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Title IX and "Sex": What B.P.J. Means for Wisconsin Schools

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The Supreme Court of the United States has at last addressed a years' long debate: How is the term "sex" defined under Title IX? In its landmark decision *West Virginia v. B.P.J.*, the Court found the term means one's sex at birth, rather than one's gender identity. As a result, the Court determined public institutions may implement sex-based eligibility restrictions for women's and girls' sports focused on the athlete's sex assigned at birth without violating Title IX. The Court similarly concluded such restrictions are lawful under the Equal Protection Clause.

The Court's decision affirmed laws across 27 states restricting athletic participation on the basis of biological sex. The decision has important implications for schools nationwide, including Wisconsin school districts subject to Title IX.

Case Background & Summary

The Court consolidated two cases brought by transgender athletes, both of whom were challenging their respective state's law preventing their participation in sports. The first case, *West Virginia v. B.P.J.*, involved a then-middle school transgender girl who was banned from participating in track and cross country under a 2021 West Virginia state law. The other, *Little v. Hecox*, was brought by a transgender collegiate athlete in opposition to Idaho's Fairness in Women's Sports Act, which prevented her from participating in women's track and field at her university. At the court of appeals level, both the Fourth and Ninth circuits found the respective laws to be discriminatory and held that these individuals could not be excluded from participation.

The Court disagreed in a 6-3 decision, holding that the respective state laws complied with Title IX and the Equal Protection Clause. As to Title IX, the Court stated there was no historical indication the drafters intended for transgender status to be included within the law's reference to "sex" and believed the drafters' separation of sports teams was based upon the "inherent physical differences between biological men and biological women." The Court therefore concluded Title IX's use of the term "sex" is limited to one's sex assigned at birth.

As to the Equal Protection Clause, the Court concluded states' interests in "ensuring safety and competitive fairness" in women's and girls' sports are substantially related to the action of determining eligibility based on biological sex. The Court noted this connection allows states to lawfully implement sex-based restrictions focused on individual's birth-assigned sex.

What Does This Practically Mean For You?

Athletics

Rules governing high school sports in Wisconsin are already largely aligned with the decision, indicating few substantive changes in the immediate future. The Wisconsin Interscholastic Athletic Association (WIAA) policy states that any high school student athlete whose "Sex Assigned at Birth" is male is prohibited from competing in a WIAA girls sport, regardless of the student athlete's gender identity or if their gender marker has been changed on their birth certificate. Regardless of sex assigned at birth or gender identity, a student athlete may practice and compete in a WIAA boys sport, assuming all other school and WIAA eligibility requirements are met.

Similar limitations have already been imposed by the NCAA, the U. S. Olympic and Paralympic Committee, and the International Olympic Committee. The Supreme Court's decision indicates that Wisconsin's rules are lawful and consistent with Title IX and the Equal Protection Clause.

Locker Rooms and Bathrooms

The Court in *B.P.J.* did not address the issue of whether states or schools may restrict access to bathrooms and locker rooms on the basis of sex assigned at birth or whether Title IX or the Equal Protection Clause may be used to enforce a student's right to use their preferred bathroom or locker room. Under the Equal Protection Clause, a state trying to restrict access would need to show some interest in maintaining separate facilities for individuals based upon sex assigned at birth, and then show that the attempted restriction is substantially related to that state interest.

Though the Court did not address the issue of bathrooms and locker rooms, it is plausible the Court's analysis under both Title IX and the Equal Protection Clause would extend to bathroom and locker room restrictions focused on birth-assigned sex. For example, under Title IX, the Court might also believe Congress' focus on the physical differences of biological sexes within the legislative history is applicable to bathrooms and locker rooms and, in turn, permits biological-based restrictions. The Court may also find the state interest of furthering safety of students is reasonably connected to such restrictions and is therefore lawful under the Equal Protection Clause.

It is worth noting an open question remains if *Whitaker v. Kenosha Unified School District* —the Seventh Circuit Court of Appeals decision finding that public school students may use bathrooms consistent with their gender identity—remains good law or, if, on the other hand, the Supreme Court's recent decision overturned it. It appears the case remains intact; however, that may change if a Wisconsin, Indiana, or Illinois school decides to apply the Supreme Court analysis and successfully defend a challenge up through the Seventh Circuit or Supreme Court of the United States.

Another significant pending case relevant to Wisconsin schools is *D.P. by A.B. v. Mukwonago Area School District*, which was decided in June 2025 and almost immediately vacated and remanded following the Supreme Court's decision in *United States v. Skrmetti*. In *Skrmetti*, the Court concluded a Tennessee law preventing doctors from providing gender-affirming care to minors did not violate the Equal Protection Clause. D.P. is a middle-school transgender girl challenging the school's policy requiring her to use the boys' bathroom and locker room or a gender-neutral alternative, which she contends violates her rights under Title IX and the Equal Protection Clause. D.P. originally prevailed before the Seventh Circuit Court of Appeals, though the win was short-lived following the Seventh Circuit's decision to remand and assess whether its holding is consistent with the logic applied by the Supreme Court in *Skrmetti*. This case is still ongoing in the Seventh Circuit, though the Supreme Court's decision in *B.P.J.* is likely to carry significant weight in the forthcoming decision.

The *Whitaker* decision—and potentially the *D.P.* decision—is inconsistent with the current administration's policies and procedures as enforced by the Office of Civil Rights, which permit schools to maintain policies restricting locker rooms and bathrooms to students based on biological sex. Prior to the Supreme Court's decision, the Department of Education had already stated its intention to investigate schools that permit locker room and bathroom access to students based on gender identity and to pursue Title IX enforcement through the Office of Civil Rights. The Department's interpretation of Title IX—that students assigned male at birth may not use girls' bathrooms because of the Department's belief it would harm cisgender girls—is similar to the interpretation considered by the Supreme Court in *B.P.J.* Though the Court's holding was limited to the context of sports, the framework it utilized is likely to extend to other matters affecting school districts, which indicates that single-sex bathroom and locker room policies will be deemed lawful.

What Now?

Although the Supreme Court decision addresses whether states can apply sex-based restrictions focused on biological sex to athletics, the practical impact on Wisconsin schools is comparatively less significant than some other states due to existing WIAA policies.

But WIAA policies do not address the use of locker rooms and restrooms in accordance with an individual's gender identity. Should local school boards wish to implement policies requiring students use bathrooms and locker rooms consistent with their biological sex, they should consult with legal counsel and determine if they are comfortable with doing so based upon the Court's analysis. Schools who wish to pursue this path should understand the Court's lack of explicit mention of bathrooms or locker rooms likely requires a Wisconsin, Illinois, or Indiana school to be a "test" case before we know the answer to whether *Whitaker* remains good law.

Schools looking to implement policies impacting locker rooms and bathrooms must also consider Wisconsin's pupil nondiscrimination law, which has for years prohibited discrimination on the basis of sex. Wisconsin's law, like Title IX up until just recently, has not been addressed by the courts for purposes of fleshing out the definition of "sex" and whether the definition is the same or different than Title IX's definition. Given the makeup of Wisconsin's Supreme Court, it is plausible schools might face different requirements under Title IX and Wisconsin law. Time will tell.

Because policies impacting transgender students remains an important legal, political, and cultural topic, litigation concerning the rights of transgender students is unlikely to end in the near future. We will continue to keep schools updated on litigation outcomes as they arise and outline how they impact your operations.

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