other similar terms. D. 62, ¶ 92. Donnelly, who was responsible for discipline for the eighth grade at BMS, did not have any interactions with Noelle beyond filing a petition related to her poor school attendance and appearing in juvenile court in support of that petition. D. 62, ¶ 93.

*3 In Attleboro, at the end of each school year, there is a transition meeting between BMS and Attleboro High School ("AHS") officials to discuss the transition from middle school to high school, and to pass on information about particular students' disciplinary or behavioral issues of concern to administrators. D. 62, ¶¶ 95-96. It is disputed whether Noelle and her alleged harassers were discussed at the transition meeting, and Plaintiff points to the testimony of several school officials, including Donnelly, Knox and others, that there was neither a discussion of Noelle and her alleged abusers nor a transfer of administrative records relating to Noelle's harassment. D. 62, ¶ 96.

C. Ninth Grade

Noelle joined the Gay-Straight Alliance club when she started at AHS. D. 62, ¶ 101. Noelle did not experience any harassment during her first semester at AHS, but in February of ninth grade, Noelle was placed in the same class as Tommy C., which had not happened since part-way through seventh grade. D. 62, ¶¶ 104-06. Over the course of approximately one week, Tommy C. poked Noelle during class and whispered the same slurs at her, including "dyke, fag, whore, slut, bitch" and adding that "the world would be better off without [Noelle]." D. 62, ¶¶ 105-06. The classroom teacher moved Tommy C.'s seat to a different location in the classroom, after which he did not make any other harassing statements or acts. D. 62, ¶ 107. York instructed him not to bother, touch, or comment on Noelle. D. 62, ¶ 108. [2]

2 The parties dispute whether York or other administrators knew about the full extent of this incident, whether the harassment happened at all and whether Noelle recanted the accusation, wholly or partially. D. 62, ¶¶ 108-13. The parties point to conflicting deposition testimony on this point.

York assembled a team of administrators to respond to any future issues raised by Noelle or Corinne. D. 62, ¶ 115. The parties dispute the impact of this team on the harassment, and Plaintiff offers the testimony of Noelle's dean, Ann Montagano ("Montagano"), that many incidents of harassment endured by Noelle were not appropriately brought to her attention, and the testimony of Lamore, the school psychologist, who did not see Noelle at all in high school despite York's testimony that she had instructed him to check-in with Noelle on a daily basis. D. 62, ¶¶ 115-18.

Later in ninth grade, a girl Noelle described as her friend called her slurs such as "slut," "whore," and "fat ass" on multiple occasions. D. 62, ¶ 120. Noelle reported the name calling after one or two weeks, after which it stopped. D. 62, ¶ 121.

D. Tenth Grade

In tenth grade, Noelle was harassed by another boy ("Andrew M."), and had panic attacks as a result of sitting next to him in class. D. 62, ¶ 127. The parties dispute when Noelle began having panic attacks. Id. As a part of her continuing exploration of her sexuality, Noelle began identifying as gay or lesbian when she was sixteen years old in the tenth grade. D. 62, ¶ 130.

Other students continued to harass Noelle. One student told her that he did not like gay people, using insults and slurs including "dumb" and "nerd," and upon learning that Noelle identified as a lesbian, "dyke" and "fag." D. 62, ¶ 136. After Noelle was allowed to change seats in the class to avoid this student, he continued to approach her table to tell her she was "ugly and stupid and fat." D. 62, ¶ 137. When Noelle was on crutches, another student told her the reason she needed the crutches was because of her weight. D. 162, ¶ 138. Noelle testified that she attributed this harassment to a student who was friends with Noelle's ex-girlfriend, and that this may have been the cause of the animus in that instance. D. 162, ¶¶ 139-140. Noelle reported this incident to York; and Montagano testified that York's investigation did not advance beyond interviewing Noelle or the harassing student, and by her own admission the investigation did not follow her usual practice of inquiring "until she came to a dead end or exhausted all possibilities." D. 62, ¶ 141.

