

PUT ME IN, COACH!: HOW TITLE IX SHOULD REGULATE TRANSGENDER FEMALE ATHLETES

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I. INTRODUCTION

In 2016, Andraya Yearwood did the unthinkable, winning not one, but *two* state championships in track and field.¹ In fact, Yearwood's victories in Connecticut's state championships would have not only been unthinkable a few years earlier but impossible due to Yearwood's status as a transgender female. Connecticut is one of sixteen states that has adopted an inclusive policy towards transgender athletes, allowing them to compete in accordance with their gender identity.² Instead of the usual victory lap and gold medals to celebrate Yearwood's athletic feat, Yearwood was greeted with a lawsuit and boos as she walked off the track.³ The lawsuit filed by three cisgender⁴ women alleges that Connecticut's inclusive transgender athlete policy violates their rights under Title IX, the federal Civil Rights law preventing discrimination on the basis of sex.⁵

Contrary to Connecticut's inclusive policy for transgender athletes, in 2020, Idaho became the first state to categorically ban transgender women from participating in sports on the basis of their gender

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¹ Katie Barnes, *The Battle Over Title IX and Who Gets to be a Woman in Sports: Inside the Raging National Debate*, ESPN (June 23, 2020), https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate.

² *Id.*

³ *Id.*

⁴ Cisgender refers to individuals who identify with the sex they were assigned to at birth. AM. PSYCH. ASS'N, DEFINITIONS RELATED TO SEXUAL ORIENTATION AND GENDER DIVERSITY IN APA DOCUMENTS 1, 5 (2015), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>.

⁵ U.S. DEP'T OF EDUC., *Title IX and Sex Discrimination* (Apr. 2010) [hereinafter *Title IX and Sex Discrimination*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>.

identity.⁶ Transgender athlete, Lindsay Hecox, sought protection from Idaho's order in court under Title IX—the same provision invoked by the cisgender women in Connecticut.⁷ These two lawsuits bring the debate into the spotlight: Who is protected from discrimination on the basis of sex under Title IX? And what does that mean for transgender athletes?

Increased awareness of transgender people and their rights in the United States has been pervasive throughout the last year. Following the 2020 election, Sarah McBride is now the first transgender state senator in the United States.⁸ Moreover, the Supreme Court's recent decision in *Bostock v. Clayton County* made clear that an employer cannot fire a transgender employee simply because of their status as transgender.⁹ Yet, transgender people still face an uphill battle on the road to equality and inclusion. As more transgender athletes elect to compete in sports, a heated debate has ensued about how and if schools should include transgender individuals in sports competitions in accordance with their gender identity. Uniform guidance is necessary to ensure fair athletic competition for both transgender and cisgender athletes. This Comment analyzes how transgender athletes, specifically transgender females, can and should be included in sports.

This Comment argues that Title IX, as currently drafted, prohibits discrimination against transgender athletes who seek to participate in sports on the basis of their gender identity. It proposes that the U.S. Department of Education's Office for Civil Rights, the agency charged with enforcing Title IX, implement regulations requiring transgender female athletes to complete one year of hormone suppression therapy before competing in women's sports to ensure a competitive athletic opportunity for both transgender women and cisgender women.

⁶ Talya Minsberg, 'Boys are Boys and Girls are Girls': Idaho is First State to Bar Some Transgender Athletes, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html>. Since then, several states have enacted discriminatory policies toward transgender women wishing to compete in accordance with their gender identity. See, e.g., John Raby, *West Virginia Transgender Athlete Bill Signed by Governor*, ASSOCIATED PRESS (Apr. 28, 2021), <https://apnews.com/article/west-virginia-bills-sports-education-09a15a1ff4b65168aed4b35a990df28e>.

⁷ *Id.*

⁸ See Matt Stevens & Maggie Astor, *These Candidates Made History in the 2020 Election*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/us/politics/election-firsts-winners.html?searchResultPosition=1>.

⁹ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). President Biden has since signed an executive order indicating that discrimination on the basis of sex includes discrimination on the basis of gender identity. Samantha Schmidt, *Biden Calls for LGBTQ Protections in Day 1 Executive Order, Angering Conservatives*, WASH. POST (Jan. 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/>.

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Support for this proposal is abundant: (1) Title VII caselaw interprets discrimination on the basis of sex to include discrimination on the basis of gender identity; (2) social science shows the benefits of sports participation to young athletes; (3) medical science shows the effectiveness of testosterone suppression; and (4) various international and collegiate athletic programs have been successful in implementing policies to include transgender athletes.

