

# TRANSGENDER STUDENT-ATHLETES AND SEX-SEGREGATED SPORT: DEVELOPING POLICIES OF INCLUSION FOR INTERCOLLEGIATE AND INTERSCHOLASTIC ATHLETICS

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## INTRODUCTION

Educators have long recognized the physical, psychological, social, and educational benefits that sports provide to students. Educational institutions have, accordingly, incorporated both curricular and extracurricular athletics since the nineteenth century.<sup>1</sup> Initially the domain of men and boys, the women’s movement and Title IX began to normalize the expectation that girls deserve equal access to the benefits of sport. Yet today, the barriers to athletic participation that exclude the increasingly visible population of transgender students are largely ignored. With a few notable exceptions, most governing bodies of scholastic and collegiate sports have yet to meaningfully consider how to incorporate transgender students into the existing athletic structure, which for the most part divides male and female athletes into separate programs. Many athletes and sport organizers assume that transgender athletes have an unfair advantage when they compete in sports consistent with their gender identity, whether due to physical traits associated with their natal sex<sup>2</sup>—in the case of male-born, female-identified athletes—or due to the effects of hormone therapy transition—in the case of female-born, male-identified athletes. At the same time, transgender students may be excluded, discouraged, or simply made to feel uncomfortable participating in athletic programs for their natal sex, which

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1. See *infra* Part III.C.1.

2. This Article will use “natal sex” to mean the sex an individual is assigned at birth.

are inconsistent with their gender identity and gender expression. As a result, for students whose gender identity is inconsistent with their natal sex, the entire sex-segregated world of athletics may be formally or effectively off limits. Until sports' governing bodies develop and enforce policies of inclusion, transgender students will continue to be denied access to and the benefits of athletic participation.

This Article examines the values that should go into the formation of such policies, including legal, medical, and educational concerns. Part I puts transgender students' athletic participation in context by examining educational athletics's deep and long standing reliance on sex and gender as a central organizing principle. It also provides some background on transgender individuals and examples of athletes who have identified as transgender. Part II describes the existing policies and positions that organizing bodies of sport have developed to address participation by transgender athletes in sex-segregated sports. Part III describes the role of law and science in the development of such policies, and concludes that both regimes are limited in their ability to define the proper balance between an individual's right to participate in athletics and countervailing concerns about fairness to other athletes. Part III then examines the educational values transmitted by scholastic and collegiate athletic programs, including those avowed by educators and supported by research. The Article concludes that educational values support policies that promote participation by transgender athletes. To that end, educators should support a default rule that allows athletes to participate in a manner consistent with their genuine gender identity, even when that gender identity is inconsistent with their natal sex. Any exceptions or limitations to this default rule must balance considerations from all three contexts: education, law, and science.

## I. SEX-SEGREGATED SPORTS AND TRANSGENDER ATHLETES

Transgender athletes are controversial because their existence disrupts essentialist and binary ideas about sex that are reflected in the historical and contemporary organization of sport. This Part will more fully explore this dissonance by providing background on the history and tradition of sex-segregated sports, background on transgenderism and

transsexuality, and examples of transsexual individuals in the sporting world.

A. *History and Tradition of Sex-Segregation in Sports*

Throughout American history, women and men have largely engaged in sporting practices that were different and separate from one another. Though women have participated in sports since colonial times,<sup>3</sup> sporting practices have historically been dominated by men. In the nineteenth century, urbanization and industrialization caused middle and working-class men to labor outside their homes and farms, where they had previously served their sons as models of masculinity.<sup>4</sup> Anxious about the feminizing effects of this trend on boys, as well as the politics of gender equality that were emerging at that time, religious institutions, schools, and businesses organized and promoted sport as a means to separate men from women and to cultivate manly virtues.<sup>5</sup> Team sports, especially football, consciously aimed to engender masculine qualities such as physicality, aggression, and dominance in male participants.<sup>6</sup> Reflective of society's different expectations for men and women, women's sporting practices were limited in scope, were segregated from men's, emphasized fitness and socializing rather than competition,<sup>7</sup> required modest and restrictive attire,<sup>8</sup> and possessed a private and insular nature.<sup>9</sup> To further emphasize their distinctness, organizers developed different rules of play in women's sports, such as the use of six-players in basketball

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3. Nancy L. Struna, *Gender and Sporting Practice in Early America: 1750-1810*, 18 J. SPORT HIST. 10, 25-30 (1991).

4. See VARDA BURNSTYN, *THE RITES OF MEN: MANHOOD, POLITICS AND THE CULTURE OF SPORT* 45 (1999).

5. See *id.* at 45, 50-61, 100 ("[O]ne of sport's primary social functions in the nineteenth century was to create and establish dominant styles of masculinity in extreme opposition to the qualities society had ascribed to women and femininity.").

6. *Id.* at 68-69, 72-73.

7. MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* 15 (1996) (describing play days); EILEEN MCDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORT* 172, 177 (2009) ("Women's games also included refreshments at the end of play as a reminder that it was ultimately a social event.").

8. MCDONAGH & PAPPANO, *supra* note 7, at 169-70.

9. See FESTLE, *supra* note 7, at 15; see also MCDONAGH & PAPPANO, *supra* note 7, at 167 ("Women's demonstrations could remain essentially private; they most definitely would not perspire in public.").

(in which most players were limited to one-third or one-half of the court) and the creation of the game of softball (a version of baseball developed for indoor play).<sup>10</sup>

The civil rights' and women's movements in the 1970s changed cultural attitudes about women's participation in sports, and produced legal reform to ensure equal access to sporting opportunities. Around that time, many states added equal rights amendments to their constitutions,<sup>11</sup> and those provisions, along with the United States (U.S.) Constitution's Equal Protection Clause, provided the legal grounds upon which girls successfully litigated their right to participate in sports alongside and on equal terms as boys.<sup>12</sup> Although these cases resulted in the theoretical integration of athletic institutions such as Little League,<sup>13</sup> in practice, sport still remains predominantly segregated on the basis of sex.

In 1972, Congress passed Title IX, a law prohibiting sex discrimination in federally-funded educational programs,<sup>14</sup> including athletics.<sup>15</sup> The statute's implementing regulations ensure that nondiscrimination in athletic programs is defined by a "separate but equal" framework.<sup>16</sup> The regulations expressly allow schools to offer separate competitive athletic programs for their male and female students,<sup>17</sup> so long as

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10. See generally MAX MCELWAIN, *THE ONLY DANCE IN IOWA: A HISTORY OF SIX-PLAYER GIRLS' BASKETBALL* (2004); see also generally JENNIFER RING, *STOLEN BASES: WHY AMERICAN GIRLS DON'T PLAY BASEBALL* (2009).

11. MCDONAGH & PAPPANO, *supra* note 7, at 124.

12. See, e.g., *Fortin v. Darlington Little League*, 514 F.2d 344, 344 (1st Cir. 1975) (holding that a Little League, a state actor, could not categorically exclude girls); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 164 (D. Colo. 1977) (holding that a high school could not constitutionally exclude a girl from the only boys' soccer team on the basis of gender alone); *Clinton v. Nagy*, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (holding that the Equal Protection Clause required a municipal football league to let a qualified girl play); see also SARAH K. FIELDS, *FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA* 7 (2005).

13. See, e.g., *Fortin*, 514 F.2d at 344.

14. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2006).

15. Gender and Athletics Act, Pub. L. No. 93-380, 88 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1681 (2006)) (instructing the Department of Health, Education, and Welfare to promulgate implementing regulations "with respect to intercollegiate athletic activities."); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (2006)) (overturning the Supreme Court's ruling, in *Grove City College v. Bell*, 465 U.S. 555, 563–68 (1984), that Title IX only applied to the specific programs receiving federal funds, an interpretation that would have excluded the statute's application to athletic programs).

16. See generally 34 C.F.R. § 106.41 (2000).

17. *Id.*

those programs offer an equitable number of opportunities<sup>18</sup> and receive equitable resources and support.<sup>19</sup> Although the regulations do contain a provision that allow students of one sex to try out for sports that are only offered to members of the other sex, this provision is limited in scope to noncontact sports and to the sex whose opportunities have previously been limited.<sup>20</sup> Thus, under Title IX regulations, schools may offer athletic programs that are entirely segregated on the basis of sex—for noncontact sports, sex-based exclusions are permitted so long as the sport is offered to both sexes,<sup>21</sup> and for contact sports, sex-based exclusions are permitted even when the sport is only offered to one sex.<sup>22</sup> While there have been numerous instances of cross-over participation—either because a school has elected to allow it<sup>23</sup> or because the Equal

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18. § 106.41(c); *see also* Dep't of Health, Educ. and Welfare, Office for Civil Rights, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,423 (Dec. 11, 1979) (providing three alternative prongs for determining compliance with the requirement of equitable participation opportunities: proportionality between the percentage of students of each sex and the percentage of athletic opportunities they receive; continuous program expansion for the underrepresented sex; or the absence of unmet interest and ability among the underrepresented sex).

19. § 106.41. Moreover, the regulation's requirement that schools provide equity in the number of competitive opportunities, § 106.41(c), may operate as a requirement that schools add separate teams for female athletes, rather than simply allow them to try out for existing male teams. *See* DEBORAH BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 22 (2010) (citing commentary in the implementing regulations at 40 Fed. Reg. 24,134 (1975)).

20. *See* § 106.41(b). Thus, under Title IX regulations, the only circumstance in which an athlete has the right to try out for the team offered to the other sex is when (a) the school only offers the sport to one sex, (b) the sport is not a contact sport, *and* (c) the opportunities have previously been limited for members of the athlete's sex. *Id.* For purposes of this regulation, contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact." *Id.*

21. *See, e.g.,* O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301 (1980) (wherein Justice Stevens denied a request to vacate a stay of appellate court order that prohibited a female student from trying out for boys' basketball team, where a girls' team was offered by the school).

22. *See* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 169, 180 (3d Cir. 1993) (denying summary judgment to male student seeking to try out for the girls' field hockey team, on the grounds that male students' opportunities have not previously been limited); *see also id.* at 180 (Scirica, J., concurring) (basing his concurrence on interpretation of field hockey as a contact sport).

23. For example, several universities have allowed women to play football, notwithstanding the contact sports exception to Title IX. *Compare* KATIE HNIDA, STILL KICKING: MY JOURNEY AS THE FIRST WOMAN TO PLAY DIVISION I COLLEGE FOOTBALL (2006) (documenting one female athlete's experience as a kicker on the University of Colorado and University of New Mexico football teams), *with* Mercer v. Duke Univ., 190

Protection Clause or state equal rights amendments has required it<sup>24</sup>—these instances are the exception to the rule. Most interscholastic and intercollegiate sports default to the “separate but equal” model endorsed by Title IX’s implementing regulations.<sup>25</sup> While Title IX has improved the quality and quantity of girls and women’s sports, in doing so, the law has also helped to legitimize the sex-segregated nature of scholastic and collegiate sports.<sup>26</sup>

Over the years, society has justified the exclusion of girls from boys’ sports and vice versa with concerns about safety, fairness, and social stigma. Many sport organizers resisted early attempts by girls to integrate boys-only sports programs by arguing that their participation alongside boys, as well as their participation in the sports boys play, would subject them to risk of physical harm.<sup>27</sup> For example, Little League Baseball officials argued that girls’ athletic and physical inferiority made them prone to injury.<sup>28</sup> Yet courts considering the constitutionality of exclusionary policies in Little League Baseball and other sports have largely rejected the safety rationale because it is rooted in broad generalizations about the physical differences between boys and girls<sup>29</sup> and because ostensible concerns about safety are

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F.3d 643, 647–48 (4th Cir. 1999) (holding that the contact sport exception does not provide immunity to schools that, after choosing to allow a female student to try out, otherwise discriminate against her on the basis of sex).

24. See, e.g., *Force by Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1031 (W.D. Mo. 1983) (holding that a rule prohibiting all female students from trying out for eighth grade football team was unconstitutional); *Darrin v. Gould*, 540 P.2d 882, 877–78 (Wash. 1975) (en banc) (holding that a rule prohibiting all female students from trying out for eighth grade football team was unconstitutional).

25. See *infra* Part II.B–C.

26. See MCDONAGH & PAPPANO, *supra* note 7, at 104–07.

27. See *Fortin v. Darlington Little League*, 514 F.2d 344, 344 (1st Cir. 1975).

28. See, e.g., *id.*; *Nat’l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 35–36 (N.J. Super. Ct. App. Div. 1978).

29. *Saint v. Neb. Sch. Activities Ass’n*, 684 F. Supp. 626, 629 (D. Neb. 1988) (“[T]his information [regarding the health and safety of female athletes] . . . contains nothing more than generalized statements applicable to typical school-age females in the population at large [and does not state that this particular girl] . . . is incapable of joining the wrestling team.”); *Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (“[B]ut these [sic] data [regarding the health and safety of female students vis-à-vis physiological differences], however refined, reflect averages and generalities . . . . No girl—and simply because she is a girl—has the chance to show that she is as fit, or more, to be on the squad than the weakest of its male members. Where such cases exist, the regulation has no reasonable relation to the achievement of the governmental objective.”); *Force by Force*, 570 F. Supp. at 1029 (“[A] gender based classification which

not promoted when stronger, larger girls are excluded and weaker, smaller boys are allowed to play.<sup>30</sup>

Sport organizers also justify sex-segregated sporting practices with claims that they ensure a fair playing field and preserve opportunities for female athletes who would be squeezed out or dominated by superior male athletes if boys and girls competed together. For example, in *O'Connor v. Board of Education*, a female middle school basketball player sought to play on the boys' team instead of the girls' team, which had a lower skill level.<sup>31</sup> In a single-justice opinion<sup>32</sup> concluding that the school's decision to exclude her from the boys' team did not violate the Equal Protection Clause, Justice Stevens reasoned that sex-segregated programs were justified by the "substantial risk that boys would dominate the girls' programs and deny them equal opportunity to compete in interscholastic events."<sup>33</sup> Courts considering claims by male athletes seeking to participate on a predominantly female team have similarly invoked concerns about preserving opportunities for female athletes,<sup>34</sup> though a

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results from ascribing a particular trait or quality to one sex, when not all share that trait or quality, is not only inherently unfair but generally tends only to perpetuate 'stereotypic notions' regarding the proper roles of men and women."); *Fortin*, 514 F.2d at 350-51 ("We conclude that the court's stated reason for finding Darlington's exclusion of girls 'rational' namely, that injury will undoubtedly occur due to the physical differences between boys and girls is unsupported.").

30. *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977) ("The failure to establish any physical criteria to protect small or weak males from the injurious effects of competition with larger or stronger males destroys the credibility of the reasoning urged in support of the sex classification . . . [a]ccordingly, to the extent that governmental concern for the health and safety of anyone who knowingly and voluntarily exposes himself or herself to injury can ever be an acceptable area of intrusion on individual liberty, there is no rationality in limiting this patronizing protection to females who want to play soccer."); *Carnes v. Tenn. Secondary Sch. Athletic Ass'n*, 415 F.Supp. 569, 571 (E.D. Tenn. 1976) ("The proof showed that plaintiff was denied the opportunity to play baseball because of her sex and not because she may have been exposed to a risk of harm any greater than that to which male players would have been exposed."); *Darrin v. Gould*, 540 P.2d 882, 892 (Wash. 1975) (en banc) ("Boys as well as girls run the risk of physical injury in contact football games. The risk of injury to 'the average boy' is not used as a reason for denying boys the opportunity to play on the team in interscholastic competition.").

31. *O'Connor v. Bd. of Educ. of School Dist. No. 23*, 449 U.S. 1301, 1302 (1980).

32. The plaintiff had appealed to Justice Stevens in his capacity as the Circuit Justice for the Seventh Circuit, requesting that he vacate the Seventh Circuit's decision to stay the injunction issued by the district court, which would have allowed her to play on the boys' team. *Id.* at 1301.

33. *Id.* at 1307.

34. *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("The



1979 Massachusetts decision provides a notable exception.<sup>35</sup> In that case, the Massachusetts Supreme Court held that a statewide ban on boys trying out for girls' teams violated the state equal protection clause.<sup>36</sup> The court dismissed arguments that boys are more skilled than girls as "overbroad generalization"<sup>37</sup> and was therefore skeptical of claims that athletic opportunities for girls would be displaced if the ban was repealed.<sup>38</sup> This decision notwithstanding, male plaintiffs generally have less success than female plaintiffs seeking access to cross-sex teams, an asymmetry that also reflects and reinforces stereotypes about the superiority of male athletes.<sup>39</sup>

Another justification for excluding girls from boys' sports is the ostensible stigma that boys would face in losing to a girl. A high school principal testified to this effect in defending his school's exclusion of girls from trying out for the boys' wrestling team, though the court ultimately rejected this argument.<sup>40</sup> This sentiment was also poignantly expressed in the recent documentary *Kick like a Girl*, which profiles the Mighty Cheetahs, a soccer team of eight-year-old girls that competes in the boys' division of its local youth soccer league.<sup>41</sup> Parents of the boys expressed embarrassment and dismay when their sons' teams lost to the Cheetahs, and even the mothers of the girls expressed sympathy for "those poor boys," because, "if they beat us, they were supposed to, and if they lose, it's really embarrassing."<sup>42</sup>

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record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished."); *B.C. v. Bd. of Educ.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987) ("By excluding males from participation on female high school athletic teams the regulation prevents males from dominating and displacing females from meaningful participation."); *Forte v. Bd. of Educ.*, 431 N.Y.S.2d 321, 323 (N.Y. Sup. Ct. 1980) (allowing males to participate on a female athletic team "would cause less of an opportunity for females and an eventual compromise of female athletic competition by male participation").