*4 In January of tenth grade, Noelle began refusing to go to school. D. 62, ¶ 145. Attleboro points to the high school counselor, Susan Sherck's testimony that Noelle was avoiding school due to her crutches, while Plaintiff relies upon York's testimony recalling that Noelle had recently been called "whore" and "pig" by fellow students at the mall. Id. AHS implemented a "safety plan" to allow Noelle to feel safer at school, although the parties dispute the value of the plan. D. 62, ¶ 147. In particular, Plaintiff points to Sherck's testimony that the safety plan was focused on bullying Noelle experienced in the hallways and, therefore, focused its solutions on her ability to safely travel around the school. Id. Noelle testified that she was harassed despite the implementation of the safety plan, including by Tommy C., who continued with the name-calling, and on at least one occasion, followed Noelle's brothers home from school and trespassed on their home's property. D. 62, ¶ 156.

The AHS administration referred Noelle to outside counseling services, and provided in-school counseling. D. 62, ¶ 153. The parties dispute the quantity and quality of these services. Noelle began doing her school work in Montagano's office, as she continued to have panic attacks in school. D. 62, ¶ 154.

Noelle was again harassed in class when Andrew M. shined a laser pointer in her eyes. D. 62, ¶ 158. Plaintiff offers evidence that after Andrew M. was suspended for this conduct, his friends called her a "snitch" and said that "the world would be better off without dykes like her in it." D. 62, ¶¶ 158, 165. Noelle testified that she had seen one of these students carrying a binder which had "death to all queers" written on the cover. D. 62, ¶ 77. Plaintiff points to Sherck's testimony that at this stage, Noelle was experiencing daily panic attacks and no longer wanted to attend school. D. 62, ¶ 158. On February 24, 2012, Noelle made a post on her Facebook account contemplating suicide in response to the harassment. D. 62, ¶ 169. After Corinne brought Noelle to AHS to seek assistance, the parties dispute the degree to which school administrators were helpful in recommending appropriate remedies to Noelle's suicidal ideations. D. 62, ¶¶ 170-78. Noelle was treated every day for eight days on an outpatient basis at a crisis center. D. 62, ¶ 179. Ultimately, Noelle chose to pursue a G.E.D. rather than return to AHS. D. 62, ¶ 180.

IV. Procedural History

Plaintiff instituted this action in Bristol Superior Court. D. 8. Defendants removed the action to federal court on June 23, 2015 and, soon thereafter, filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). D. 12. The Court allowed the motion in part, dismissing Plaintiff's claims under 42 U.S.C. § 1983 as well as various state law claims for negligence, violation of the Massachusetts Declaration of Rights, violation of the right to be free from sexual harassment in receiving public education, violation of the right to be free from sexual discrimination in a place of public accommodation, and violation of the Massachusetts Equal Rights Act. D. 31. Only Plaintiff's claim under Title IX against Attleboro remains. The Court heard the parties on the pending motion and took this matter under advisement. D. 67.

V. Discussion

Title IX provides that "[n]o 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(a). To state a claim under Title IX for student-on-student sexual harassment, a plaintiff must show "(1) that he or she was subject to 'severe, pervasive, and objectively offensive' sexual harassment by a school peer, and (2) that the harassment caused the plaintiff to be deprived of educational opportunities or benefits, ... (3) [the funding recipient] knew of the harassment, (4) in its programs or activities and (5) it was deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of the known circumstances." Porto v. Town of Tewksbury, 488 F.3d 67, 72-73 (1st Cir. 2007). For sexual harassment to fall within the gambit of Title IX, it must have been because of the plaintiff's sex. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). Attleboro only disputes (i) whether Noelle's harassment constitutes sex discrimination; and (ii) whether their response was deliberately indifferent.