Part II of this Comment explores the history of Title IX, how it applies to sports, and how the Office for Civil Rights regulates transgender athletes. It explains the Supreme Court's recent decision in *Bostock v. Clayton County*. In *Bostock*, the Court interpreted sex discrimination under Title VII to include discrimination on the basis of gender identity.¹⁰ Title VII is the federal Civil Rights law prohibiting employment discrimination on the basis of sex. Because Title IX does not define "sex" and because the Supreme Court has yet to interpret what "sex" means for Title IX purposes, the Court's decision in *Bostock* informs future Title IX interpretations.

Part III of this Comment surveys various policies for incorporating transgender athletes into sex-segregated sports, including the policies of several states, the National Collegiate Athletic Association, and the International Olympic Committee. Part IV of this Comment argues that the Department of Education Office for Civil Rights should promulgate regulations that require transgender female athletes wishing to compete based on their gender identity to undergo one year of hormone suppression. This proposal allows transgender females opportunities to participate in sports while ensuring they do not have an unfair advantage relative to cisgender athletes. Part V of this Comment responds to common criticisms that government and athletic organizations must address in their efforts to allow transgender athlete participation.

II. A BRIEF OVERVIEW: TITLE IX AND SEX DISCRIMINATION

This Part provides a brief overview of Title IX, its history, and its role in regulating athletic programs. Specifically, it discusses what "sex" means under Title IX and how "sex" relates to gender identity. This Part will go on to explain how both the Obama administration and the Trump administration have previously understood how to comply with Title IX's prohibition on discrimination on the basis of sex as it relates to the participation of transgender athletes. Lastly, it examines how courts

¹⁰ See *Bostock*, 140 S. Ct. at 1778, 1783.

interpret “sex” under Title VII and how this informs what “sex” means under Title IX.

A. *Title IX’s General Mandate Prohibiting Sex Discrimination*

Congress passed Title IX of the Education Amendments in 1972.¹¹ Title IX states: “No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹² Although the statute in its original language does not explicitly contemplate sports, Title IX is widely known for championing women’s involvement in sports, providing more athletic opportunities to females, and yielding higher participation of females in sports.¹³ Since Title IX’s passage, Congress has dramatically increased academic, athletic, and employment opportunities for females.¹⁴

The Office for Civil Rights (OCR) is tasked with enforcing Title IX. OCR has promulgated regulations expressly recognizing Title IX’s application to sports by providing that:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.¹⁵

The same regulations, however, authorize the creation of separate teams for each sex when selection “for such teams is based upon competitive skill or the activity involved is a contact sport.”¹⁶ Examples of contact sports where Title IX permits separate teams include “wrestling, rugby, ice hockey, football, [and] basketball.”¹⁷

While recognizing that there will be contact sports, such as football, where a female will not be eligible to try out for the men’s team, the

¹¹ *Title IX and Sex Discrimination*, *supra* note 5.

¹² 20 U.S.C. § 1681 (emphasis added).

¹³ See *Title IX and the Rise of Female Athletes in America*, WOMEN’S SPORTS FOUND. (Sept. 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/>.

¹⁴ *Title IX and Sex Discrimination*, *supra* note 5.

¹⁵ 34 C.F.R. § 106.41(a).

¹⁶ § 106.41(b).

¹⁷ U.S. DEP’T OF EDUC., *Requirements Under Title IX of the Education Amendments of 1972*, <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last updated Jan. 10, 2020).

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regulation maintains that individuals cannot be denied equal opportunities on the basis of sex.¹⁸ Factors for assessing equal opportunity include but are not limited to: “the provision of equipment and supplies, . . . locker rooms, practice, and competitive facilities;” “opportunity to receive coaching and academic tutoring;” and “scheduling of games and practice times.”¹⁹ Some feminist legal scholars have criticized Title IX, arguing that it authorizes discrimination and marks women’s sports as inferior to men’s sports.²⁰ This distinction, however, has withstood challenges in courts on the grounds that sex-segregated sports protect athletic opportunities for females.²¹

B. Title IX Implementing Regulations: What is Sex and Gender Identity?

Title IX prohibits discrimination *on the basis of sex*. Courts, as well as individuals, struggle to understand what “sex” means and how it relates to gender, if at all.²² Although “sex” and “gender” are often used interchangeably, each has a distinct and different meaning. When Congress drafted Title IX, its drafters likely did not contemplate that sex discrimination extended beyond discrimination on the basis of being biologically male or female.²³ In the years since Title IX was first passed, however, there have been significant research developments regarding sex, specifically, as it relates to and informs gender identity.²⁴ Sex is “a person’s biological status and is typically categorized as male, female, or intersex.”²⁵ Indicators of biological sex include “sex chromosomes, gonads, internal reproductive organs, and external genitalia.”²⁶ Individuals who identify with their sex assigned at birth are referred to as cisgender.²⁷

In contrast, gender identity “refers to a person’s internal sense of being male, female or something else.”²⁸ If a person’s gender identity and biological sex do not align, they may identify along the transgender

¹⁸ § 106.41(c) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”).