35. See generally *Attorney General v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (Mass. 1979) (finding a statewide ban on boys trying out for girls' teams unconstitutional).

36. See *id.* at 296.

37. *Id.* at 293.

38. *Id.*

39. See BRAKE, *supra* note 19, at 43.

40. *Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) ("[I]t is not the duty of the school to shield students from every situation which they may find objectionable and embarrassing due to their own prejudices.").

41. *KICK LIKE A GIRL* (HBO Documentary 2008).

42. *Id.*

Concerns about safety, fairness, and stigma are all rooted in the presumption of male athletic superiority. Courts have appropriately labeled this a generalization and granted victory to most female plaintiffs challenging sex-based restrictions on constitutional grounds.<sup>43</sup> Despite the obvious generality of this sentiment (recognized by most courts), sex-segregation is the norm. Indeed, it is endorsed by Title IX,<sup>44</sup> and the Equal Protection Clause does not require integration when there are separate teams for boys and girls in the same sport.<sup>45</sup> As suggested by the continued, widespread segregation in athletics, as well as the essentialist arguments that support the practice, the sex-segregated framework allows sport to sustain a hierarchy that privileges boys by constructing their activities as categorically superior.<sup>46</sup> Sport, therefore, is anything but ideologically neutral where sex is concerned. Transgender athletes are treading on already “contested ideological terrain.”<sup>47</sup>

### *B. Transgender and Transsexual Individuals*

For purposes of this Article, I use “transgender” as an umbrella term to describe individuals whose gender identity does not match the gender identity commonly experienced by those of the individuals’ natal sex.<sup>48</sup> Cisgender, in contrast, refers to individuals whose gender identity and natal sex align.<sup>49</sup> Transgender is also distinct from intersex, a category

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43. See, e.g., *Fortin v. Darlington Little League*, 514 F.2d 344, 350–51 (1st Cir. 1975); *Saint v. Neb. Sch. Activities Ass’n*, 684 F. Supp. 626, 629 (D. Neb. 1988).

44. See *supra* notes 14–22 and accompanying text.

45. See *O’Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 449 U.S. 1301, 1307 (1980).

46. See, e.g., Michael Messner, *Sports and Male Domination: The Female Athlete as Contested Ideological Terrain*, in *WOMEN, SPORT AND CULTURE* 65, 68 (Susan Birrell & Cheryl L. Cole, eds., 1994); Paul Willis, *Women in Sport in Ideology*, in *WOMEN, SPORT AND CULTURE*, *supra*, at 46.

47. Messner, *supra* note 46, at 72; see also Susan Birrell & Cheryl L. Cole, *Double Fault: Renee Richards and the Construction and Naturalization of Difference*, in *WOMEN, SPORT AND CULTURE*, *supra* note 46, at 374 (suggesting that the controversy surrounding a male-to-female transsexual tennis player “illuminates sport as an important element in a political field that produces and reproduces two apparently natural, mutually exclusive, ‘opposite’ sexes.”).

48. Cf. Tamar Z. Semerjian & Jodi H. Cohen, “FTM Means Female to Me”: *Transgender Athletes Performing Gender*, 15 *WOMEN SPORT & PHYSICAL ACTIVITY J.* 28, 29 (2006).

49. See JULIA SERANO, *WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* 12 (2007).

that includes a number of natal physical conditions that produce atypical combinations of chromosomes, hormones, genitalia, and other physical features.<sup>50</sup>

Used here, the category transgender includes those who are transsexual—identifying as the sex other than their natal sex. It also includes those who do not identify entirely with either sex (an identity that some call gender queer), as well as some who identify with some gender nonconforming expression or behavior but not as a member of the other sex (cross-dressers, for example). The factors that cause an individual to have a transgender orientation are not fully understood. Studies suggest that the origins of transsexuality are neurobiological, involving the brain's exposure to atypical hormone levels during fetal development.<sup>51</sup> Psychologists may apply a diagnosis of Gender Identity Disorder (GID) to those with “strong and persistent cross-gender identification” that is accompanied by “significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>52</sup>

Some transsexual individuals want to achieve consonance with their gender identity by transforming their bodies through hormone treatments or a combination of hormone treatments and surgical procedures—though not all transsexual individuals desire or have access to these treatments. Hormone treatments consist of androgen for female-to-male transsexuals and estrogen, progesterone, and testosterone blocking agents for male-to-female transsexuals.<sup>53</sup> The World Professional Association for Transgender Health (W-PATH), which offers a standard of care for medical providers assisting transsexual individuals who desire transition,<sup>54</sup> recommends that before receiving hormone therapy, a transsexual individual should either

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50. *Id.* at 25.

51. *In re Helig*, 816 A.2d 68, 76–77 (Md. 2003) (citing, e.g., William Reiner, *To Be Male or Female—That is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224 (1997); Milton Diamond & H. Keith Sigmundson, *Sex Reassignment at Birth*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 298 (1997)).

52. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994) [hereinafter DSM-IV].

53. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, THE HARRY BENJAMIN STANDARDS INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 13 (6th ed. 2001), <http://www.wpath.org/Documents2/socv6.pdf> [hereinafter W-PATH].

54. *See generally id.*

undergo “real life experience”—living as a member of the other sex—for at least three months, or in the alternative, undergo at least three months of psychotherapy.<sup>55</sup>

In addition to hormone treatments, surgical options are also available. Notably, because hormone treatments change an individual’s appearance significantly, and because surgery is expensive and usually not covered by insurance,<sup>56</sup> many do not seek surgery. Despite the commonly used phrase “sex reassignment surgery,” there are actually many possible surgeries. An individual transitioning from male to female may elect genital surgeries to remove the penis and/or testes (penectomy and orchiectomy) as well as surgeries to create female genitalia (vaginoplasty, clitoroplasty, and labiaplasty).<sup>57</sup> Male-to-female transsexuals may also undergo surgeries to change secondary sex characteristics, such as breast augmentation surgery. For female-to-male transsexuals, the first (and sometimes only) surgery performed is breast removal (mastectomy), though surgeries to remove female sex organs (hysterectomy and vaginectomy, among others), as well as those to create male genitalia (phalloplasty, insertion of testicular prosthetics) are also available.<sup>58</sup> W-PATH standards recommend that an individual should first undergo at least twelve months of hormone treatment and real-life experience before being eligible for genital surgery.<sup>59</sup>

Children, as well as adults, may have a transgender identity, as individuals become aware of their gender and gender identity at a very young age. It is possible for children as young as two to three-years-old to express evidence of what

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55. *Id.* at 13. The goal of psychotherapy is not to change the individual’s gender identity, but “to help the person to live more comfortably within a gender identity and to deal effectively with non-gender issues.” *Id.* at 12.

56. See, e.g., Alice M. Underwood, *New Policies Cover Transgender Health*, HARV. CRIMSON, Mar. 10, 2010, <http://www.thecrimson.com/article/2010/3/10/transgender-policy-medical-insurance/> (describing efforts by Harvard University to modify the standard health insurance policies for students and employees that would otherwise deny coverage for sex reassignment surgeries). Relatedly, transgender advocates recently prevailed in the tax court or arguments that some sex reassignment surgeries should be deductible as a medical expense. *O’Donnabhain v. Comm’r*, No. 6402-06, 134 T.C. No. 4 (Feb. 2, 2010) (holding that genital surgery, though not breast augmentation, was deductible as a medical expense).

57. W-PATH, *supra* note 53, at 21.

58. *Id.*

59. *Id.* at 20.

later might be understood as transgender identity.<sup>60</sup> In fact, toddlerhood, prepubescence, and adolescence are the most common times for transgender individuals to realize that they are transgender.<sup>61</sup> Medical providers may diagnose a child with GID if the child's assigned sex causes significant distress, the child persistently repudiates his or her assigned sex, and the child expresses a wish to be of another sex.<sup>62</sup> There is, however, no uniform age at which gender identity becomes fixed. Transgender and cisgender individuals alike may experience different gender identities throughout development before a particular identity emerges as persistent.<sup>63</sup> Consequently, the question of whether transsexual youth should undergo irreversible sex reassignment treatment is complicated and highly individualized. In some cases, providers may prescribe hormone treatment to delay puberty (reversible interventions), hormones that masculinize or feminize the body (partially reversible interventions), or surgical procedures that reassign sex (irreversible interventions).<sup>64</sup> W-PATH standards advise providers that "irreversible physical interventions should be delayed as long as is clinically appropriate."<sup>65</sup>

### C. *Transsexual Athletes*

Though the transgender and transsexual populations are small—one recent study estimates the prevalence of transsexualism at one in 500 individuals<sup>66</sup>—it is a group with increasing visibility.<sup>67</sup> While stigma and discrimination still operate to deter individuals from openly acknowledging or presenting their gender non-normativity, increased awareness, social and medical support, and legal protections

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60. STEPHANIE BRILL & RACHEL PEPPER, *THE TRANSGENDER CHILD* 61 (2008).

61. *Id.* at 66.

62. DSM-IV, *supra* note 52, at 537–38.

63. *See* BRILL & PEPPER, *supra* note 60, at 61.

64. W-PATH, *supra* note 53, at 8–11.

65. *Id.* at 9.

66. Femke Olyslager & Lynn Conway, *On the Calculation of the Prevalence of Transsexualism*, INT'L J. TRANSSEXUALISM 1 (2007), available at <http://ai.eecs.umich.edu/people/conway/TS/TSpvalence.html#Article>.

67. Caroline Symons & Dennis Hemphill, *Transgendering Sex and Sport in the Gay Games*, in *SPORT, SEXUALITIES AND QUEER THEORY* 109, 115 (Jayne Caudwell ed., 2006) (discussing transgender activism and formation of visible communities).

have allowed more transgender individuals to publically identify as such. This includes individuals involved in the highly-gendered realm of sports, as illustrated by the examples provided in this Section. This Section will also offer examples of intersex athletes who have been competing in women's sports. Though policies governing participation by intersex athletes are not the focus of this Article, these examples are included because, among other reasons, people often confuse transgender and intersex athletes.

### 1. Male-to-Female Transsexual Athletes<sup>68</sup>

In 1977, American tennis player Renee Richards, a male-to-female transsexual, successfully challenged the United States Tennis Association's (USTA) requirement that athletes possess a pair of X chromosomes in order to qualify for the women's draw at the U.S. Open.<sup>69</sup> The USTA's initial decision to ban Richards from the Women's Open illustrates the conflict between transsexual athletes and the sex-segregated world of sport. The USTA decided to require athletes to undergo sex-verification testing and to employ chromosome-based testing specifically for the purpose of excluding Richards.<sup>70</sup> Echoing the same essentialist arguments that support the segregation of sport by sex, the USTA defended this action by asserting its belief that male-to-female transsexual athletes have a competitive advantage when competing against natal women.<sup>71</sup> Moreover, the USTA dismissed the legitimacy of Richards's female gender identity

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68. Though not an athlete, Mike Penner (also known as Christine Daniels), is worthy of mention as the first openly transgender individual to work in the male-dominated profession of sports reporting. In 2007 Penner came out as transsexual in his column in the *Los Angeles Times* and reported as Christine Daniels for more than a year before resuming the Mike Penner byline in 2008. See Mike Penner, *Old Mike, New Christine*, L.A. TIMES, Apr. 26, 2007, <http://articles.latimes.com/2007/apr/26/sports/sp-oldmike26>; see also Keith Thursby, *Mike Penner Dies at 52: Los Angeles Times Sports Writer*, L.A. TIMES, Nov. 29, 2009, <http://articles.latimes.com/2009/nov/29/local/la-me-mike-penner29-2009nov29>. Penner's decision to detransition illustrates the complex and individualized nature of gender identity. For transsexual individuals, transition is not necessarily a linear process, nor does it uniformly end in a decision to undergo sex reassignment. Penner's journey ended tragically in 2009 when he died of apparent suicide. *Id.*

69. See generally *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977).

70. *Id.* at 268.

71. *Id.*

by suggesting that sex-verification testing was necessary to guard against impostors driven to compete in women's sport by the lure of "millions of dollars of prize money" and "nationalistic desires to excell [sic] in athletics."<sup>72</sup> Richards sued, alleging that the USTA's exclusion violated New York's antidiscrimination law.<sup>73</sup> A New York state court agreed, aligning itself with the testimony of medical experts as well as tennis player Billie Jean King, who supported Richards's inclusion.<sup>74</sup> This expert testimony did not attack the premise of male athletic superiority, only the idea that this categorical superiority extended to Richards post-transition.<sup>75</sup> The court's decision paved the way for Richards to compete in the 1977 U.S. Open, where she lost in the semifinal round.<sup>76</sup>

In addition to Richards's historic example, male-to-female transsexual athletes compete in contemporary women's sports as well. Two examples come from the sport of golf. In 2004, Danish-born, Australian-based golfer Mianne Bagger became the first transsexual woman to compete in a professional golf tournament, having surgically transitioned from male to female in 1995.<sup>77</sup> Golf associations in Australia and Europe revised their policies to allow Bagger to participate, and according to Bagger, other golfers on the tour welcomed her.<sup>78</sup> Though some expressed concerns about Bagger's competitive advantage and the potential that men would transition in order to enter women's golf tournaments,<sup>79</sup> these arguments seem to come from the media and the public rather than from

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72. *Id.* at 269.

73. *Id.* at 268. Richards also alleged a violation of the Fourteenth Amendment, but the court granted relief under state law. *Id.* at 273.

74. *See id.* at 271–72.

75. *See Richards*, 400 N.Y.S.2d at 271–72 ("It is Billie Jean King's judgment that, 'she (plaintiff) does not enjoy physical superiority or strength so as to have an advantage over women competitors in the sport of tennis.'").

76. *See Birrell & Cole, supra* note 47, at 374. Seventeen-year-old Lea Antonopolis beat the 41-year-old Richards. *Id.*

77. JIM BUZINSKI & CYD ZEIGLER, *THE OUTSPORTS REVOLUTION* 156–57 (2007); Martin Blake, *Transsexual Set to Claim European Tour Card*, *THE AGE*, Nov. 3, 2004, <http://www.theage.com.au/news/Golf/Transsexual-set-to-claim-European-tour-card/2004/11/02/1099362143207.html>.

78. Dennis Passa, *Female Golfer, Once Male, Makes Debut*, *PITTSBURGH POST-GAZETTE*, Feb. 27, 2005, at D5.

79. *See, e.g.*, David Whitley, *Why Take Roids When You Can Change Sexes?*, *ORLANDO SENTINEL*, Mar. 24, 2005, at D1 ("All we can do is hope women's golf never starts paying \$1 million a week to winners. The thought of Phyllis Mickelson on the first tee is almost too much to bear.").

within the sport. Similarly, after another transsexual golfer, Lana Lawless, won the Women's World Long Drive Championship in 2008,<sup>80</sup> there was some public outcry about the fairness of the result, but there was no internal controversy and even some of Lawless's own competitors publically defended her right to participate.<sup>81</sup>

The sport of cycling also includes a number of male-to-female transsexual athletes competing in women's events. Michelle Dumaresq, a Canadian mountain bike racer, has competed in women's events since 2001, six years after her surgical transition from male to female.<sup>82</sup> Though the regional, national, and international governing bodies of cycling have endorsed Dumaresq's participation in women's events, commentators have criticized and competitors have protested Dumaresq's inclusion.<sup>83</sup> In 2002, several of Dumaresq's fellow riders appealed her victory at a Canadian event with a petition objecting that her "strength, endurance, speed and skill [are] all quite good as a man, but too suspiciously impressive for a woman."<sup>84</sup> They suggested that Dumaresq compete in a separate, transgender category.<sup>85</sup> In 2006, the runner-up to Dumaresq's victory at the Canadian National Championships used the medal podium to protest Dumaresq by donning a t-shirt that read "100% Pure Woman

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80. Matt Calkins, *Transgender Golfer Is Women's Long Drive Champ*, PRESS-ENTERPRISE (Dec. 31, 2008), [http://www.pe.com/sports/golf/stories/PE\\_Sports\\_Local\\_S\\_calkins\\_01.4310002.html](http://www.pe.com/sports/golf/stories/PE_Sports_Local_S_calkins_01.4310002.html).