A. Sex Stereotyping Based On Sexual Orientation Can Support A Sex Discrimination Claim Under Title IX

***5** The Court held in its decision on Defendants' motion to dismiss that the complaint stated a Title IX claim under either a sex or sex stereotyping theory. D. 31 at 7-9. Attleboro renews substantially the same argument, contending that Noelle's harassment relating to her sexual orientation cannot support a claim under Title IX on a sex stereotyping theory. Attleboro's argument remains unavailing. Sex discrimination can be based on sex stereotypes. See, e.g., Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 909 (1st Cir. 1988). Actionable sex stereotypes include those based on sexual orientation. See J.R. v. New York Cty. Dept. of Ed., No. 14-cv-0392-ILD-RML, 2015 WL 5007918, at *6 (E.D.N.Y. Aug. 20, 2015); Centola v. Potter, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002); Snelling v. Fall Mountain Reg'l Sch. Dist., No. 99-cv-448-JD, 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001); cf. Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000). Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the gender roles of men and women, and the relationships between them. Videckis v. Pepperdine University, 150 F. Supp. 3d, 1151, 1160 (C.D. Cal. 2015). Discrimination based on a perceived failure to conform to those gendered stereotypes constitutes actionable discrimination under Title IX. Id. at 1160-61.

Other courts facing similar questions have found that sexual orientation can form the basis of a sex stereotyping discrimination claim under Titles VII or IX. Most recently, the Seventh Circuit in Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017) (en banc), held that discrimination on the basis of sexual orientation is a form of sex stereotyping discrimination under Title VII.[3] Id. at 351-52. In Hively, the plaintiff was an adjunct professor on a college campus. Id. at 341. She alleged that between 2009 and 2014, she was rejected from at least six full-time positions due to her sexual orientation. Id. The Court considered two analytical frameworks for identifying the relationship between sexual orientation discrimination and sex discrimination. Id. at 345. Analogous here, the court considered the "comparative method," in which the court isolated the significance of the plaintiff's sex to the defendant's decision; in other words, holding all other things constant and changing only the plaintiff's sex, would she have endured the same harassment? Id. The court concluded that this but-for analysis showed that the defendant's conduct was "paradigmatic sex discrimination"; in other words, that the plaintiff faced the discrimination because she was a woman. Id. at 345-46; see Boutillier v. Hartford Public Sch., 221 F. Supp. 3d 255 (D. Conn. 2016); Videckis, 150 F. Supp. 3d at 1154. The comparative method makes clear what other courts had already explored, that "[t]he gender stereotype at work here is that 'real' men should date women, and not other men," and that the converse is equally true and actionable under Title VII or IX. Centola, 183 F. Supp. 2d at 410.

3 The Seventh Circuit has since applied its holding in Hively to a Title IX stereotyping claim. See Whitaker By Whitaker v. Kenosha Unified Sch.

Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).

Attleboro's citations in support of their contention that such a claim is not cognizable under Title IX are not persuasive. For example, it cites to Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601 (E.D.N.Y. 2011), where the court held that the plaintiff's claims were based upon her perceived lesbianism and/or bisexuality, and therefore, not cognizable under Title IX. Tyrell, 792 F. Supp. 2d at 623. There, however, the court did not consider the comparative method to identify sex discrimination as now laid out by Hively, nor did it inquire in any other manner beyond relying upon Second Circuit precedent. See id. at 622-23.

***6** Furthermore, the plaintiff in Tyrell did not alternately plead a theory of discrimination by sex stereotyping, see id. at 623, which the Second Circuit has held can support a claim for harassment on the basis of sexual orientation-related gender stereotypes. See Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 199-201 (2d Cir. 2017); J.R., 2015 WL 5007918, at *6 (holding that bullying based on male plaintiff's feminine mannerisms supported a Title IX claim). Noelle has alleged a sex stereotype theory in this case, and the Court has already held that such a theory is sufficient to state a claim for sex discrimination under Title IX. D. 31 at 7-8. Attleboro relies upon additional cases that do not involve harassment relating to sexual orientation, seeking to contextualize Noelle's harassment as akin to any other crass name-calling. Given the nature of the Title IX claim here and the disputed record of facts giving rise to that claim, the Court does not find these citations persuasive here. [4]