¹⁹ § 106.41(c).

²⁰ See EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* 7 (2007).

²¹ See *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993).

²² See *Barnes*, *supra* note 1.

²³ *Id.*

²⁴ *Id.*

²⁵ AM. PSYCH. ASS’N, *supra* note 4, at 1, 5.

²⁶ *Id.*

²⁷ *Id.* at 1.

²⁸ *Id.* at 4.

spectrum.²⁹ Transgender describes “individuals whose gender identity is different from the sex they were assigned at birth.”³⁰ “A transgender male is someone who identifies as male but was assigned the sex female at birth, and a transgender female is someone who identifies as female but was assigned the sex of male at birth.”³¹

Transgender persons often undergo gender transitions so that their perceived sex corresponds with their sense of gender identity. “Gender transition refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth.”³² “During gender transition, individuals begin to live and identify as the sex consistent with their gender identity.”³³ Gender transition may be marked by a change in dress, adoption of a new name, or assumption of pronouns consistent with their gender identity.³⁴

Many transgender individuals “experience ‘gender dysphoria,’ which is characterized by significant and substantial distress as a result of their birth determined sex being different from their gender identity.”³⁵ Severe anxiety, depression, and even suicidal thoughts in social, occupational, and other important areas of life characterize gender dysphoria.³⁶ Title IX is silent regarding if it includes prohibition of discrimination against transgender individuals. Yet, transgender persons remain in desperate need of protection from discrimination.

C. *Protections for Transgender Athletes under Title IX*

Confusion surrounding Title IX requirements for transgender athlete participation on the basis of their gender identity results in part from contradictory guidance provided by the former Trump administration and its predecessor, the Obama administration.³⁷ The Obama administration permitted transgender athletes to participate in

²⁹ *Id.* at 7.

³⁰ Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEP’T OF EDUC.: OFF. FOR CIV. RTS. (May 13, 2016) [hereinafter *Obama Guidance Letter*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-2016-05-title-ix-transgender.pdf>.

³¹ *Id.*

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Hecox v. Little*, 479 F. Supp. 3d 930, 945 (D. Idaho 2020).

³⁶ *Id.*

³⁷ See Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEP’T OF EDUC.: OFF. FOR CIV. RTS. (Feb. 22, 2017) [hereinafter *Trump Guidance Letter*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; see also *Obama Guidance Letter*, *supra* note 30.

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sports on the basis of their gender identity.³⁸ This inclusive framework, which allowed athletes to express their gender identity through sports participation, has since been expressly withdrawn.³⁹

Traditionally, Dear Colleague Letters, informal guidance documents that are not subject to the requirements of notice and comment and that do not add requirements to applicable law,⁴⁰ have provided guidance on either the inclusion or exclusion of transgender athletes.

1. The Obama Administration

The Obama administration issued a Dear Colleague Letter on May 13, 2016, which summarized “a school’s Title IX obligations regarding transgender students and explain[ed] how . . . [to] evaluate a school’s compliance with these obligations.”⁴¹ The letter explicitly clarified that Title IX’s prohibition against sex discrimination “encompasses discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.”⁴² This means that for purposes of Title IX compliance, a school cannot treat a “transgender student differently from the way it treats other students of the same gender identity.”⁴³

The letter instructs that once a student notifies an institution of the student’s gender identity, the student shall be treated consistently with that identity.⁴⁴ Under this guidance letter, notification of a change in gender identity did not require a medical diagnosis or a treatment plan.⁴⁵ Most importantly for the purposes of this Comment, this meant: “When a school provide[d] sex-segregated activities and facilities, transgender students [were] allowed to participate in such activities and access such facilities consistent with their gender identity.”⁴⁶ This includes, among other things, restrooms, locker rooms, and athletic programs.⁴⁷ This Dear Colleague Letter marked a shift from a strict concept of two discrete and separate sexes. In doing so, it urged schools not to rely on “overly broad generalizations or stereotypes about the difference between transgender students and other students of the

³⁸ See *Obama Guidance Letter*, *supra* note 30.

³⁹ See *Trump Guidance Letter*, *supra* note 37.

⁴⁰ See *id.* at 2.

⁴¹ *Obama Guidance Letter*, *supra* note 30, at 1.

⁴² *Id.* at 1.