81. *Id.* Lawless was denied entry into the 2010 long drive championship after its organizers, the Long Drivers of America, changed its eligibility rules to match the LPGA's "female at birth" policy. See Katie Thomas, *Transgender Woman Sues L.P.G.A. Over Policy*, N.Y. TIMES, Oct. 12, 2010, <http://www.nytimes.com/2010/10/13/sports/golf/13lawsuit.html>. Lawless recently filed an antidiscrimination lawsuit against both organizations. *Id.* Subsequently, LPGA players voted to rescind the "female at birth" policy; a corresponding amendment to the organization's constitution is reportedly forthcoming. Stina Sternberg, *LPGA Votes to Banish "Female at Birth" Clause*, GOLF DIGEST (Dec. 1, 2010), <http://www.golfdigest.com/golf-digest-woman/blogs/golf-digest-woman/2010/12/lpga-votes-to-banish-female-at.html#ixzz16s4uCa1F>.

82. Jim Byers, *Cyclist Rides into History: Once a Man, She Just Wants to Be a Winner*, TORONTO STAR, Sept. 1, 2002, at A1.

83. See Sheila L. Cavanaugh & Heather Sykes, *Transsexual Bodies at the Olympics: The International Olympic Committee's Policy on Transsexual Athletes at the 2004 Athens Summer Games*, 12 BODY & SOC'Y 75, 76 (2006), available at [http://www.miannegolf.com/refs/sykes\\_article\\_2.pdf](http://www.miannegolf.com/refs/sykes_article_2.pdf).

84. Jon Billman, *Michelle Raises Hell*, OUTSIDE, Apr. 2004.

85. Austin Murphy, *Gender Flap*, SPORTS ILLUSTRATED, Sept. 23, 2002, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1026848/index.htm>.



Champ.”<sup>86</sup> Despite these instances, Dumaresq received support from many fellow riders, including American Missy Giove.<sup>87</sup> Additionally, Dumaresq has won several championships at the national level, and has also competed in the World Mountain Bike Championships, where her best finish is seventeenth place.<sup>88</sup> Dumaresq is not the only transgender to participate in cycling. Even more recently, Canadian short-track cyclist Kristen Worley nearly qualified for the 2008 Beijing Olympics after transitioning from male to female.<sup>89</sup>

## 2. Female-to-Male Transsexual Athletes

In contrast to the examples of male-to-female transsexual athletes, there are fewer well-known athletes who have transitioned from female to male. Two examples, both from college sports, illustrate the varied experiences among transsexual athletes that stem from the variety of forms that a transition can take. Alyn Libman’s transition from female to male, while in high school, included a physical transition induced by testosterone.<sup>90</sup> He went on to compete as a male on the University of California-Berkeley club figure skating team and under the auspices of U.S. Figure Skating.<sup>91</sup> Keelin Godsey, an All-American thrower on the Bates College women’s track and field team, transitioned from female to male before his senior year in 2005.<sup>92</sup> To remain eligible for women’s events sanctioned by the NCAA<sup>93</sup> and USA Track

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86. Jim Morris, *Transgendered Racer Insulted; Second-Place Finisher Wears T-shirt ‘100 Per Cent Pure Woman Champ,’* THE SPECTATOR (Hamilton, Ont.), Aug 3, 2006, p.6.

87. Giove’s support of Dumaresq is captured by interviews in the documentary 100% WOMAN (Artemis Dreams Productions 2004).

88. See Stephen Hui, *An Olympic Victory for Transsexuals*, SEVEN OAKS (Aug. 10, 2004), [http://www.sevenoaksmag.com/features/25\\_olympic.html](http://www.sevenoaksmag.com/features/25_olympic.html).

89. David Winer, *Cycling Association Denies Rider Her Shot at Summer Olympics*, MISSISSAUGA NEWS, June 10, 2008, at 61.

90. See Rona Marech, *Olympics’ Transgender Quandary Debate Rages on the Fairness of New Inclusion Rule*, S.F. CHRON., June 14, 2004, at A1.

91. See *id.*; see also *2008 Intercollegiate Team Figuring Skating Championships*, SK8STUFFMORE.COM, <http://www.sk8stuffmore.com/comps/08/r08collnat.pdf> (last visited Nov. 6, 2010).

92. Paul Steinbach, *Change Candidates*, ATHLETIC BUS. (Aug. 2008), <http://athleticbusiness.com/articles/article.aspx?articleid=1817&zoneid=3>.

93. As discussed later, *infra* Part II.B., the NCAA defines an athlete’s sex by their state identification, a practice that would allow a female-born, male-identified athlete

and Field (in which Godsey still competes, seeking a position on the U.S. Olympic team), Godsey's transition did not include surgery or hormones.<sup>94</sup> As an identified male competing in women's sports, Godsey received the formal support of his school and conference, but still faced challenges ranging from finding appropriate locker room space (Bates College provided him with a separate closet) to dealing with awkwardness and discomfort among some competitors.<sup>95</sup>

### 3. Intersex Athletes

As explained above, intersex is not the same as transgender. Human variation can include incongruence between gender identity and birth sex, as well as incongruence within and among the physical characteristics of sex at birth. Transsexual athletes may present a surgically or hormonally constructed body that challenges assumptions about sex categories that organize sport, while intersex athletes may present natural (used here to mean non-transitioned) bodies that do the same. Ensuring fairness and inclusion of intersex athletes is, while an important and laudable goal, beyond the scope of this Article.<sup>96</sup> Many people are familiar with examples of intersex athletes from both a historical and contemporary context. In an effort to clarify the differences between intersex and transgender, and because athletes of both categories challenge the sex-binary paradigm reflected in organized sports, this profile of intersex athletes is included.

Austrian downhill skier Eric Schinegger competed in (and won) the 1966 women's World Cup before a sex-verification test required for women to compete in the 1968 Olympics revealed that he had internal male genitalia caused by an intersex condition.<sup>97</sup> He voluntarily surrendered his gold medal to the second-place female finisher, and after surgical

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whose drivers license identifies their sex as female to participate on women's team. The NCAA, however, bans exogenous testosterone, *see infra* note 237, so that same athlete would be excluded from women's sports upon commencing a hormonal transition.

94. Steinbach, *supra* note 92.

95. *Id.*; Stan Grossfeld, *Addressing Issue*, BOS. GLOBE, Mar. 3, 2006, at C1.

96. *But see* Erin Buzuvis, *Caster Semenya and the Myth of the Level Playing Field*, 6 MOD. AM. 2, Fall 2010, at 36.

97. Billman, *supra* note 84.

transition, returned to the sport to compete in men's events.<sup>98</sup> In 1967, Polish sprinter Eva Klobukowska was banned from sports and stripped of her Olympic medals after genetic testing revealed anomalous sex chromosomes in some cells (likely an XX/XY mosaicism).<sup>99</sup> Twenty years later, another runner, Maria Jose Martinez Patino, discovered for the first time during a sex verification test that she lacked a second X chromosome typical of most women.<sup>100</sup> Patino, who was encouraged to withdraw with a fake injury, was later diagnosed with Androgen Insensitivity Syndrome (AIS),<sup>101</sup> an inability to process testosterone that effectively neutralizes the development in utero of male sex characteristics that are usually triggered by the presence of a Y chromosome.<sup>102</sup> Patino successfully challenged the decision of track and field's international governing body, and was reinstated two years later.<sup>103</sup> Unfortunately, Patino was by then past her athletic prime, but due to her efforts the IAAF's sex-verification policy today includes AIS on its list of conditions that will not preclude athletes from competing in women's sports.<sup>104</sup> In 1996, eight of the over 3000 female athletes at the Summer Games in Atlanta tested positive for evidence of a Y chromosome<sup>105</sup> but were permitted to compete either because

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98. *Id.*

99. Cheryl L. Cole, *One Chromosome Too Many?*, in *THE OLYMPICS AT THE MILLENNIUM: POWER, POLITICS, AND THE GAMES* 128, 129–30 (Kay Schaffer & Sidonie Smith eds., 2000); Laura A. Wackwitz, *Verifying the Myth: Olympic Sex Testing and the Category "Woman"*, 26 *WOMEN'S STUDIES INT'L J. F.* 553, 556 (2003).

100. See Cole, *supra* note 99, at 138.

101. *Id.*

102. J.C. Reeser, *Gender Identity and Sport Is the Playing Field Level?*, *BRIT. J. SPORTS MED.* 695, 696 (2005). (explaining that one in 60,000 individuals is affected by AIS).

103. Cole, *supra* note 99, at 139.

104. Myron Genel, *Gender Verification No More?*, 5 *WOMEN'S HEALTH* 3 (2000). In addition to AIS, the IAAF policy lists gonadal dysgenesis, and Turner Syndrome as conditions which afford no competitive advantage, and thus allowed. INT'L ASS'N OF ATHLETICS FED'NS, IAAF POLICY ON GENDER VERIFICATION TESTING § A(6)(a) (2006) [hereinafter IAAF POLICY ON GENDER VERIFICATION, available at <http://www.iaaf.org/mm/document/imported/36983.pdf>]. It also recognizes congenital adrenal hyperplasia, androgen-producing tumors, and anovulatory androgen excess as conditions which "may afford competitive advantage, but should nevertheless be allowed." *Id.* § A(6)(b).

105. Genel, *supra* note 104. Prior to the Atlanta games, the IOC changed its sex-verification methods from a sex chromatin test, which determined whether the athlete had a second X chromosome, to the Polymerase Chain Reaction test for the presence of Y chromosome. Cole, *supra* note 99, at 142–43.

further testing revealed androgen insensitivity syndrome or another condition—5-alpha-steroid reductase deficiency—that inhibits the masculinizing function of testosterone.<sup>106</sup> The International Olympic Committee (IOC) abandoned compulsory sex-verification testing for women's events in 1999,<sup>107</sup> but it and the international governing body of track and field allow for testing on a case-by-case basis, in response to suspicion of gender fraud.<sup>108</sup> Suspicion-based testing revealed the intersex condition of Indian runner Santhi Soundarajan, who was stripped of her silver medal in the 2006 Asia Games,<sup>109</sup> and most recently South African sprinter Caster Semenya after her victory in the 800 meters at the 2009 World Championships.<sup>110</sup> The IAAF's decision to sex-test Semenya subjected the eighteen-year-old to public criticism and scrutiny into intimate and personal matters. The Federation has ruled that she may keep her medal from the 2009 World Championships, and recently cleared her to compete in future women's events.<sup>111</sup>

Notably, in all of these examples, the intersex athletes became aware of their intersex condition because of their participation in women's sports. Additionally, all of these athletes identified as female before and, except for Schineggar, continued to do so after failing a sex-verification test. None sought to perpetrate gender fraud, which is the stated impetus for sex-verification testing in the first place.<sup>112</sup> Yet, as Semenya's example so painfully conveys, intersex athletes are vulnerable to criticism stemming from the presumption that anomalous sex-related physical characteristics necessarily produce a competitive advantage. This presumption itself may be challenged as being rooted in

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106. *Id.*; Reeser, *supra* note 102, at 696.

107. Joe Leigh Simpson et al., *Gender Verification at the Olympics*, 284 JAMA 1568, 1568 (2000).

108. *Id.*; see also IAAF POLICY ON GENDER VERIFICATION, *supra* note 104.

109. Nilanjana Bhowmick & Jyoti Thottam, *Gender and Athletics: India's Own Caster Semenya*, TIME (Sept. 1, 2009), <http://www.time.com/time/world/article/0,8599,1919562,00.html>.

110. See Jere Longman, *South African Runner's Sex Verification Test Won't Be Public*, N.Y. TIMES, Nov. 19, 2009, <http://www.nytimes.com/2009/11/20/sports/20runner.html>.

111. *Id.*; *South African Runner Caster Semenya Cleared to Compete as a Woman*, L.A. TIMES, July 7, 2010, at C6.

112. Haley K. Olsen-Acre, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207, 212 n.22 (2006).

the false premise that men—and women with anomalous sexual anatomy—are categorically superior athletes.<sup>113</sup> It ignores the high degree of physical variation among athletes of the same sex, not to mention disparities in social and economic advantages which also translate into athletic “advantage” relative to the rest of the field. Intersex athletes and transgender athletes thus present different challenges to the sex-segregated, binary organization of sport, but related and overlapping issues and concerns.

## II. POLICIES GOVERNING PARTICIPATION BY TRANSEXUAL ATHLETES IN SEX-SEGREGATED SPORTS

Despite these historic and contemporary examples of transgender athletes, sport organizations have only recently begun to formalize policies addressing the inclusion of transgender athletes in sex-segregated sport. The first to do so was the IOC in 2004.<sup>114</sup> This Part will examine the IOC’s policy as well as the efforts of other private and public bodies to define the terms of sport participation by transsexual athletes.

### A. *International Olympic Committee Policy*

In 2004, the IOC became the first sport organization to promulgate a policy designed to allow participation by transsexual athletes in a manner consistent with their newly assigned sex.<sup>115</sup> Prior to that time, most organizations required athletes to compete with members of their natal sex.<sup>116</sup> In fact, until as recently as 1998, the IOC required female athletes to undergo compulsory chromosome testing in order to ensure that those athletes were natal women.<sup>117</sup> Sport organizations in other countries successfully lobbied for exemption from laws prohibiting discrimination against transgender individuals<sup>118</sup>—the United Kingdom’s Gender

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113. Jennifer Finney Boylan, *The XY Games*, N.Y. TIMES, Aug. 3, 2008, at WK.10.

114. Cavanaugh & Sykes, *supra* note 83, at 88.

115. *Id.*

116. The IOC’s former practice of mandatory sex-verification testing, discussed at *supra* note 107, demonstrates how adamantly one sport organization maintained the boundary between separate sports for men and women, as defined by their sex chromosomes.

117. Wackwitz, *supra* note 99, at 553.

118. Cavanaugh & Sykes, *supra* note 83, at 89.

Recognition Act allows sport organizations to exclude transsexual people if it is necessary for “fair competition or the safety of the competitors.”<sup>119</sup> Sport organizations are similarly exempt from the transgender nondiscrimination law in effect in New South Wales, Australia.<sup>120</sup> On the other hand, Women’s Golf Australia revised its female-at-birth policy in 2004 so that Mianne Bagger could compete in the Women’s Australian Open, and the Canadian Cycling Association accepted Michelle Dumaresq’s revised birth certificate as evidence of her qualification for women’s competition.<sup>121</sup>

In 2003 the IOC endorsed a policy that allows transsexual athletes to compete in their newly assigned sex once they have undergone sex reassignment surgery—removal of external genitalia and gonads.<sup>122</sup> Moreover, unless that surgery occurred prior to puberty, the athlete must also undergo hormone therapy to minimize “gender-related advantages,” observe a two-year waiting period following the surgery, and obtain government recognition of their newly-assigned gender.<sup>123</sup> The IOC’s policy, known as the Stockholm Consensus, has, as Professor Heather Sykes predicted,<sup>124</sup> become a “template” for sport organizations around the world. Those organizations subsequently adopting policies governing the participation of transgender athletes include: USA Track and Field, USA Rugby, USA Hockey, the United States Golf Association, Ladies Golf Union (Great Britain), the Ladies European Golf Tour, Women’s Golf Australia, USA Track and Field, and the Gay and Lesbian International Sports Association,<sup>125</sup> as well as a handful of state interscholastic

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119. Gender Recognition Act, 2007, c. 7, § 19 (Eng).

120. Heather Sykes, *Transsexual and Transgender Policies in Sport*, 15 *WOMEN SPORT & PHYSICAL ACTIVITY J.* 3, 8 (2006).

121. Cavanaugh & Sykes, *supra* note 83, at 90–91.

122. See Int’l Olympic Comm’n, *Statement of the Stockholm Consensus on Sex Reassignment in Sports*, OLYMPIC.ORG (Nov. 12, 2003), [http://www.olympic.org/Documents/Reports/EN/en\\_report\\_905.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_905.pdf).