4 For example, Attleboro relies upon Morgan v. Town of Lexington, 823 F.3d 737, 745 (1st Cir. 2016) and Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002). However both Morgan and Frazier can be distinguished from this case in several ways. First, in Morgan, the words used against the plaintiff were not gendered or targeted towards his perceived sexual orientation, whereas Noelle was repeatedly subjected to sexually offensive slurs. Second, there was no allegation of any sex or gender-based animus against the plaintiff by any of his fellow students in Morgan, nor by the discipline matron in Frazier, while the record here contains evidence could be found to show that Noelle was targeted because of her gender and sexual orientation.

Accordingly, the Court reaffirms that Plaintiff's claim of sex discrimination relating to Noelle's perceived or actual sexual orientation are cognizable as a sex stereotyping theory under Title IX.

B. Plaintiff Has Shown a Triable Issue of Fact of Peer-on-Peer Sexual Harassment

1. Severe, Pervasive, and Objectively Offensive Sexual Harassment

Attleboro contends that Noelle's harassment does not constitute sex-based harassment. In particular, Attleboro argues that (i) Noelle's harassment based on her sexual orientation is not sex-based; (ii) verbal teasing related to her weight and height are not sex-based; and that (iii) any physical assault she endured was not accompanied by sex-based expressions of intent, and thus are not sex-based. Attleboro's arguments are unavailing.

First, beginning in the seventh grade, Noelle recalled being bullied by twin brothers at school, including calling her "dyke" in response to her refusal to go on a date with the boys "because she didn't like boys." D. 62, ¶¶ 40-41. Such targeted language alone has been sufficient to show sex discrimination. Bowe v. Eau Claire Area Sch. Dist., No. 16-cv-746, 2017 WL 1458822, at *3 (W.D. Wis. Apr. 24, 2017) (holding that the Plaintiff had alleged a peer-harassment claim under Title IX because the consistent pattern of gender stereotype slurs used against the Plaintiff, including "fag," "bigot," "bitch," and "pussy," made it easy to infer that his classmates harassed him because of his failure to adhere to traditional gender stereotypes, which constituted as discrimination on the "basis of sex"). [5]

5 Attleboro's other case citations in support of its argument otherwise do not compel a different conclusion as to its summary judgment motion where the disputed facts here, when viewed in light of the non-movant, support a Title IX claim, as explained above. See, e.g., Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165 (5th Cir. 2011).

Furthermore, evaluating the evidence in context, the Court believes that a factfinder could reasonably infer that instances of Noelle being asked on dates were necessarily intertwined with her gender and sexual orientation, and further instigating

incidents that led to more severe harassment. With respect to the seventh grade incident described above, Noelle testified that her refusal to go on a date was because she did not "like boys," which then escalated to calling her "dyke" and "fag." D. 62, ¶¶ 37, 40-41. Attleboro asks the Court to parse Noelle's incidents of harassment, such that any one of them, even rising to physical assault, is not sex-based if it was not directly accompanied by the appropriate slurs expressing animus. That would be improper because "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' [ ] 'depends on a constellation of surrounding circumstances, expectations, and relationships.' " Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting Oncale, 523 U.S. at 82). Similarly, much of the bullying Noelle endured relating to her weight and appearance cannot be viewed outside the context that some of the same tormenters interspersed calling her "ugly and stupid and fat" with calling her "dyke" or "fag." See, e.g., D. 62, ¶¶ 136-37.

