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JUSTICE DEPARTMENT SAYS TITLE IX DOESN'T COVER TRANSGENDER STATUS OF STUDENT ATHLETES

The Justice Department recently filed a brief opposing the participation of transgender athletes in women's high school sports. In *Soule et al. v. Connecticut Association of Schools, Inc.*, et al., No. 3:20-cv-00201-RNC (D. Conn.), the Department of Justice said that Title IX's prohibition of "sex" discrimination does not prohibit discrimination based on transgender status. In fact, the Justice Department believes that allowing transgender athletes to participate might violate Title IX.

THE LAWSUIT

Since 2017, two transgender Connecticut high school student athletes who identify as female have dominated girls' track. The pair has won a combined 15 girls' track championship races. The plaintiffs in *Soule* are three high school student athletes who say that a high school athletic conference's policy that allows transgender athletes to compete in women's events violates Title IX because it discriminates against athletes who were born biologically female. The plaintiffs say that among other things they lost races, missed out on potential college recruitment, and never experienced the "thrill of victory."

The conference implemented the policy in 2013 to address concerns about

transgender participation in high school sports. The policy states that an athlete can participate in a gender specific sport that aligns with his/her/their publicly identified gender under these conditions:

For purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season.

The choice of gender identification is left to the student and the local school. Once identified, the student's eligibility to participate in a gender specific sport is fixed for the rest of the athlete's high school career. The conference believes that this prevents students from gaining an athletic advantage. The conference also cleared the policy with the Department of Education's Office of Civil Rights ("OCR"), which confirmed that Title IX supports transgender athletic opportunities.

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THE STATEMENT OF INTEREST

The Justice Department disagrees with OCR and the conference. It stated that Title IX does not apply to transgender athletes. Focusing on the word “sex” in the Title IX statute, the Justice Department reasoned that the court should give the word its “ordinary, contemporary, common meaning” when Congress enacted Title IX in 1972. At that time, the Justice Department believes “sex” meant biological sex and not gender identity. The Department of Justice also noted that there are several post-Title IX statutes prohibiting discrimination based on gender identity, which suggests that Title IX does not. The Department therefore concluded that Title IX does not protect transgender athletes.

But the Justice Department went further. It stated that not only does Title IX not protect transgender athletes, but it prohibits them from competing against biological females. Like the plaintiffs, the Justice Department noted that physiological differences are the reason women’s sports exist, and accused the conference policy of depriving women of single-sex athletic competitions in violation of Title IX.

PREDICTIONS

This is not the first time the Justice Department has opposed the extension of civil rights laws to issues of gender identity and sexual orientation. And it is also not the first time it has done so in opposition to an

agency recommendation. The Justice Department has had mixed results in those cases, including:

■ In 2017, the Justice Department opposed the extension of Title VII— a federal law that prohibits employment discrimination on the basis of sex, race, color, religion or national origin—to discrimination based on sexual orientation in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018). The Second Circuit disagreed and concluded that Title VII does apply to discrimination based on sexual orientation because that discrimination “is a subset of sex discrimination.” That case is currently before the Supreme Court.

■ In 2019, the Justice Department asked the Supreme Court to rule that Title VII does not protect transgender people. The Sixth Circuit had determined that a funeral home had violated Title VII when it fired a transgender person who had planned to begin to live as a woman, including by wearing the company’s female uniform. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The Justice Department asked the Supreme Court to find no violation, echoing the argument that “sex” does not include gender identity.

It remains to be seen if the District of Connecticut will be more open to the Justice Department’s arguments. Two transgender student athletes have moved to intervene, with help from the American Civil Liberties Union (the “ACLU”).