123. *Id.*

124. Sykes, *supra* note 120, at 11.

125. Pat Griffin, *Inclusion of Transgender Athletes on Sports Teams*, WOMEN’S SPORTS FOUND. (2008), <http://www.womenssportsfoundation.org/Content/Articles/Issues/Homophobia/1/Inclusion-of-Transgender-Athletes-on-Sports-Teams.aspx>. For examples of organizations adopting a policy based on the IOC formulation see *Policy on Transgender and Transsexual Athletes*, USA TRACK & FIELD, <http://www.usatf.org/about/policies/transgenderAndTranssexualAthletes/> (last visited Nov. 12, 2010); USA RUGBY, USA RUGBY ELIGIBILITY REGULATIONS sec. 2.4(d),

athletic associations, which will be discussed more fully below.<sup>126</sup>

### *B. National Collegiate Athletic Association Position*

The National Collegiate Athletic Association (NCAA) is an association that governs intercollegiate athletics for its more than 1000 member institutions.<sup>127</sup> The NCAA has no formal policy governing participation by transgender athletes in competition under its aegis. Instead, it provides a nonbinding position statement to its member institutions, in which it does not prohibit transgender athletes from competing at the collegiate level.<sup>128</sup> The NCAA bases an athlete's sex on his or her state classification, such as that found on a "driver's license, taxes, voter registration, etc."<sup>129</sup> If an athlete who has a male state classification participates on a women's team, the team is classified as a "mixed team" that is ineligible for the women's championship in that sport.<sup>130</sup> Because the NCAA's position incorporates state classification, the variety of states' requirements for changing sex designation on

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<http://www.usarugby.org> (follow "Eligibility" hyperlink; then follow "USA Rugby Eligibility Regulations" under "Eligibility Information") (last visited Sept. 19, 2010) ("USA rugby shall follow the International Olympic Committee and US Olympic Committee policies regarding transgendered athletes."); *Gender Policy for the United States Golf Association*, USGA, [http://www.usga.org/championships/special\\_requests/Application-Procedures-For-Transgendered-Individuals/](http://www.usga.org/championships/special_requests/Application-Procedures-For-Transgendered-Individuals/) (last visited Sept. 19, 2010); *Ladies British Amateur Stroke Play Championships*, LADIES' GOLF UNION sec. 3(a), [http://www.lgu.org/championships/champs10\\_stroke\\_home/sp10conditions/](http://www.lgu.org/championships/champs10_stroke_home/sp10conditions/) (last visited Sept. 19, 2010) ("Players must be of the female gender and have been female at birth or have had the female gender assigned. For the avoidance of doubt, the Ladies' Golf Union reserves the right to carry out a confidential case-by-case evaluation at any time either prior to or after the Championship if in its reasonable opinion such an evaluation is or becomes necessary. Any player in breach of this condition may be disqualified.").

126. See *infra* Part II.C.

127. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA MEMBERSHIP REPORT 14, 17, 21 (2008–09), available at <http://catalog.proemags.com/publication/cc5da338#/cc5da338/10>.

128. See *Current NCAA Position Regarding Transgender Student-Athlete Participation & Resource List*, TRANSGENDER LAW & POLY INST., [http://www.transgenderlaw.org/resources/NCAA\\_Policy.pdf](http://www.transgenderlaw.org/resources/NCAA_Policy.pdf) (last visited Nov. 12, 2010) [hereinafter NCAA Position].

129. *Id.* Accord Leilana McKindra, *Transgender Cases Present Challenge for Policymakers*, NCAA NEWS, reprinted in NAT'L CENTER FOR LESBIAN RIGHTS (Nov. 20, 2006), [http://www.nclrights.org/site/PageServer?pagename=issue\\_sports\\_spncaanewsonline112006](http://www.nclrights.org/site/PageServer?pagename=issue_sports_spncaanewsonline112006).

130. NCAA Position, *supra* note 129. A men's team may accept an athlete who has a female state classification and still remain eligible for the men's championship. *Id.*

drivers' licenses has the potential to produce inconsistencies in requirements for transgender athletes to participate in NCAA athletics.<sup>131</sup> Some states will change an applicant's driver's license sex designation upon receiving medical evidence of the applicant's gender identity, rather than proof of sex reassignment.<sup>132</sup> The Massachusetts Registry of Motor Vehicles, for example, requires an application from the individual affirming that the requested change is not for fraudulent purposes.<sup>133</sup> Massachusetts also requires a statement from the individual's medical provider attesting to the individual's gender identity and to the fact that it "will remain as such for the foreseeable future."<sup>134</sup> Other states, including Rhode Island and New Hampshire, require applicants seeking a change of gender marker on their drivers' licenses to submit evidence of completed sex-reassignment surgery.<sup>135</sup> To obtain the same change, some states require a court order,<sup>136</sup> while others require an applicant to provide an amended birth certificate<sup>137</sup>—a prerequisite that itself requires evidence of sex reassignment surgery in the forty-seven states that will issue them.<sup>138</sup> This patchwork of state laws creates the possibility that an NCAA member institution could—consistent with NCAA policy—field a women's team that includes an athlete from Massachusetts who identifies as female but has not undergone sex reassignment surgery, but not a similarly-situated athlete from Rhode Island.

### *C. Policies Governing Interscholastic Athletics*

In 2007, the Washington Interscholastic Athletic

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131. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 770–72 (2008); see also *Drivers License Policies by State*, NAT'L CENTER FOR TRANSGENDER EQUALITY, [http://transequality.org/Resources/DL/DL\\_policies.html](http://transequality.org/Resources/DL/DL_policies.html) (last visited Sept. 20 2010).

132. Spade, *supra* note 131, at 770–72.

133. MASS. DEP'T OF MOTOR VEHICLES, MASSACHUSETTS GENDER DESIGNATION FORM, <http://www.masstpc.org/publications/3party/MA%20RMV%20Gender%20Change%20Form.pdf>.

134. *Id.* Accord *Transgender Legal Issues*, 2010 GLAD: EQUAL JUSTICE UNDER LAW 37, [hereinafter GLAD], available at <http://www.glad.org/uploads/docs/publications/trans-legal-issues.pdf> (a guide to changing personal identification in the New England states).

135. *Id.* at 41, 43.

136. Spade, *supra* note 131, at 771.

137. *Id.* at 772.

138. *Id.* at 767–68.



Association (WIAA) became the first interscholastic athletic organization to adopt a formal policy for transgender athletes.<sup>139</sup> Unlike the NCAA's position, the WIAA's policy allows students to participate in sports "in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records."<sup>140</sup> The policy also incorporates a procedure to handle questions as to "whether a student's request to participate in a sex-segregated activity consistent with his or her gender identity is bona fide."<sup>141</sup> The policy does not specify who has standing to raise such questions, only that they would trigger a hearing before "an eligibility committee specifically established to hear gender-identity appeals."<sup>142</sup> The committee—whose proceedings are sealed to assure confidentiality<sup>143</sup>—will consider documentation of the student's "consistent gender identification" in the form of affirmed written statements from the student, the student's parent or guardian, or his or her health care provider; no medical evidence is required.<sup>144</sup> The policy allows an aggrieved student to appeal the initial decision of the gender eligibility committee to the executive director of the WIAA.<sup>145</sup> It also allows the student to rely on a favorable decision for the duration of the student's

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139. Michael Popke, *Student I.D.*, ATHLETIC BUS. (June 2010), <http://athleticbusiness.com/articles/article.aspx?articleid=3556&zoneid=32>.

140. WASH. INTERSCHOLASTIC ATHLETIC ASS'N, 2010-2011 OFFICIAL HANDBOOK ¶ 18.15.0, <http://www.wiaa.com/ConDocs/Con358/Eligibility.pdf> [hereinafter WIAA]. The policy requires students seeking to avail themselves of the policy to provide notice to the school. *Id.* ¶ 18.15.1. It then requires the school to notify the WIAA. *Id.* ¶ 18.15.2.

141. *Id.* ¶ 18.15.0.

142. *Id.* ¶ 18.15.3. The provision defines the committee as follows:

The Gender Identity Eligibility Committee will comprised of a minimum of three of the following persons one of whom must be from the physician or mental health profession category:

- A. Physician with experience in gender identity health care and the World Professional Association for Transgender Health (WPATH) Standards of Care.
- B. Psychiatrist, psychologist or licensed mental health professional familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care.
- C. School administrator from a non-appealing school
- D. WIAA staff member
- E. Advocate familiar with Gender Identity and Expression issues.

*Id.*

143. *Id.* ¶ 18.15.0

144. *Id.* ¶ 18.15.4

145. *Id.* ¶ 18.15.5

participation in WIAA-sponsored athletics.<sup>146</sup> The WIAA's policy applies to its 800 member institutions—public and private high schools and middle schools in the state of Washington.<sup>147</sup> According to a recent news article, the gender-eligibility committee has convened once since its creation, resulting in a decision certifying a female-to-male transsexual student's eligibility for boys' basketball.<sup>148</sup>

The Connecticut Interscholastic Athletic Conference (CIAC), which governs interscholastic athletics for 184 high schools and 148 middle schools (public and private) in the state of Connecticut,<sup>149</sup> also has a formal policy addressing participation by transgender athletes. The CIAC requires students to participate in their "birth sex" unless they have undergone "sex reassignment," which it defines in similar fashion as the IOC.<sup>150</sup> That is, transgender students in Connecticut who transition after puberty must undergo sex reassignment surgery, hormone treatment, a two-year waiting period after surgery, and legal recognition of new sex.<sup>151</sup> Though the CIAC's policy is considerably different from the WIAA's, the CIAC's Executive Director has publically stated that Connecticut's policy is based upon the WIAA's.<sup>152</sup> This error is likely based upon the fact that prior to implementing its current policy, the WIAA considered a plan to adopt a policy similar to the IOC's.<sup>153</sup>

The Colorado High School Activities Association (CHSAA) added a policy governing participation by transgender student athletes in 2009.<sup>154</sup> Like the CIAC policy, it allows students to participate in sports consistent with their reassigned sex only if they transitioned—presumably with hormones—prior to

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146. WIAA, *supra* note 140, ¶ 18.15.0

147. *Mission & Purpose*, WIAA, <http://www.wiaa.com/subcontent.aspx?SecID=299> (last visited Dec. 28, 2010).

148. Popke, *supra* note 139.

149. CONN. ASS'N OF SCHS., CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE HANDBOOK 9 (2009–2010), [http://www.casciac.org/pdfs/ciachandbook\\_0910.pdf](http://www.casciac.org/pdfs/ciachandbook_0910.pdf). [hereinafter CIAC HANDBOOK].

150. *Id.* at 50 (ART. IX. B. contains the bylaws for transgender participation).

151. *Id.*

152. Hannah Vahl, *City Board of Ed Passes Policy Regarding Transgender Athletes*, MIDDLETOWN PRESS, Nov. 22, 2009, <http://www.mail-archive.com/transgender-news@googlegroups.com/msg02544.html>.

153. See generally WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, HANDBOOK (2007–2008) (on file with author).

154. Mike Lowe, *Transgender Policies Aim for Fairness on the Field*, PORTLAND HERALD (Me.), Mar. 26, 2010, at A1.

puberty, or have undergone surgical and hormonal transition.<sup>155</sup> Rather than import the IOC's two-year waiting period following surgery like the CIAC policy, the CHSAA requires that "hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and sufficient length of time to minimize gender-related advantages."<sup>156</sup> The policy contemplates that the CHSAA will conduct such determinations confidentially, and on a case-by-case basis.<sup>157</sup> The CHSAA has reportedly received two eligibility requests already, and anticipates several more.<sup>158</sup>

In 2010, the Maine Human Rights Commission (MHRC) became the first government entity to initiate public policy<sup>159</sup> regarding transgender student-athletes when it published a draft guidance document that would allow transgender athletes to compete in the sex category that matches their gender identity, and to use locker rooms and facilities consistent with their gender identity as well.<sup>160</sup> The MHRC is a state agency charged with enforcing the Maine Human Rights Act,<sup>161</sup> which prohibits discrimination on the basis of sex, sexual orientation, and other categories in public accommodations, including all educational institutions in the state.<sup>162</sup> It has since withdrawn the draft, but has indicated

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155. COLO. HIGH SCH. ACTIVITIES ASS'N, CONSTITUTION OF THE COLORADO HIGH SCHOOL ACTIVITIES ASSOCIATION art. 3, [http://www.chsaa.org/about/pdf/Handbook\\_2010.pdf](http://www.chsaa.org/about/pdf/Handbook_2010.pdf).

156. *Id.*

157. *Id.*

158. See Popke, *supra* note 139.

159. Unlike the MHRC, the CIAC and WIAA are nongovernmental organizations whose policies are private law that is binding on member institutions who have agreed to follow the organizations' bylaws as a condition for membership. See generally, 17 CORPUS JURIS SECUNDUM *Associations* § 14 ("The constitution, bylaws, and regulations of an association constitute a contract which the courts will enforce both as between the members themselves and as between the association on one side and the individual members on the other . . .").

160. Maine Human Rights Comm'n, *Sexual Orientation in Schools and Colleges* (Feb. 8, 2010) (unpublished draft) (on file with author); see also Dylan Riley, *Transgender Guidelines Stir Controversy*, MAINE CAMPUS (Feb. 25, 2010), <http://mainecampus.com/2010/02/25/transgender-guidelines-stir-controversy/>.

161. See generally ME. REV. STAT. ANN. tit. 5, § 4566 (2010).

162. *Id.* § 4552 (listing protected categories); 94-384 C.M.R. 4.02(B) (defining the scope of equal education opportunity regulations to include "any public school or educational program, any public post-secondary institution, and any private school or educational program approved for tuition purposes if both male and female students are admitted."). Notably, the MHRC does not enumerate protection on the basis of gender identity and expression, a category believed to provide the strongest protection

that it will reinitiate policymaking on this issue in the near future.<sup>163</sup> Should the MHRC adopt a policy or guidance that requires schools and universities to honor an athlete's gender identity when determining their eligibility for athletics, such an interpretation would create a conflict for NCAA member-institutions in the state of Maine, whose women's teams would be ineligible for competition if they accepted athletes based on their gender identities in accordance with state policy, rather than their drivers' license classification.<sup>164</sup>

### III. INCORPORATING LAW, SCIENCE, AND EDUCATIONAL VALUES INTO TRANSGENDER ATHLETE PARTICIPATION POLICIES

As explained in the previous Part, in only four states does a public or associational policy operate to define the terms of transgender athletes' participation in interscholastic athletics.<sup>165</sup> At the college level, the NCAA's stated position on the matter may best be read as tentative, since it is not formally binding on member institutions and any application would clearly produce inconsistent and unfair results.<sup>166</sup> Thus, there is generally little policy that addresses transgender student-athletes, to the detriment of both students and institutions alike. Without policies of inclusion, the highly sex-segregated structure of athletics likely deters transgender individuals from participating, depriving them as well as their would-be teammates of educational experiences that sport can provide. The absence of policies also puts institutions at risk of having to decide questions of transgender-athlete participation for the first time in the context of an individual student-athlete's case. Institutions that settle policy questions in advance and in the abstract protect future students from the unfairness and possible

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to transgender individuals. The MHRC's policy, therefore, reflects a broad interpretation of the statute's ban on sex discrimination.

163. Heather Steeves, *Panel Rules Against Orono School in Transgender Bathroom Access*, BANGOR DAILY NEWS (Sept. 20, 2010), <http://www.bangordailynews.com/story/Statewide/Panel-rules-against-Orono-school-in-transgender-bathroom-access,154263>.

164. Maine has no formal policy governing sex designation changes on driver's license, but the Bureau of Motor Vehicles advises applicants to submit a doctor's statement attesting to a gender change. GLAD, *supra* note 134, at 37.

165. These states are Colorado, Connecticut, Maine, and Washington. *See supra* Part II.C.

166. *See* NCAA Position, *supra* note 128.

harm that could result from being the test case. Additionally, preemptive decision-making allows institutions to consider the issue free of the pressures of time or personal relationships that could obstruct thorough and thoughtful policy formation.

It is easier to decide that there should be policies governing transgender-students' participation in athletics than it is to decide what those policies should say. The substantive issue is challenging because it requires policymakers to consider two important interests that are sometimes seen as conflicting: the interest of transgender student-athletes to participate in athletics, and the interest of institutions to ensure that all students have a safe field of play and equitable opportunities to meaningfully participate against others of similar skill levels.<sup>167</sup> In seeking to strike this balance, policymakers will likely consider a variety of factors, which may draw from law, science, and the educational purpose of athletics, respectively. This Part will examine these three categories in turn. It will conclude that while law and science frame the outer boundaries of policy, neither category conclusively addresses the issue. Educational values, particularly the educational purpose of scholastic and collegiate athletics, must therefore weigh strongly in determining the terms of transgender student-athlete participation.

#### *A. The Role of Law in the Formation of Transgender Athlete Participation Policies*

Various laws prohibit educational institutions from discriminating on the basis of sex, gender, and in some cases, gender identity and expression.<sup>168</sup> Yet the extent to which these laws allow institutions to limit transgender individuals' access to sex-segregated spaces is uncertain. This Section will address the relevance of the Constitution, sex discrimination statutes, and gender-identity discrimination statutes to policies addressing transgender athletes' participation in the sex-segregated context of athletics.

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167. Griffin, *supra* note 125.

168. See generally D.C. CODE § 2-1402.41 (2010) (education); see also generally IOWA CODE ANN. § 216.9 (West 2010) (education); ME. REV. STAT. ANN. tit. 5, § 4601 (2010) (education); MINN. STAT. ANN. § 363A.02 (West 2010); N.J. STAT. ANN. § 10:5-4 (West 2010); R.I. GEN. LAWS § 11-24-2.1 (2010); VT. STAT. ANN. tit. 9, § 4501 (West 2010).