*7 Noelle also testified that one of the instances, in which she was punched in the stomach, came immediately after refusing "sarcastic" requests to date Tommy C., who in turn also referred to her as a "dyke" upon her refusal. D. 62, ¶ 45. Noelle testified that Tommy C. physically assaulted her on several other occasions, in some instances with evidence in the record indicating an alternative motive, and some with no stated motive at all. D. 62, ¶¶ 54, 61, 63, 66. Noelle was placed in the same class as Tommy C. in the ninth grade, and for a week before being moved away from Noelle, he resumed calling her derogatory names, fairly characterized as invoking reference to her sexual orientation and/or gender and touched her without permission during class. D. 62, ¶¶ 104-06; see Doe v. Galster, 768 F.3d 611, 617 (7th Cir. 2014) (recognizing previous holdings that, in the employment context, "gendered words like bitch and whore ... can be strong evidence that the harassment at issue is on the basis of sex").

Finally, Andrew M., whose friend directed a laser pointer at Noelle's eye in class and was suspended as part of that underlying incident, D. 62, ¶¶ 158, 161, reacted to his friend's suspension by proclaiming that "the world would be better off without dykes like [Noelle] in it." D. 62, ¶ 158. Noelle testified that she had separately seen the same boy holding a binder which had "death to all queers" written on the cover. D. 62, ¶ 77. Noelle testified that when she was in the eighth grade, she was again called "dyke," "faggot," and "other sexually offensive terms" on multiple instances. D. 62, ¶ 92.

The record includes admissible evidence supporting Plaintiff's position that Noelle was subjected to "wide-spread peer harassment" and physical assault because of stereotyping animus focused on her sex, appearance, and perceived or actual sexual orientation. Snelling, 2001 WL 276975, at *5; see Videckis, 150 F. Supp. 3d at 1160–61. Accordingly, Plaintiff has offered evidence that would allow a reasonable factfinder to determine was severe, pervasive, and objectively offensive sexual harassment.

2. Deliberate Indifference

Deliberate indifference is "a stringent standard of fault" that requires proof that a plaintiff "disregarded a *known or obvious* consequence of his action or inaction." Porto, 488 F.3d at 73 (emphasis in the original) (quotation mark omitted) (quoting Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 410 (1997)). A Title IX claim that "the school system could or should have done more is insufficient to establish deliberate indifference." Porto, 488 F.3d at 73. The First Circuit has suggested that a school might be deliberately indifferent if it had notice of sexual harassment or discrimination and did nothing or failed to take additional measures after its initial measures were ineffective. See id. at 74 (citing Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999)).

Although it is a closer issue, there is a genuine issue of material fact as to whether Attleboro was deliberately indifferent to Noelle's peer-to-peer sexual discrimination. While it did take some remedial steps after some of the instances of harassment, the inconsistency of the responses, the dismissal of Noelle's complaints out-of-hand by some teachers without escalating the issue to appropriate administrators, and the failure to deploy a response and strategy across Noelle's school years could allow a rational jury to conclude that the response was "clearly unreasonable in light of the known circumstances." Thomas v. Springfield Sch. Comm., 59 F. Supp. 3d 294, 302 (D. Mass. 2014). The court in Thomas, 59 F. Supp. 3d at 304, concluded that the school's response "demonstrate[d] a complete lack of concern" about the harassing conduct and allowed reoccurrence of the harassment "without raising the suspicions of those teachers responsible for supervising them" given the prior history. Id.

In this case, a reasonable factfinder could conclude that some instances of harassment in the record were met with no response at all, constituting deliberate indifference. For

example, Noelle reported instances of the sex and sexual orientation-based name-calling in seventh grade to a teacher, and the teacher told her to ignore it. D. 62, ¶ 43. Furthermore, after a series of instances when Noelle was tripped in the hallway, including when on crutches from a car accident, Knox's investigation did not result in any remediation after other administrators denied knowledge of the event. D. 62, ¶¶ 61-69. Finally, Noelle has offered evidence that Knox had directed administrators to punish student infractions for using hate speech, including the slurs used against Noelle, with warnings to parents rather than punishment ranging from three days of suspension to possible expulsion as recommended in the school's code of conduct for students. D. 62, ¶ 22. From these facts, a reasonable factfinder could conclude that Attleboro in some instances demonstrated a complete lack of concern for addressing Noelle's harassment.