## 1. Constitutional Law

Judicial interpretations of the U.S. Constitution's Equal Protection Clause extend heightened scrutiny to classifications based on sex.<sup>169</sup> Under heightened scrutiny, state classifications that differentiate between citizens based on their sex only survive if they serve an important purpose and are narrowly tailored to that purpose.<sup>170</sup> In contrast, policies that do not trigger heightened scrutiny receive much more deference, satisfying the Equal Protection Clause so long as there is some rational basis for the policy.<sup>171</sup> As noted above, some courts have applied heightened scrutiny to invalidate policies that exclude members of one sex from athletic teams of another.<sup>172</sup> Consequently, rejecting classifications based on generalizations and stereotypes about physical differences between boys and girls justify blanket exclusions of girls from boys' teams and vice versa.<sup>173</sup> If courts were to apply heightened scrutiny to policies that exclude transgender athletes from participation in accordance with gender identity, such policies would likely fail.<sup>174</sup> Instead, courts applying heightened scrutiny would require such policies to attempt to ensure that exclusions are no more than necessary to protect important interests in fairness and safety.<sup>175</sup>

It is, however, not clear that heightened scrutiny would apply to cases involving alleged discrimination against transgender student-athletes. Except for cases where the alleged discrimination affects a fundamental right<sup>176</sup>—which

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169. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

170. *Virginia*, 518 U.S. at 524 (“To succeed, the defender of the challenged action must show “at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” (citing *Miss. Univ. for Women*, 458 U.S. at 724)).

171. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” (internal citation omitted)).

172. *See supra* notes 12, 29–30 and accompanying text.

173. *See supra* Part I.A.

174. *Cf.* Jill Pilgrim et al., *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 495, 541–42 (2003).

175. *See generally* *Craig v. Boren*, 429 U.S. 190 (1976).

176. *See generally* *Somers v. Superior Court*, 92 Cal.Rptr.3d 116 (Cal. Ct. App. 2009)

does not include the right to education generally<sup>177</sup> nor to athletic opportunities particularly<sup>178</sup>—courts have not applied heightened scrutiny in cases involving discrimination on the basis of gender identity. Commentators have argued that discrimination targeting transgender individuals should trigger heightened scrutiny, based on the similarities between transgender classifications and other suspect classifications that already receive such protection.<sup>179</sup> But the Supreme Court has demonstrated reluctance to recognize new suspect classifications,<sup>180</sup> and is thus unlikely to apply heightened scrutiny in cases of transgender discrimination.

On the other hand, courts may be more willing to reach heightened scrutiny in such cases by viewing sex discrimination to include discrimination on the basis of one's failure to conform to stereotypes associated with one's biological sex.<sup>181</sup> By way of example, a male-to-female transsexual student could argue under this theory that a school violates the Equal Protection Clause's prohibition on sex discrimination by excluding her from girls' sports because she fails to conform to stereotypes about females, i.e., the stereotype that only those who had female sex assigned to them at birth are those who may be properly considered girls.

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(applying heightened scrutiny to a state's policy restricting non-resident transsexual from amended her birth certificate from that state, due to its impairment of the fundamental right to interstate travel).

177. See generally *Plyler v. Doe*, 457 U.S. 202 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1972).

178. See, e.g., *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 525, 553 (3d Cir. 2007); *Kanongata'a v. Wash. Interscholastic Activities Ass'n*, No. C05-1956C, 2006 WL 1727891, at \*22 (D. Wash. June 20, 2006).

179. See Diane Elkind, Note, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 902–03 (2006) (arguing that like other recognized suspect classifications that warrant heightened scrutiny, transgender individuals constitute a discrete and insular minority that possesses an immutable trait (gender identity), that has historically been targeted for discrimination, and that is politically powerless. As such, they satisfied the elements for a suspect class that the Court has relied on since *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

180. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (refusing to recognize mental disability as protected characteristic warranting heightened scrutiny); *Romer v. Evans*, 517 U.S. 620 (1996) (using rational basis review rather than strict scrutiny to strike down amendment to state constitution that singled out gays and lesbians).

181. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004).

Courts have been willing to construe sex discrimination to include gender-nonconformity discrimination for purposes of the Equal Protection Clause,<sup>182</sup> and recently, one federal district court became the first to do so for the benefit of a transgender plaintiff.<sup>183</sup> Thus, while there are grounds for extending constitutional protection to transgender students seeking to participate in athletics consistent with their gender identity, existing precedent extending the Constitution's protection in this manner is still rather limited.

## 2. Antidiscrimination Statutes

Transgender plaintiffs fare better, however, under statutes that protect against discrimination on the basis of sex and gender identity. Sex discrimination statutes include Title IX, which applies directly to educational institutions, Title VII, which applies to employers, and state statutes that prohibit sex discrimination in educational institutions or public accommodations generally.<sup>184</sup> *Richards v. United States Tennis Association* is the only case to hold that a sex discrimination statute—namely, the New York Human Rights Law—protects a transgender athlete's right to participation in sex-segregated sports consistent with the athlete's gender identity.<sup>185</sup> In that case, however, the court narrowly focused on the method of sex-verification testing that the USTA used

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182. See generally *id.* (holding that the Equal Protection Clause prohibition discrimination based on the presumption “that a woman will conform to a gender stereotype” as well as discrimination rooted in the “supposition that a woman is unqualified for a position because she does not conform to a gender stereotype.”).

183. See *Glenn v. Bumby*, No. 1:08-CV-2360-RWS, 2010 WL 2674413, at \*16 (M.D. Ga. July 2, 2010) (applying heightened scrutiny to determine that a state employer violated the Equal Protection Clause when terminating the employment of transgender employee because the employee's female presentation did not comport with the employer's stereotype of how a biological male should act).

184. Many courts do so by interpreting the prohibition on sex discrimination to include discrimination against an individual who fails to comply with stereotypical appearance and behavior associated with the individual's biological sex, as first articulated in *Price Waterhouse Coopers v. Hopkins*. See *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004) (transsexual employee had cause of action under Title VII, “because Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination” regardless whether that person's gender nonconformity can also be labeled transsexuality); see also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.C. Cir. 2006) (transsexual male-to-female (MTF) plaintiff whose job offer was revoked after she came to the interview presenting as a woman).

185. See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977).



to exclude Richards.<sup>186</sup> The decision neither forecloses nor endorses other tests that may determine a transsexual athletes' eligibility for sports of their transitioned sex, such as surgical, hormonal, and legal identification requirements. Moreover, cases where transgender plaintiffs have contested exclusion from other sex-segregated contexts, like bathrooms, are neither consistent nor dispositive of this question as it relates to sports. Some courts have interpreted sex discrimination statutes to permit defendants to exclude transgender individuals from bathrooms,<sup>187</sup> but in one case, a court recognized that a college's decision to exclude a pre-operative male-to-female transsexual professor from the women's bathroom could constitute sex discrimination under Title IX and Title VII.<sup>188</sup> In reaching this decision, the court construed the plaintiff as a gender non-conforming female—that is, the court saw the plaintiff as a woman who was being discriminated against because of her stereotypically male traits.<sup>189</sup> After acknowledging the “well settled” position that “Title VII’s prohibition on sex discrimination encompasses discrimination against an individual for failing to conform to sex stereotypes,”<sup>190</sup> the court concluded that “neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.”<sup>191</sup> Moreover, the court rejected the idea that a long-standing practice and societal preference for sex-segregated spaces could somehow trump individual rights.<sup>192</sup>

A handful of states prohibit educational institutions specifically, or public accommodations generally, from discriminating on the basis of gender identity.<sup>193</sup> None of

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186. *Id.* at 268.

187. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007).

188. *See* *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. 02-1531PHX-SRB, 2004 WL 2008954, at \*2 (D. Ariz. June 3, 2004).

189. *Id.* at \*2.

190. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

191. *Id.*

192. *Id.* at \*3 (“[A]pplication of this rule may not be avoided because restroom availability is the benefit at issue.”).

193. *See* D.C. CODE § 2-1402.41 (2010) (education); *see also* IOWA CODE ANN. § 216.9 (West 2010) (education); ME. REV. STAT. ANN. tit. 5, § 4601 (2010) (education); MINN. STAT. ANN. § 363A.02 (West 2010); N.J. STAT. ANN. § 10:5-4 (West 2010); R.I. GEN. LAWS § 11-24-2.1 (2010); VT. STAT. ANN. tit. 9, § 4501 (West 2010). Several additional states are currently pursuing comparable laws. *See Legislation*, HUMAN RIGHTS

these statutes, however, have been applied to cases involving transgender athletes seeking the right to participate in sports consistent with their transitioned sex. In cases involving the similarly sex-segregated context of bathrooms, some courts have determined that excluding a transgender individual from the bathroom that matches their identified gender is not discrimination on the basis of gender identity, which is prohibited by law.<sup>194</sup> Such bathroom restrictions, they reason, turn on the intended-users' biological gender, not their gender identities.<sup>195</sup> On the other hand, the MHRC has interpreted the prohibition on gender-identity discrimination to require the accommodation of transgender students in the sex-segregated bathroom that matches their gender identity.<sup>196</sup>

### 3. Legal Considerations: A Conclusion

In sum, while judicial interpretations of the Constitution and antidiscrimination statutes have not directly considered whether educational institutions must include transgender students in athletic programs consistent with their gender identity, doctrine is arguably developing in a direction that could produce such protection for transgender athletes. Both heightened scrutiny, if applied, and a gender nonconformity theory of sex discrimination support the right of transgender plaintiffs to participate in sex-segregated activities in a manner consistent with gender identity. Moreover, existing precedent supports the conclusion that any exclusion of transgender athletes should be reasonably related, if not narrowly tailored, to a genuine or demonstrable concern such

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CAMPAIGN, [http://www.hrc.org/issues/workplace/equal\\_opportunity/equal\\_opportunity\\_legislation.asp](http://www.hrc.org/issues/workplace/equal_opportunity/equal_opportunity_legislation.asp) (last visited Nov. 12, 2010). Many educational institutions themselves prohibit discrimination on the basis of gender identity and expression. TRANSGENDER LAW & POLICY INSTITUTE, <http://www.transgenderlaw.org/college/index.htm#policies> (last visited Nov. 12, 2010) (identifying 303 colleges and universities that do so).

194. See generally *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005); *Goins v. W. Group*, 635 N.W.2d 717 (Minn. 2001). These decisions have been criticized for failing to examine the defendants' reason for the exclusion, not taking into account that defendants' policy that scrutinizes transgender individuals' biological gender and no one else's, and ignoring that the harmful and discriminatory effect of such policies is to preclude access to either bathroom. See generally Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010).

195. See, e.g., *Hispanic AIDS Forum*, 792 N.Y.S.2d at 44; *Goins*, 635 N.W.2d at 726.

196. Abigail Curtis, *State Rules in Favor of Young Transgender*, BANGOR DAILY NEWS (June 30, 2009), <http://www.bangordailynews.com/detail/109732.html>.

as fairness or safety. Stereotypes, myths, and bias are not acceptable grounds for exclusion or restriction of transgender athletes' participation in sex-segregated athletics. Finally, as states and educational institutions themselves add gender identity and expression to their own anti-discrimination laws and policies, the legality of excluding transgender students from athletic opportunities that match gender identity becomes increasingly tenuous.

*B. The Role of Science in the Formation of Transgender Athlete Participation Policies*

Scientific research may contribute to the formation of policies governing the participation of transgender athletes in athletics. It is, however, important to acknowledge that empirical research does not provide conclusive answers about the competitive advantage afforded by sex-based physical traits that are present at birth and/or that have been modified by surgical or hormonal transition. As such, policymakers should not rely on science alone to define the parameters of transgender athletes' participation.

In examining the role of science in this context, it is necessary to acknowledge that there are generalized physiological differences between men and women. Men tend to have taller, leaner, and more muscular bodies, characteristics that produce greater metabolic activity and anaerobic capacity—producing energy in the absence of oxygen—as well as the ability to generate larger amounts of force.<sup>197</sup> Men have a higher percentage of type II muscle fibers, which allow for greater contraction strength and power.<sup>198</sup> Men have thicker and denser bones, which can increase stability and decrease the risk of injury, and greater lung capacity and higher levels of hemoglobin that more efficiently deliver oxygen to muscles.<sup>199</sup> Notably, these are

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197. Michaela C. Devries, *Do Transitioned Athletes Compete at an Advantage or Disadvantage as Compared with Physically Born Men and Women?: A Review of the Scientific Literature*, ATHLETESCAN 4–5 (May 18, 2008), <http://www.athletescan.com/content/publications.asp> (follow “Promising Practices: Working with Transitioning/Transitioned Athletes in Sport” hyperlink; then follow “Do Transitioned Athletes Compete at an Advantage or Disadvantage” hyperlink).

198. *Id.* at 5 (referring to Type II muscle fibres, in contrast to Type I muscle fibers, which produce endurance, owing to their higher mitochondrial content).

199. *Id.* at 5–6.

average differences, not categorical distinctions. In the context of sports, this means that a male athlete competing in womens' sport is not necessarily going to be the tallest, leanest, most muscular individual on the team.

Moreover, scientific and medical advances have problematized the use of "men" and "women" as categorical distinctions. Specifically, variations at the chromosomal, hormonal, physical, and psychological levels preclude conclusive assignment of "male" and "female" labels in all cases. Sex chromosomes can defy the usual XX or XY categories and manifest in XO, XXY, XYY, or XXX configurations, or in a mosaic condition in which different cells in the same individual's body have different sex chromosomes.<sup>200</sup> Conditions like AIS produce a body that might be chromosomally male but hormonally female,<sup>201</sup> while others, like congenital adrenal hyperplasia, cause individuals with XX chromosomes to have anatomical features that are more typically masculine.<sup>202</sup> Other conditions affecting physical development in utero and/or at puberty produce internal and external genitalia that defy classification as entirely male or female; indeed, for one out of every 1500 to 2000 births, an expert in sex differentiation must be called in to interpret atypical presentation of the baby's gender.<sup>203</sup> Based on variations such as these, Brown University scientist and author, Anne Fausto-Sterling, dismissed Euro-American culture's rigid insistence on only two sexes, stating, "A body's sex is simply too complex. There is no either/or. Rather, there are shades of difference."<sup>204</sup> Applied to the context of sport, scientific research on the variability of sex demonstrates that the sex-segregated, binary model of competition is by definition an imperfect division because, in one commentator's words, "nature doesn't actually have a line between the sexes."<sup>205</sup> The absence of a clear, scientific distinction between men and women further challenges the

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200. Robert Ritchie et al, *Intersex at the Olympic Games*, 101 J. ROYAL SOC. MED. 395, 396 (2008).

201. ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 52 (1st. ed. 2000).

202. *Id.* at 59.

203. *Id.* at 53.

204. *Id.* at 3.

205. Alice Dreger, *Sex Typing for Sport*, 40 HASTINGS CENTER REP. 2, 22-23 (2010), available at [bioethics.northwestern.edu/faculty/work/dreger/dreger-hcr-sport-of-sex.pdf](http://bioethics.northwestern.edu/faculty/work/dreger/dreger-hcr-sport-of-sex.pdf).

assumption that an individual has a competitive advantage by virtue of being born male. Who is to say that an individual who competes in women's sports due to a female gender identity has an advantage, given the natural physical variation among those who we would categorize as women?

Science also makes it easier to reject assumptions about sex-based competitive advantage by failing to substantiate a conclusive relationship between competitive advantage and the physical features associated with sex.<sup>206</sup> A study by the international governing body of volleyball, for example, failed to correlate a relationship between height (believed to be an advantageous characteristic for volleyball players) and success of elite teams.<sup>207</sup> Only once in Olympic history has the women's volleyball team with the tallest average height won the gold medal.<sup>208</sup> Ironically, the final ranking of the men's volleyball teams who medaled in Athens in 2004 was inversely proportional to the teams' average height.<sup>209</sup> Sport already acknowledges this indeterminate relationship between physical attributes and competitive advantage by generally not excluding or stratifying athletes based on size.<sup>210</sup>

Correspondingly, studies that compare athletic performance between girls and boys are unable to isolate the extent to which differences are due to biological, rather than environmental factors. Researchers whose studies demonstrated boys' higher performance at certain athletic skills—throwing, catching, kicking, side-arm swing, and motor grip strength—acknowledged that environmental factors, such as access to athletic training and participation, may account for as much of this advantage as biological factors do.<sup>211</sup> There is, moreover, research suggesting that motor skills, coordination, and form—which all contribute to athletic talent—are learned skills, not innate talents.<sup>212</sup> For

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206. Devries, *supra* note 197, at 7.

207. See Reeser, *supra* note 102, at 698.

208. *Id.*

209. *Id.* ("Thus insofar as team success in volleyball is concerned, there would appear to be factors more critical to individual performance than average player height.")

210. Wrestling, which divides players by weight class, is an obvious exception.

211. Stephen A. Butterfield et al., *Grip Strength Performances by 5- to 19-Year Olds*, 109 PERCEPTUAL & MOTOR SKILLS 362, 368–69 (2009); COLETTE DOWLING, *THE FRAILTY MYTH: REDEFINING THE PHYSICAL POTENTIAL OF WOMEN AND GIRLS* 67–68 (Random House ed., 2000).

212. DOWLING, *supra* note 211, at 62.

example, according to one study, second-grade boys and girls threw at the same speed with their nondominant arms, suggesting that practice, rather than innate biological traits, produced boys' superior speed in dominant-arm throws.<sup>213</sup> We do not know, and science does not tell us, the extent to which the general tendency for men and boys to demonstrate athletic talent superior to women and girls is the product of "social inequality disguised as a natural one."<sup>214</sup> When it comes to sport, men and boys have enjoyed centuries of preferential treatment, including encouragement, validation, opportunity, and incentive, not to mention the tailoring of sport to suit men's physical and socially-constructed characteristics.<sup>215</sup> Girls, in contrast, are stifled in their development of physical attributes and skills that contribute to athletic talent by the negative, stereotype-driven feedback they receive from an early age when they engage in physical or athletic behaviors such as running, jumping, and climbing.<sup>216</sup> Science, in sum, does not support the conclusion that a natal male has an innate and absolute athletic advantage when competing against a natal female, or that a natal female would have an innate and absolute athletic disadvantage when competing against a natal male.<sup>217</sup>

Lastly, even if sex-based physiological differences did provide a compelling reason to exclude transgender athletes from participating with their identified sex rather than their birth sex, these differences are reduced or eliminated by hormone-based transitions. Many physiological differences between men and women are the result of men's higher testosterone levels<sup>218</sup> and women's higher estrogen levels.<sup>219</sup>

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213. *Id.* at 65 (citing Kathleen Williams et al., *Environmental Versus Biological Influences on Gender Differences in Overarm Throw for Force*, 5 *WOMEN SPORT & PHYSICAL ACTIVITY J.* 42 (1996)).

214. Symons & Hemphill, *supra* note 67, at 110.

215. DOWLING, *supra* note 211, at 51–52 (calling this phenomenon "learned weakness"); see also Yael Lee Aura Shy, *"Like Any Other Girl": Male-to-Female Transsexuals and Professional Sports*, 14 *SPORTS LAW J.* 95, 101–02 (2007).

216. Shy, *supra* note 215 ("If males were not pervasively expected and encouraged by society to excel at sports and females actively discouraged from doing so the biological differences between the two genders would perhaps not be quite as meaningful in a sports context.").

217. Cf. Sarah Teetzel, *On Transgender Athletes, Fairness and Doping: An International Challenge*, 9 *SPORT SOCIETY* 227, 246 (2006) ("Variance within male and female sex categories is so vast that it is difficult to tell if a new member of a sex category has an unfair advantage or not relative to the rest of the field.").

218. The normal testosterone level in physically born men is  $21 \pm 1$  nmol/L. Devries,

Transitioned women, i.e., male-to-female transsexuals, have similar concentrations of testosterone and estrogen as physically born women, due to the administration of synthetic estrogen and anti-androgens,<sup>220</sup> which produce physiological similarities as well. For example, levels of hemoglobin—the protein that delivers oxygen to muscles during exercise—are comparable between natal women and transitioned women who received one year of hormone therapy.<sup>221</sup> Hormone treatment also increased body fat and decreased muscle mass in transitioned women—changes that leveled off after one year of treatment.<sup>222</sup> Though transitioned women still have, on average, larger muscles and less body fat than natal women, there is a wide range of muscle size and body fat among both transitioned and natal women.<sup>223</sup> Moreover, as mentioned earlier, neither of these persistent differences is proven to translate into an athletic performance advantage such as speed, strength, or aerobic capacity.<sup>224</sup> As for height, no study has measured whether hormone transition affects this trait. Anecdotally, however, some male-to-female transsexuals have reported a loss in height following transition.<sup>225</sup>

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*supra* note 197, at 7–8. Physically born women have between  $1.0 \pm 0.2$  nmol/L and  $1.1 \pm 0.1$  nmol/L, depending on the phase of the menstrual cycle. *Id.* at 8. Testosterone produces the skeletal and cardiovascular characteristics described above. *Id.* Testosterone levels correlate to muscle mass. *Id.* Interestingly, however, muscle mass is not correlated to strength. *Id.*

219. Women produce more estrogen ( $184 \pm 71$  to  $361 \pm 107$  pmol/L, depending on the phase of the menstrual cycle) than men ( $128 \pm 13$  pmol/L), though the effects of estrogen on physiological performance are less significant. *Id.* One role of estrogen is to regulate substrate metabolism, helping the body use stored lipids as a source of energy during exercise. *Id.* Estrogen also protects muscles and bloods from damage from stress that results from exercise. *Id.* at 9–10.

220. *Id.* at 10.

221. *Id.* at 12.

222. *Id.* at 12–13; Reeser, *supra* note 102, at 697; L.J. Gooren & M.C. Bunck, *Transsexuals and Competitive Sports*, 151 *EUR. J. ENDOCRINOLOGY* 425, 426–27 (2004); J.M. Elbers et al., *Effects of Sex Steroid Hormones on Regional Fat Depots as Assessed by Magnetic Resonance Imaging in Transsexuals*, 276 *AM. J. PHYSIOLOGY* 317, 320–21 (1999).

223. Devries, *supra* note 197, at 12.

224. *Id.* at 15. Muscle mass is not necessarily indicative of muscle strength. Reeser, *supra* note 102, at 697 (“Although it is well appreciated that the skeletal muscle cross sectional area is proportional to contractile force production, it cannot be definitively concluded on the basis of this principally anatomical study that the residual difference between the hormonally treated male to female and the pretreatment female to male group would offer a significant performance advantage to the male to female cohort.”).

225. Teetzel, *supra* note 217, at 243 (“Michelle Dumarasq reportedly went from

Similarly, hormone treatment produces a masculinizing effect in transitioned men. Synthetic testosterone improves oxygen delivery to the muscles to a degree comparable to that of natal men.<sup>226</sup> It also increases the muscle cross-sectional area, though the average muscle cross-sectional area is higher in natal men.<sup>227</sup> Synthetic testosterone decreases fat content and increases overall body weight, though transitioned men still have higher subcutaneous fat levels than natal men.<sup>228</sup>

In sum, policymakers should make the following science-based considerations when designing policies of inclusion for transgender athletes. First and foremost, policymakers should recognize that medical science does not support the conclusion that natal men have physical features presumed to be advantageous in athletics, nor does it support the conclusion that physical features associated with masculinity produce a competitive advantage. Consequently, the process of producing a fair policy should include considerations beyond the presumed physiology of competitors. Specifically, considerations may include the educational value of athletic participation, discussed in detail in the next section.

Additional science-based considerations may come into play if policymakers decide that, imprecision of sex notwithstanding, a transgender athlete must have some degree of physical similarity to athletes participating in a given sex category. One consideration is the absence of any science-based rationale for a surgical requirement, such as

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being a 1.83 m tall man weighing 95 kg to a 1.75 m tall woman weighing between 77–81 kg after sex-reassignment surgery and hormone therapy.”); Jodi H. Cohen & Tamar Z. Semerjian, *The Collision of Trans-Experience and the Politics of Women’s Ice Hockey*, 10 INT’L J. TRANSGENDERISM 133, 138 (2008) (describing a male-to-female transsexual/recreational hockey player’s account of her physical changes due to hormone therapy to include a loss of at least two inches in height).

226. Transitioned men (i.e., female-to-male transsexuals) have testosterone levels that are comparable or higher than those of physically born men. Devries, *supra* note 197, at 12. Under the common dosage regime, in which testosterone is administered every fourteen days, transitioned men have higher levels of testosterone than physically born men for five to nine days after injection, after which, testosterone levels become comparable until the next injection; however, a dosage regime has recently been developed that requires only four injections a year and provides a much more even dose. *Id.* at 11. Under this new regime, testosterone levels between transitioned men and physically born men are comparable at all times. *Id.*

227. *Id.* at 12. Notably, however, there is a wide range of muscle area in both groups. *Id.*

228. *Id.*



that those that appear in the IOC policy,<sup>229</sup> the CHSAA policy,<sup>230</sup> and the CIAC policy,<sup>231</sup> since the combined administration of estrogen and androgen-blockers produced physical similarities between transitioned and physically-born women, and the administration of testosterone produced physical similarities between transitioned and physically-born men. Without evidence that surgical requirements are necessary to produce physical similarities that might be relevant in sports, policies that include a surgical requirement are vulnerable to legal challenge, as surgery does not appear related, let alone narrowly tailored, to any purpose, rational or otherwise. Correspondingly, a requirement that competitors have state-recognition of their transitioned sex, such as the NCAA position,<sup>232</sup> may similarly lack scientific justification, in light of the fact that some states require surgery in order to change gender classification.<sup>233</sup>

A final consideration in this vein relates to the length of time a hormone regimen should be required before a transgender athlete is allowed to participate as their transitioned sex. As discussed above, studies show comparable physical features between transitioned and physically-born women after one year of treatment with synthetic estrogen and anti-androgens.<sup>234</sup> As there are no studies showing additional changes after one year of such treatment, a two-year waiting period, such as required by IOC, CHSAA, and the CIAC, is not justified by medical science. Policies should also account for the different considerations hormone treatments pose for both transitioned men and transitioned women. The IOC, CHSAA, and CIAC policies appear on their face to impose identical requirements on each, requiring—in addition to surgery and legal recognition—two years of hormone therapy for eligibility to men's sports.<sup>235</sup> It is unclear as a matter of science why any waiting period is required for transitioned men, given concerns that the presence, not absence, of masculine features

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229. See *supra* note 122 and accompanying text.

230. See *supra* note 155 and accompanying text.

231. See *supra* note 149 and accompanying text.

232. See *supra* note 129 and accompanying text.

233. See *supra* notes 131–38 and accompanying text.

234. See *supra* notes 223–225 and accompanying text.

235. See *supra* notes 122, 149, 152 and accompanying text.

is the basis for presuming their competitive advantage. Moreover, existing policies do not address the reality that synthetic testosterone—the fundamental element to female-to-male transition—is a banned, performance-enhancing substance according to the World Anti-Doping Agency<sup>236</sup> and the NCAA.<sup>237</sup> The NCAA provides medical exemptions for synthetic testosterone to athletes with medical diagnosis of hypogonadism, a testosterone deficiency resulting from disorders of the testes, the hypothalamus, or the pituitary gland.<sup>238</sup> The NCAA and other governing bodies of sport should clarify doping policies to ensure that transitioned men competing in men's sports receive a similar medical exemption for synthetic testosterone.

Whether this medical exception should apply to transitioned and transitioning men who want to participate in women's sports is another question that existing transgender athlete policies have not addressed. Over time, synthetic testosterone produces muscular and other physical benefits in transitioned men.<sup>239</sup> But it is not clear that testosterone has an immediate or short term effect.<sup>240</sup> Thus, there is not a scientific basis to exclude a transitioning man from women's sport after a single administration of testosterone. It may be reasonable for a policy to allow a transitioning male athlete to participate in women's sport for a short time (perhaps to finish a season) after commencing treatment. The length of time, for which a policy should allow such participation, however, cannot be scientifically determined, in light of the indeterminacy of testosterone and competitive advantage, as well as the variation of physical features among natal women. Policymakers would have to bring factors other than science to bear on this question.

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236. WORLD ANTI-DOPING AGENCY, THE 2009 PROHIBITED LIST INTERNATIONAL STANDARD 2-3 (Sept. 20, 2008), [http://www.wada-ama.org/rtecontent/document/2009\\_Prohibited\\_List\\_ENG\\_Final\\_20\\_Sept\\_08.pdf](http://www.wada-ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf); see also Reeser, *supra* note 102, at 699.

237. NCAA *Medical Exceptions*, NCAA.ORG (Mar. 11, 2008), <http://www.ncaa.org/wps/wcm/connect/309567004e0b8a5d9ad5fa1ad6fc8b25/medicalexcptions080311.pdf?MOD=AJPERES&CACHEID=309567004e0b8a5d9ad5fa1ad6fc8b25>.

238. *Id.*

239. Natasha Singer, *Does Testosterone Build a Better Athlete?*, N.Y. TIMES, Aug. 10, 2006, at G6.

240. *Id.*

C. *The Role of Educational Values in the Formation of Transgender Athletic Participation Policies*

Educators have long recognized that athletics enhance the education of individual students and provide benefits to schools and communities as well. Because educational institutions provide athletic programs in pursuit of educational goals, policymakers must consider transgender athlete participation with the educational purpose of athletics in mind. This section will first examine the educational justifications for scholastic and collegiate athletics. It will then argue that these justifications are served by policies that are inclusive of transgender athletes because such policies promote the educational purpose of athletics, as they relate to transgender athletes, their teams and their communities.

1. Collegiate and Scholastic Sports Purport an Educational Purpose

In marked and deliberate contrast from governing bodies of professional athletics and athletics in other elite, non-scholastic contexts such as the Olympics, educational institutions provide extracurricular athletic opportunities, because they perceive these opportunities to have an educational value consistent with an academic mission. For example, the CIAC, discussed above, “believes that interscholastic athletic programs and competition are an integral part of a student’s academic, social, emotional and physical development.”<sup>241</sup> The CHSAA similarly believes that athletic opportunities that are “fun” and “education-based” enhance the academic mission of schools by teaching life skills, perspective, and the development of positive character.<sup>242</sup> It is common for college athletic department mission statements to espouse athletic participation that augments the institution’s academic purpose, by supporting individual students’ intellectual, physical, character and ethical, and social development.<sup>243</sup> Some mission statements

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241. CIAC HANDBOOK, *supra* note 149, at 9.

242. COLO. HIGH SCH. ACTIVITIES ASS’N, CHSAA MISSION STATEMENT, <http://chsaa.org/home/pdf/Mission-Statement-fnl.pdf>.

<sup>243</sup> See, e.g., *Mission Statement*, W. NEW ENG. C., [http://www.wnecgoldenbears.com/sports/2009/8/6/GEN\\_0806095521.aspx?tab=missionstatement](http://www.wnecgoldenbears.com/sports/2009/8/6/GEN_0806095521.aspx?tab=missionstatement) (last visited Jan 3, 2011); *Athletic Compliance Office Mission*, TEX. A&M,

address particular benefits of participation, such as teamwork, self-knowledge, self-esteem, and citizenship.<sup>244</sup> Many statements acknowledge the importance of diversity as a means to further these objectives.<sup>245</sup>

The relationship between educational institutions and athletics traces back to education philosopher John Dewey's 1916 publication, *Democracy and Education*, in which he argued that the role of education was not merely to deliver knowledge, but to integrate students into the social environment and cultivate their participation in a democratic society.<sup>246</sup> Dewey's holistic philosophy incorporated physical education, not just as an "agreeable diversion[]" from tedious school work that improved students' morale and attendance, but as a psychological and social benefit as well:

When exercises which are prompted by these instincts are a part of the regular school program, the whole pupil is engaged, the artificial gap between life in school and out is reduced, motives are afforded for attention to a large variety of materials and processes distinctly educative in effect, and cooperative associations which give information in a social setting are provided.<sup>247</sup>

Expanding on Dewey's philosophy, other educators promoted the socializing function of sport, including its capacity to develop character traits such as "obedience, subordination, self-sacrifice, cooperation, friendliness, a spirit

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<http://www.aggieathletics.com/compliance/mission-statement.html> (last visited Jan 3, 2011).

<sup>244</sup> See, e.g., *The Mission of Springfield College Athletics*, SPRINGFIELD C. PRIDE, <http://www.spfldcol.edu/homepage/athletics.nsf/Headline/B94117447784C5598525776E0049AD4C> (last visited Jan. 3, 2011); *Mission Statement*, SMITH PIONEERS, [http://www.smithpioneers.com/sports/2010/10/4/GEN\\_1004103326.aspx?tab=missionstatement](http://www.smithpioneers.com/sports/2010/10/4/GEN_1004103326.aspx?tab=missionstatement).

<sup>245</sup> See, e.g., *Department of Athletics and Physical Education Mission Statement*, CORNELL BIG RED, <http://cornellbigred.com/sports/2007/7/11/MissionStatement.aspx?tab=missionstatement> (last visited Jan. 3, 2011); *Mission Statement and Diversity Statement*, UNHWILDCATS.COM, [http://www.unhwildcats.com/releases/ad\\_welcome](http://www.unhwildcats.com/releases/ad_welcome) (last visited Jan. 3, 2011); *Athletic Department Mission*, U. TULSA ATHLETIC DEP'T, <http://www.tulsa-hurricane.com/athletic-dept/tuls-mission-statement.html> (last visited Jan. 3, 2011); *Mission Statement*, S. GA. C., <http://www.sgc.edu/athletics/mission.html> (last visited Jan. 3, 2011).

<sup>246</sup> JOHN DEWEY, *DEMOCRACY AND EDUCATION*, Sec. 15 (1916).