***8** A reasonable factfinder could also conclude that other instances of harassment in the record occurred when Attleboro failed to take further steps in the wake of an initial, inadequate response. For example, when Noelle told teachers about the instances when she was punched in seventh grade, one of the teachers accused her of lying. D. 62, ¶ 45; see id., ¶¶ 43, 51, 137. Knox's investigation of the incident resulted in a referral to the school psychologist for mediation between Noelle and her alleged attacker. D. 62, ¶¶ 48-50. When Tommy C. was put in the same class as Noelle again for ninth grade, where he again called her offensive sex and orientation-related slurs and poked her during class, Knox's investigation again resulted in mediation.[6] D. 62, ¶¶ 83-84. Thus, even if the "measures were timely and reasonable," they can still amount to deliberate indifference, precluding summary judgment. Canty v. Old Rochester Reg'l Sch. Dist., 66 F. Supp. 2d 114, 116–17 (D. Mass. 1999). Based on these disputed facts, a factfinder could determine that Attleboro was, by omission or inadequacy, deliberately indifferent to a pattern of bullying and physical assault that had the known or obvious consequence of making the school environment so unbearable that, at best, Noelle never returned to the Attleboro school system again, or at worst, considered committing suicide.

6 Furthermore, with respect to mediation organized by Knox and used in sporadic attempts to resolve some of the incidents of harassment, there is a further question of fact regarding whether these responses were deliberately indifferent in and of themselves. Knox's own administrators testified that they did not always meet with Noelle when they should have, D. 62, ¶ 118, and others characterized their sporadic meetings and responsibilities as "put[ting] a Band-aid on their situation." D. 62, ¶ 153.

Cases relied upon by Attleboro are not analogous to this case. Morgan, 823 F.3d at 737, does not directly address deliberate indifference, and the alleged discrimination in that case —lacked the "constellation of surrounding circumstances" involving homophobic slurs and other harassment that the court contemplated might have been sufficient. Morgan, 823 F.3d at 745-46 (quoting Carmichael v. Galbraith, 574 Fed.Appx. 286, 290 (5th Cir. 2014) (per curiam)). In Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 178 (1st Cir. 2007), rev'd on other grounds, 129 S. Ct. 788, 792, 798 (2009), the school attempted to remediate the harassment not only by investigating, but also by offering to place the harassed student in a new school bus assignment, where the harassment had occurred. Id. at 169-70. The First Circuit held that the response was not "so lax, so misdirected, or so poorly executed as to be clearly unreasonable under the known circumstances." Id. at 175.[7] However, in that case, the school administrator responsible for handling such claims responded swiftly upon initial reports, escalated his investigation upon discovering the harassment may have been more severe than he had initially understood and responded to the victim's continuing distress at school by issuing a memorandum to the entire school staff instructing that he be informed if the victim was observed crying or committing disciplinary infractions. Id. In this case, however, Plaintiff has raised "competent evidence" that the school's response to her harassment "was bungled." Id. Accordingly, Plaintiff has also demonstrated that there is a triable question of fact as to whether Attleboro was deliberately indifferent.

7 The Court is not persuaded otherwise by Attleboro's reliance upon cases concluding otherwise where those cases did not involve similar circumstances, even as disputed. See Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1122 (10th Cir. 2008) (relying on police investigation rather than interviewing witnesses according to policy was not deliberate indifference); Oden v. N. Marianas Coll., 440 F.3d 1085, 1089 (9th Cir. 2006) (violating time deadlines of harassment policy was not deliberate indifference).

VI. Conclusion

For the foregoing reasons, the Court DENIES Attleboro's motion for summary judgment, D. 54.

So Ordered.

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