<sup>247</sup> *Id.*

of fair play, and sportsmanship.”<sup>248</sup> This contributed to a shift in educators’ focus from physical education, which promoted health and fitness, to athletics, which promoted social development objectives as well.<sup>249</sup> Jesse Feiring Williams in the 1930s, for example, advocated education *through* physical activity, rather than education *of* physical activity. Williams’s philosophy—still “alive and well in the twenty-first century”<sup>250</sup>—espouses that physical education and sports develop character and skills that provide lifelong benefits. The 7.5 million high-school students who participate in interscholastic athletics today are a testament to the staying-power of these ideas.<sup>251</sup>

At the same time that primary and secondary schools were beginning to endorse extracurricular athletics, colleges and universities also began to view athletics as something to not merely tolerate, but to embrace for its potential to provide character education.<sup>252</sup> Universities also recognized that the competitiveness of sports mirrored the business world for which many students were being trained.<sup>253</sup> In 1905, colleges and universities formed the organization eventually known as

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248. BETTY SPEARS & RICHARD SWANSON, HISTORY OF SPORT AND PHYSICAL EDUCATION IN THE UNITED STATES 181, 201, 208 (3d ed. 1988); Ellen Gerber, *The Controlled Development of Collegiate Sport for Women 1923-1936*, 2 J. SPORT HIST. 1, 13 (1975) (citing AM. PHYSICAL EDUC. REV., THE AIMS AND SCOPE OF PHYSICAL EDUCATION (1920)).

249. ROBERT MECHIKOFF, A HISTORY AND PHILOSOPHY OF SPORT AND PHYSICAL EDUCATION: FROM ANCIENT CIVILIZATIONS TO THE MODERN WORLD 221 (5th ed. 2010).

250. *Id.* at 234.

251. See NAT’L FED’N OF STATE HIGH SCH. ASS’NS, 2008-09 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 48, <http://www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3506>. The survey, which did not measure participation by transgender athletes, reported participation in competitive high school athletics by approximately 3.1 million girls and 4.4 million boys. *Id.*

252. See Frank W. Carsonie, *Educational Values: A Necessity of Reform for Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 661, 671 (1991). The character-producing role of sport was particularly aimed at developing masculine character in men. See BURSTYN, *supra* note 5, at 45. Today, however, arguments about character development through sport should be applied on a gender-neutral basis.

253. Carsonie, *supra* note 252, at 671. Rowing and football were among the first intercollegiate sports, both emerging among Ivy League colleges in the mid-1800s. See RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 3-4 (1988) (describing the 1852 Harvard-Yale regatta, the first intercollegiate athletic event in the United States); BURSTYN, *supra* note 5, at 72 (describing the institutionalization of football at Yale). Walter Camp, the father of intercollegiate football and the head coach at Yale, promoted the educational value of the sport when he stated, “[f]ootball has come to be recognized as the best school for instilling into the young man those attributes which business desires.” *Id.* at 72.

the NCAA to coordinate intercollegiate competition and protect the student-athlete from dangers and abuse as a result of unchecked competition.<sup>254</sup> Though critics today argue that the NCAA has fostered a model of sport that sublimates educational values in favor of commercial interests,<sup>255</sup> the organization and its member institutions all purport to adhere to core values that include the “paramount” educational experience of the student-athlete.<sup>256</sup>

## 2. Policies Should Ensure that Transgender Students Receive the Educational Benefits of Sport

Not only have educational institutions historically and continuously justified extracurricular athletics by espousing their positive relationship to education, there is also contemporary research and theory that supports these claims. Studies have found that student athletes enjoy physical benefits, such as reduced risk of obesity, heart disease, and diabetes, and reduced use of cigarettes and narcotics.<sup>257</sup> Athletic participation also provides “socioemotional benefits,” as athletes report greater self-knowledge, ability to manage emotions, and psychological resiliency.<sup>258</sup> Sports can foster such social skills as collaboration, trust, empathy and responsibility.<sup>259</sup> Participation in sports, like other shared

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254. See *The History of the NCAA*, NCAA.ORG, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/about+the+ncaa/overview/history.html](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/overview/history.html) (last visited Nov. 12, 2010).

255. See KNIGHT FOUNDATION, *A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION* 21 (June 2001); see also generally Carsonie, *supra* note 252; Rodney K. Smith, *An Academic Game Plan for Reforming Big Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213 (1990).

256. *Our Mission*, NCAA.ORG, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/About%20The%20NCAA/Overview/mission.html](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About%20The%20NCAA/Overview/mission.html) (last visited Nov. 12, 2010).

257. WOMEN'S SPORTS FOUND., *HER LIFE DEPENDS ON IT II* 9–35 (Dec. 2009), available at <http://www.womenssportsfoundation.org/Content/Research-Reports/Her-Life-Depends-On-It-II.aspx>; Suzanne Le Menestrel & David F. Perkins, *An Overview of How Sports, Out-of-School Time, and Youth Well-Being Can and Do Intersect*, 115 NEW DIRECTIONS FOR YOUTH DEV. 13, 15 (2007).

258. Le Menestrel & Perkins, *supra* note 257, at 16; WOMEN'S SPORTS FOUND., *supra* note 257, at 40–44.

259. See Richard Bailey et al., *The Educational Benefits Claimed for Physical Education and School Sport: An Academic Review*, 24 RES. PAPERS EDUC. 1, 9–14 (2006) (citing numerous studies); see also Le Menestrel & Perkins, *supra* note 257, at 16–17; Ann Rosewater, *Learning to Play and Playing to Learn: Organized Sports and Educational Outcomes*, EDUC. DIG., Feb. 2009, 1, 10–12, available at

activities, may also provide access to “social capital”—the resources from one’s social network—that facilitate students’ cognitive and social development and offer protection against social isolation, and foster attachment to the community.<sup>260</sup> It is perhaps these benefits of athletic participation that explain findings that, while participating in athletics, students were less likely to report feelings of hopelessness and suicide.<sup>261</sup>

Research has also linked sport and physical activity to such positive academic outcomes as increasing regular attendance to classes, completing more years of education, and earning higher grades.<sup>262</sup> Though it is difficult for such studies to determine the extent to which this is a causal relationship rather than correlative one, it is possible that athletic participation promotes academic success by fostering students’ attachment to the school community, thereby reducing absenteeism and attrition, or by increasing students’ physical activity, which can improve their attention and memory.<sup>263</sup> One recent study of female student-athletes controlled other factors that could have influenced their educational attainment, including parents’ education, family income, type of school, student expectations, family size, race, high school test scores, college grades and whether the student continued their athletic career at college, and found that former high school athletes were forty-two percent more likely to graduate from college.<sup>264</sup>

Although no research has yet examined whether participation in sports produces positive outcomes in

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<http://www.californiahealthykids.org/articles/play.pdf>.

260. Richard Bailey, *Evaluating the Relationship Between Physical Education, Sport and Social Inclusion*, 57 EDUC. REV. 71, 74–75 (2005) (discussing social capital as developed by Pierre Bourdieu, James Coleman, and Robert Putnam).

261. Lindsay A. Taliaferro et al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, 78 J. SCH. HEALTH 545, 549 (2008) (“Sport participation was significantly associated with reduced odds for hopelessness and suicidal behavior among both genders.”). It is important to note that this study did not study, and does not claim that sport participation *causes* low rates of suicide and hopelessness; while a causal effect is possible, it may also be the case that hopeless and suicidal youth are less likely to join sports. *See id.*

262. Le Menestrel & Perkins, *supra* note 257, at 17; WOMEN’S SPORTS FOUND., *supra* note 257, at 48–53.

263. *See* Le Menestrel & Perkins, *supra* note 257, at 17; *see also* Bailey et al., *supra* note 259, at 16.

264. Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation of Females’ Educational Attainment*, 38 YOUTH & SOC’Y 443, 454 (2007).

transgender youth, there is research that suggests that the physical, mental, and social benefits of sport is greater for those in other disadvantaged groups.<sup>265</sup> As one commentator explains, “[f]or children who are on the margin (e.g., poor, learning-disabled, obese, gay), sport participation can minimize feelings of difference and isolation and increase the likelihood of attending college.”<sup>266</sup> Sport can provide athletes with a supportive network of teammates that may help mitigate feelings of isolation and offer some protection against harassment. The physicality of sports can contribute to a positive self-image, and the social status that comes with being an athlete may foster acceptance.<sup>267</sup>

These benefits of sport participation are particularly salient to the “especially vulnerable population”<sup>268</sup> of transgender youth. Transgender students face an elevated risk of social isolation, as shown by reports of the high rates at which transgender students experience verbal and physical abuse and harassment at the hands of their peers.<sup>269</sup> Studies also show that transgender youth are at a higher risk for suicide and other life threatening behaviors, due to such factors as rejection by parents and peers, abuse and harassment, feelings of isolation, and low body-esteem.<sup>270</sup> As a result, many transgender youth drop out of school, run away, and engage in risky and life-threatening behavior for survival.<sup>271</sup> If participation in sports does provide the benefits

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265. Bailey, *supra* note 260, at 78–79, 82.

266. Rosewater, *supra* note 259, at 1.

267. See, e.g., Martha E. Ewing et al., *The Role of Sports in Youth Development*, in PARADOXES OF YOUTH AND SPORT 35–36 (Margaret Gatz et al. eds., 2002) (noting positive relationship between physical competence, interpersonal relationships, and peer acceptance); see *id.* at 40 (describing findings that athletic participation enhanced popularity of African American and Hispanic girls and boys as well as a modest affect on popularity of high school girls).

268. Arnold Grossman & Anthony R. D’Augelli, *Transgender Youth: Invisible and Vulnerable*, 51 J. HOMOSEXUALITY 111, 112–13 (2006).

269. See *id.* at 122; see also GAY, LESBIAN & STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCE OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS xi (2009), [hereinafter GLSEN], available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1375-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf). Among GLSEN’s findings are those that nearly nine out of ten transgender students were verbally harassed because of their appearance, two-thirds felt unsafe in school, half had been physically harassed in the last year, and a quarter had been physically assaulted in the last year. *Id.*

270. Arnold H. Grossman & Anthony R. D’Augelli, *Transgender Youth and Life-Threatening Behavior*, 37 SUICIDE & LIFE-THREATENING BEHAV. 527, 528 (2007).

271. Grossman & D’Augelli, *supra* note 268, at 113.



that research suggests, it is possible that sports can provide transgender students with resiliency to mitigate the risks associated with isolation, low body-esteem, suicide, problems in school, and life-threatening behavior. To be sure, sport is not an easy or guaranteed antidote to these problems. A transgender athlete may face as much harassment from teammates as from anyone else; however, schools are already under legal, as well as moral, obligations to protect students against harassment.<sup>272</sup>

Harassment, therefore, should not be a reason for schools to fail to strive to ensure that sports are a part of the “inclusive school communities” recommended by researchers as a bulwark against social isolation and related risks faced by transgender youth.<sup>273</sup> Indeed, transgender athletes who have participated on single-sex teams consistent with their gender identity have reported that inclusion was validating<sup>274</sup> and sport offered a “respite” or “escape” from the stress and turmoil associated with transition.<sup>275</sup> So long as interscholastic athletics exist for the positive effect of sports on students’ physical, mental, and social development, participation policies should be particularly inclusive of students, including transgender students, who are particularly in need of these benefits.<sup>276</sup>

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272. Schools must address and protect students from sexual harassment by peers. *See generally* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (holding that a school’s deliberate indifference to peer-on-peer sexual harassment violates Title IX); *see also* Seiwert v. Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942 (S.D. Ind. 2007) (extending Title IX liability to peer harassment motivated by the victim’s gender identity); Snelling v. Fall Mountain Reg’l Sch. Dist., No. 99-448-JD, 2001 WL 276975 (D.N.H., Mar. 21, 2001) (same); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000). Thus, risk of peer harassment is not a valid argument against policies to include transgender students in athletics.

273. *See* Arnold H. Grossman et al., *Lesbian, Gay, Bisexual and Transgender Youth Talk About Experiencing and Coping with School Violence: A Qualitative Study*, 6 J. LGBT YOUTH 24, 42–43 (2009); *see also* GLSEN, *supra* note 269, at 48 (recommending that schools “consider how policies and practices related to traditional notions of gender may contribute to a hostile school climate” for transgender youth).

274. Teetzel, *supra* note 217, at 244 (quoting remarks of Alyn Libman). *See supra* text accompany notes 90–91 for mention of Alyn Libman.

275. Cohen & Semerjian, *supra* note 225, at 140 (describing hockey as transsexual athlete’s “respite” and “escape” from the gender turmoil she experienced during transition); *id.* (“I was oscillating between the two, do I be a girl *or* do I play hockey, what do I do? Woman—hockey player—woman—hockey player, and I constantly bounced back and forth, and it wasn’t until I finally realized that I could do both that I felt free.”).

276. This argument can also be made to support the inclusion in athletics of other

### 3. Policies Should Promote the Educational Benefits of Diverse and Inclusive Teams

Policies that operate to include transgender athletes not only promote the educational values of sport for individual participants, but for teams and communities as well. Schools sponsor athletics in part to foster understanding and acceptance among students of diverse backgrounds and demographics.<sup>277</sup> Such expectations are consistent with the “Contact Hypothesis,” which proposes that, in the right context, interpersonal contact between members of majority and minority groups can effectively reduce stereotypes, discrimination, and prejudice.<sup>278</sup> For intergroup contact to produce these effects, members of the majority and minority groups must have equal status, focus on common goals, engage in an activity that requires interdependency and cooperation to achieve these goals, and receive support in their contact by customs, law, or authority.<sup>279</sup> The Contact Hypothesis is particularly relevant to sports, as members of a team have equal status as players, engage in the common pursuit of team success (like scoring a goal), rely on each other to play different but complementary roles, and receive encouragement to cooperate in pursuit of their goals.<sup>280</sup>

Consistent with the Contact Hypothesis, there are many examples of successfully diverse athletic teams in which contact between majority and minority members has fostered understanding and acceptance. Jackie Robinson, who famously integrated Major League Baseball when he was signed to the Brooklyn Dodgers in 1947, is perhaps the most iconic example.<sup>281</sup> Though his white teammates were hostile

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marginalized minority groups as well. See, e.g., Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT’L L.J. 249, 264–74 (2009) (arguing that sport participation provides particular benefits to children with disabilities).

277. See *supra* Part III.C.1.

278. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 281 (Addison-Wesley ed., 1954); see also Anne M. Bowen & Martin J. Bourgeois, *Attitudes Toward Lesbian, Gay, and Bisexual College Students: The Contribution of Pluralistic Ignorance, Dynamic Social Impact, and Contact Theories*, 50 J. AM. C. HEALTH 91, 91–92 (2001).

279. See ALLPORT, *supra* note 278, at 281.

280. Allport himself used the example of a “multi-ethnic athletic team” as one where contacts may “reach below the surface . . . to be effective altering prejudice.” *Id.* at 276.

281. See James R. Devine, *The Past as Moral Guide to the Present: The Parallel Between Martin Luther King Jr.’s Elements of a Nonviolent Civil Rights Campaign and Jackie Robinson’s Entry onto the Brooklyn Dodgers*, 3 VILL. SPORTS & ENT. L.J. 489,

to Robinson's presence at first, playing on the same team as Robinson provided them opportunity and occasion to defend, support, and eventually embrace him as a member of the team.<sup>282</sup> Robinson also garnered the respect and admiration of black and white fans alike, which some scholars suggest may have helped cultivate a broad-based coalition opposed to racial segregation and in support of civil rights.<sup>283</sup>

Although the example of Jackie Robinson is unique in its context and cultural significance, contemporary research and examples also suggest that diverse sports teams have transformative potential. Researchers studying sexual orientation and stereotypes in women's college sports report several examples of lesbian and bisexual athletes whose openness has positively affected the team.<sup>284</sup> For example, one interviewee reported that playing on a team that included openly lesbian members changed her life by helping her to shed the homophobic views that she cultivated growing up void of contact with openly-gay people.<sup>285</sup> These findings are

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548–50 (1996).

282. *Id.* at 549. Devine describes how racist taunts directed at Robinson from members of an opposing team unified the Dodgers:

Finally, in the last game of this three game series, Dodger second baseman Eddie Stanky, one of those who originally petitioned against Robinson joining the team, reportedly screamed toward the Phillies' dugout, "Listen you yellow-bellied cowards, . . . why don't you yell at somebody who can answer back?" Other players soon stepped forward. In an early season road game, pregame taunts again greeted Robinson and those who were willing to be on the same team with him. Kentucky-born Dodger captain Pee Wee Reese, who grew up in a segregated neighborhood and who could recall his father showing him where they hanged "niggers" who got out of line, stopped his warm up, went over to first base and put his arm around Robinson's shoulders in an indication of solidarity with his teammate. When the press got word of the verbal abuse facing Robinson, support galvanized behind his actions.

*Id.*

283. *Id.* at 553 (noting that the generation of baby-boomers who grew up rooting for the integrated Dodgers went on to become Freedom Riders and participate in the March on Washington); Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 251 (1998); J. Gordon Hylton, *American Civil Rights Laws and the Legacy of Jackie Robinson*, 8 MARQ. SPORTS L.J. 387 (Spring 1998).

284. See Kerrie J. Kauer & Vikki Krane, "Scary Dykes" and "Feminine Queens": Stereotypes and Female Collegiate Athletes, 15 WOMEN SPORT & PHYSICAL ACTIVITY J. 42, 51–52 (2006).

285. *Id.* Notable, however, the researchers also found that some straight teammates' reactions reflected more tolerance than acceptance; concluding, for example, that statements that their lesbian and bisexual teammates' sexual orientation "doesn't matter" suggests that they "did not truly appreciate the significance of their sexual identity." *Id.* at 52.

consistent with other studies that found people are more accepting and open-minded of lesbian and gay individuals when they have had interpersonal contact with a member of those minority groups,<sup>286</sup> as well as with other research and examples from the realm of sports.<sup>287</sup> Though there is little research testing the Contact Hypothesis with respect to transgender individuals, and no such research with regard to transgender athletes, research that has been conducted suggests that frequent and more intimate contact with transgender individuals is likely to reduce prejudice.<sup>288</sup> Thus, given the likelihood that contact can reduce prejudice against transgender individuals, as well as evidence that the Contact Hypothesis has worked in sports setting to reduce prejudice about other sexual minorities, it is reasonable to anticipate that sports teams that integrate transgender athletes can provide a forum to reduce prejudice and increase tolerance

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286. See *id.* at 53 (citing Gregory M. Herek, *Heterosexuals' Attitudes Towards Lesbians and Gay Men: Does Coming Out Make a Difference?*, in *A QUEER WORLD: A LESBIAN AND GAY STUDIES READER* (M. Duberman ed., 1997)); see also Bowen & Bourgeois, *supra* note 278, at 94 (noting that college students who lived in residence halls with openly gay or lesbian students had less prejudice against gays and lesbians); see generally Gregory M. Herek, & John P. Capitanio, "Some of My Best Friends:" *Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 *PERSONALITY & SOC. PSYCHOL. BULL.* 412, 418 (1996) (noting that heterosexual individuals who had interpersonal contact with gay men or lesbians expressed "significantly more favorable attitudes toward gay men and lesbians," and those with multiple and more intimate contacts had the most favorable attitudes).

287. Emily Roper & Erin Halloran, *Attitudes Toward Gay Men and Lesbians Among Heterosexual Male and Female Student-Athletes*, 57 *SEX ROLES* 919, 924-25 (2007) (finding that male and female college athletes who had significant contact with gay and lesbian teammates had significantly more positive attitudes towards gays and lesbians); see also Katie Thomas, *College Team Teaches Lesson in Acceptance*, *N.Y. TIMES*, May 9, 2010, at SP.1 (reporting on acceptance experienced by the captain of the SUNY-Oneonta's men's lacrosse team upon coming out to them as gay); John Buccigross, "We Love You, This Won't Change a Thing," *ESPN*, [http://sports.espn.go.com/nhl/columns/story?columnist=buccigross\\_john&id=4685761](http://sports.espn.go.com/nhl/columns/story?columnist=buccigross_john&id=4685761) (last updated Dec. 2, 2009) (reporting on the positive effect of openly-gay team manager Brendan Burke on the University of Miami (Ohio) men's hockey team); Rick Reilly, *The Biggest Play of His Life*, 92 *SPORTS ILLUSTRATED*, May 8, 2000, at 114 (reporting on acceptance and tolerance on the Masconomet High School (Topsfield, Mass.) football team of its openly-gay captain, Corey Johnson).

288. Mark E. King et al., *Contact Reduces Transprejudice: A Study on Attitudes Towards Transgenderism and Transgender Civil Rights in Hong Kong*, 21 *INT'L J. SEXUAL HEALTH* 17, 25 (2009) (finding a positive correlation between respondents' contact with transgender individual and their positive attitudes about transgenderism and transgender civil rights); Nicola Tee & Peter Hegarty, *Predicting Opposition to the Civil Rights of Trans People in the United Kingdom*, 16 *J. CMTY. & APPLIED SOC. PSYCHOL.* 70, 75-76 (2006) (same).

and acceptance of this marginalized minority.

Importantly, however, pursuing the benefits of diversity is not without risk. Research suggests that minority members of diverse athletic teams may be isolated, singled out for different treatment, or have other negative experiences.<sup>289</sup> Therefore, schools should not expect that the benefits of diversity will result automatically from the inclusion of transgender students, or any minority. Schools must ensure that the promulgation of inclusive policies is accompanied by efforts to promote education, understanding, tolerance, and acceptance of transgender athletes. For example, the CHSAA reportedly educated athletic directors of its member institutions with apparent success:

We did a series of educational outreaches to give them a base of knowledge about what was coming, and they bought into it. Sometimes when you talk about transgender issues, people go, "Oh, my God, we're not going to have that conversation." But, educationally, our athletic directors are on board — whether they agree with it or not.<sup>290</sup>

Schools should also guard vigilantly against harassment and abuse of transgender athletes by their teammates or coaches by implementing school-wide, anti-harassment policies and ensuring that such policies are enforced in the extracurricular context of athletics as well as the rest of the school's programs and activities. To be effective in this regard, anti-harassment policies should, at a minimum, enumerate gender identity as a protected category, identify prohibited conduct, include means for reporting violations of the policy, ensure that reported violations are promptly investigated, and protect those who report violations from further harassment or retaliation.<sup>291</sup> Advocates also recommend that educators receive professional development and training to improve their intervention skills against

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289. See George B. Cunningham et al., *Personal Identity and Perceived Racial Dissimilarity Among College Athletes*, 12 GROUP DYNAMICS: THEORY, RES. & PRAC. 167, 174 (2008). But see Kauer & Krane, *supra* note 284, at 53 (noting that all but one of the fifteen female athletes studied reported a team atmosphere that was accepting of openly lesbian and bisexual members).

290. Popke, *supra* note 139 (quoting Rhonda Blanford-Green, assistant commissioner of the CHSAA).

291. See, e.g., *Anti-Bullying/Anti-Harassment Policies*, IOWA DEP'T OF EDUC., [http://www.iowa.gov/educate/index.php?option=com\\_content&task=view&id=1154](http://www.iowa.gov/educate/index.php?option=com_content&task=view&id=1154) (last visited Nov. 12, 2010).

harassment and for inclusion of transgender students,<sup>292</sup> which can certainly enhance the benefits and mitigate the risks to transgender athletes.

Correspondingly, while the inclusion of transgender athletes can provide the opportunity to promote educational values to the athletes' teams, policies that include transgender athletes can promote educational values even before any transgender athletes actually avail themselves of the policy. Because education and sports are highly visible and salient sites of cultural production,<sup>293</sup> policies in this context have the power to influence societal norms. Thus, a policy of inclusion in the context of school sports can serve as an important tool for legitimizing transgender identities and dismantling gender stereotypes at the community level.<sup>294</sup>

#### 4. Policies Should Promote Participation Over Competition

Policies that include transgender athletes can promote educational values by mitigating the win-at-all-costs mentality that has crept into scholastic sports programs and undermines the educational purpose of athletics. According to research, sports that are recreation-focused are more beneficial to participants' psychological well-being than competitive athletics, as recreation-based activities draw participants for intrinsically-motivated reasons such as health, relationships, and personal growth, while competitive programs promote participation for extrinsic reasons like wealth, fame, and image.<sup>295</sup> Athletic programs that convey to participants an excessive pressure to win produce negative results, such as low self-esteem and lack of attachment, that are antithetical to the educational purpose of sports.<sup>296</sup> For these reasons, educators should strive for "developmentally

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292. GLSEN, *supra* note 269, at 48.

293. See, e.g., Janice M. Beyer & David R. Hannah, *The Cultural Significance of Athletics in U.S. Higher Education*, 14 J. SPORT MGMT. 105, 106 (2000).

294. GLSEN, *supra* note 269, at 48 ("Practices and policies that are sensitive to the experiences of transgender students would not only serve to improve their school experiences, but can send an important message to all members of a school community that individuals will not be limited nor defined merely by their gender.").

295. Nikos L.D. Chatzisarantis & Martin S. Hagger, *The Moral Worth of Sport Reconsidered: Contributions of Recreational Sport and Competitive Sport to Life Aspirations and Psychological Well-Being*, 25 J. SPORTS SCI. 1047, 1055 (2007).

296. Bailey et al., *supra* note 259, at 13.

focused” athletic programs that discourage emphasis on competition and winning in favor of a focus on developing physical competence, and promoting “physical activity, socioemotional development,” life skills, sportsmanship and good health.<sup>297</sup>

Excluding transgender athletes from participation in sports consistent with their gender identity signals to all student-athletes that competition and winning is more important than recreation and participation. As discussed above, the common justification for such exclusion is that the sexes must be strictly separated to ensure competitive equity. This is, of course, false. For one thing, as discussed above, sex is an imperfect proxy for physical differences that might create advantages in sports.<sup>298</sup> And in team sports, an individual player with a physical advantage does not necessarily translate into a net advantage for the team, which also might include members with disadvantageous physical traits. Moreover, considering economic, social, and other advantages that may exist between teams or among members of the same team further blurs the concept of the equal playing field.<sup>299</sup> What is perhaps most harmful about schools’ public pursuit of an equal playing field is their signals that winning is more important than participation. If schools and, by extension, athletic associations truly value the educational purpose of sport—which is demonstrably stronger in programs that are less competitive and more participatory—they should be willing to allow a transgender athlete to play on the team other than his or her natal sex, even if transgender athletes or their teams have some demonstrable, concrete advantage.<sup>300</sup> When policies operate to exclude transgender athletes, schools are signaling that it is better to exclude athletes than to run even the slightest risk that competitive inequity would somehow jeopardize or taint a

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297. See Le Menestrel & Perkins, *supra* note 257, at 17.

298. See *supra* Part III.A.

299. See, e.g., Teetzel *supra* note 217, at 231 (“We must keep in mind that sport cannot be completely fair because, if this were the case, there would be no winners and losers.”); Nicholas Dixon, *On Winning and Athletic Superiority*, in *ETHICS IN SPORT* 49, 67 (William J. Morgan et al. eds., 2007) (“Bad refereeing decisions, cheating, gamesmanship, and bad luck can result in a loss for the team that performed better and deserved to win.”).

300. By extension, this argument would apply to cisgendered athletes who want to play on opposite-sex teams.

team's victory.

### 5. Educational Values: A Conclusion

As discussed earlier in this Part, both law and science fail to conclusively settle questions regarding the degree to which educational institutions should accommodate transgender athletes in sex-segregated sports. Inclusion of transgender athletes can provide educational benefits to the individual athletes, their teams, and their communities. These values should contribute to the development of policies by picking up where law and science leave off. Practically, this means that where there is no legal or scientific reason to exclude transgender athletes from participating in athletics consistent with their gender identity, rather than natal sex, educational values should govern and schools and institutions should allow these athletes to play.

## CONCLUSION

To be most consistent with the three areas of consideration discussed above—law, science, and education—policies governing participation by transgender athletes should generally allow transgender athletes to compete in a manner consistent with their gender identity, as the WIAA policy and MHRC's draft guidance propose.<sup>301</sup> This default rule acknowledges the avowed primary purpose of education in college and scholastic sports, and enhances the educational value of athletics through participation, particularly participation by minority groups, including transgender individuals. It also incorporates the science-based considerations about the indeterminacy of sex categories and the imprecision of sex as a proxy for physical features and competitive advantage, as well as principles of antidiscrimination law that disfavor arbitrary differential treatment.

Policymakers should carve exceptions from this default rule only when doing so is consistent with the educational, scientific, and legal considerations discussed above. For example, governing bodies may restrict the policy to transgender athletes with a genuine transsexual gender

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301. See *supra* notes 139–48, 159–61 and accompanying text.



identity. Policymakers can narrowly tailor such a limitation to the objective of ensuring that (a) the sex-segregated model of sport persists<sup>302</sup> and (b) the athletes are not claiming a gender identity for the purpose of sport that is inconsistent with the identity they claim in other aspects of their lives. This limitation addresses the common, though for the most part baseless,<sup>303</sup> concern that women's sports are vulnerable to infiltration by men pretending to be women by granting competitors and other stakeholders the right to present evidence that the athlete's claimed-gender identity is fraudulent or inconsistent with the identity the athlete claims outside of sport.

Policymakers should be skeptical of imposing other limitations or exceptions to the default rule. Any requirement for students to undergo surgical transition or legal identity change before participating in sports of their transitioned sex is not justified by legal or scientific considerations.<sup>304</sup> Imposing a surgical requirement as a condition for participation in high school sports, as the CIAC policy does, defies educational values by operating as an effective ban against transgender participation, given that treating psychologists do not recommend surgical transition for most youths.<sup>305</sup>

Policymakers should also acknowledge that any requirement that transgender athletes undergo a hormonal

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302. Though this Article criticizes the sex-segregated model of sport, *see supra* Part I, its focus is on finding a place for transgender athletes within that model, and thus accepts for these purposes that the sex-segregated model is legally, scientifically, and educationally justifiable. For persuasive arguments against the sex-segregated model of sport, *see* MCDONAGH & PAPPANO, *supra* note 7. For evaluation of these arguments and pragmatic defense of the sex-segregated model, *see* BRAKE, *supra* note 19, at 63–66.

303. For decades, the IOC justified compulsory gender testing with concerns about men pretending to be women to gain advantages in women's sports, even though only one known instance of gender fraud at the Olympics had ever been documented. *See* Olsen-Acre, *supra* note 112, at 212 n.22; Cavanaugh & Sykes, *supra* note 83, at 83.

304. *See supra* Part III.B.

305. *See* text accompanying *supra* note 65. According to the tabloid press, a 16-year-old German was the youngest person to ever undergo sex reassignment surgery. *From Tim to Kim: German Pop Star, 16, Becomes World's Youngest Transsexual After Sex Change Op.*, MAIL ONLINE (U.K.), <http://www.dailymail.co.uk/news/worldnews/article-1135724/From-Tim-Kim-German-pop-star-16-worlds-youngest-transsexual-sex-change-op.html> (last updated Feb. 5, 2009). Even she, had she lived in Connecticut, would have likely graduated from high school without ever being eligible to participate in girls' sports under CIAC policy, which requires surgery and a two-year waiting period. *See* CIAC HANDBOOK, *supra* note 149, at 50.

transition before competing with their identified gender may also impinge educational values by excluding transgender students who may not have access to hormone treatment or who might not yet be ready to engage in such treatment. As discussed, a hormone transition requirement does not ensure competitive equity, which is already precluded by the indeterminacy of sex and failure of sex categories to encapsulate competitive advantages.<sup>306</sup> As such, a hormone transition requirement is not required by scientific or legal considerations. Recognizing that educational institutions may, however, strike a different balance between the educational benefits served by participation, on the one hand, and expectations to provide a competitive environment, on the other, a hormonal transition requirement may be appropriate for some institutions. Specifically, hormonal transition requirements may be warranted where athletes are older, and thus less likely to be excluded by such a requirement, and where institutions have made a commitment to provide a competitive, athletic environment as part of their educational mission of athletics.<sup>307</sup> Correspondingly, the length of waiting period after initiating hormone treatment before a male-to-female transsexual athlete becomes eligible for women's sports, or before a female-to-male athlete becomes ineligible for women's sports, should be based on a similar balancing of concerns. In sum, there is no single policy that is appropriate for all educational institutions—for instance, what might make sense for NCAA Division I institutions may not be justified at the high school level.

Finally, the right to participate in athletics is just the threshold factor in determining whether transgender athletes have effective access to athletic programs. Policymakers should ensure that other collateral considerations are taken into account. Anti-harassment policies and professional development directed at coach-educators should be developed

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306. See *supra* notes 200–19 and accompanying text.

307. See PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 14 (2010), available at <http://www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901> (recommending that high schools allow athletes to participate consistent with their gender identity without any requirements for hormonal transitions, but that colleges adopt participation policies that allow male-to-female athletes to participate on women's teams after one year of hormone therapy, and that preclude female-to-male athletes from participating on women's teams after commencing hormone therapy).

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and implemented to help ensure that the environment of athletic teams is inclusive and welcoming. Schools must also address sex-segregated spaces, namely locker rooms, which are integral to the athletic experience, and ensure that policies and practices governing their use by transgender students do not deter or effectively bar their participation in athletics.

In conclusion, the current dearth of policies regarding transgender-athlete participation creates both the need and opportunity for educational institutions to craft inclusive policies that balance educational values with legal and scientific considerations. By stepping up to the plate in this regard, policymakers can promote inclusion, understanding, and acceptance of transgender individuals not just in the context of athletics, but by their example, leadership, and influence, throughout society as well.