⁴³ *Id.* at 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ See *Obama Guidance Letter*, *supra* note 30, at 3.

same sex.”⁴⁸ Notably, the letter was only guidance for implementing Title IX.⁴⁹ It did not implement new Title IX regulations or requirements but rather worked solely with the existing statute and its regulations. This is evidence that under the current Title IX statutory framework, it is permissible for transgender persons to participate in sports on the basis of their gender identity.⁵⁰

2. Rollback on Protections During the Trump Administration

Although the Obama administration’s inclusive policy guidelines gave transgender athletes reason to celebrate, it was not long before they were withdrawn. The Trump administration triggered turnover in agency officers enforcing Title IX. Resultingly, the Trump administration rolled back the inclusive policies enabling transgender athletes to express themselves by participating in sports teams in accordance with their gender identity. On February 22, 2017, then-Secretary of Education, Betsy DeVos, issued a new Dear Colleague Letter to revoke the May 13, 2016, Dear Colleague Letter. The February 22 letter rescinded the Obama-era policy, which permitted sports participation on the basis of gender identity.⁵¹ According to the February 22 letter, the rescission was based on the administration’s belief that the previous guidance document lacked significant legal analysis or explanation as to the express language of Title IX.⁵²

While rescinding protections for transgender athletes to compete in accordance with their gender identity, the 2017 guidance maintained that “withdrawal of these guidance documents does not leave [transgender] students without protections from discrimination, bullying, or harassment.”⁵³ Specifically, the letter asserted the administration’s commitment to allowing LGBT students to learn and thrive at school by exploring all claims of discrimination within the classroom.⁵⁴ But the Trump administration later claimed gender discrimination and threatened to withhold millions of dollars from educational institutions in Connecticut because Connecticut allows transgender athletes to compete on teams that correspond with their

⁴⁸ *Id.*

⁴⁹ *Id.* at 1.

⁵⁰ *See id.*

⁵¹ *Trump Guidance Letter, supra* note 37, at 1.

⁵² *See id.*

⁵³ *Id.* at 2.

⁵⁴ *See id.*

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gender identity.⁵⁵ The Department of Education believed Connecticut's inclusive policy violated Title IX because it was discriminatory to cisgender women.⁵⁶ And under Title IX, the federal government can withhold funding from institutions that discriminate on the basis of sex.⁵⁷

In addition to the executive branch's interpretations of discrimination on the basis of sex, courts also may provide an answer as to whether discrimination on the basis of sex includes discrimination on the basis of gender identity. The following Section explains how courts may interpret "sex" under Title IX in reference to "sex" under other federal civil rights laws.

D. *Title VII of the Civil Rights Act's Influence on Title IX*

The conflicting guidance from the Trump administration and the Obama administration, respectively, results from Title IX's silence when it comes to defining the term "sex." Furthermore, the Supreme Court has yet to interpret the term "sex" for the purposes of discrimination under Title IX. In the employment discrimination context, the Supreme Court has ruled that discrimination on the basis of gender identity is sex discrimination in violation of Title VII (the federal statute that prohibits sex discrimination in employment). Although Title IX applies to education and Title VII applies to employment, courts rely on Title VII caselaw when interpreting similar terms under Title IX.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin."⁵⁸ Because Title VII also prohibits sex discrimination, courts have relied on Title VII when interpreting "sex" in Title IX matters.⁵⁹ As early as 1992, in *Franklin v. Gwinnett County Public Schools*, the U.S. Supreme Court explicitly cited Title VII caselaw when interpreting Title IX.⁶⁰ The Court noted that under Title VII, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s] on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student."⁶¹ Thus,

⁵⁵ See Luke Broadwater & Erica L. Green, *DeVos Vows to Withhold Desegregation Aid to Schools Over Transgender Athletes*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/transgender-students-betsy-devos.html>.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ 42 U.S.C. § 2000e-2(a)(1) (1964) (emphasis added).

⁵⁹ See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65 (1992).

⁶⁰ *Id.*

⁶¹ *Id.* at 75 (quotation omitted) (citation omitted) (alteration in original).

the Court found the interpretation of sex under Title VII included sexual harassment and applied the same interpretation to Title IX.

This precedent has continued within lower courts. In *Jennings v. University of North Carolina*, a student-athlete sued her institution for violating her rights under Title IX by subjecting her to pervasive sexual harassment vis-à-vis her soccer coach.⁶² In its opinion, the Fourth Circuit expressly affirmed, “we look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”⁶³ Furthermore, in *Miles v. New York University*, a student filed a Title IX suit against her teacher for sexual harassment experienced during the student’s transition from one gender to another.⁶⁴ Notably, the parties conceded and the court noted that “it is now established that the Title IX term ‘on the basis of sex’ is interpreted in the same manner as similar language in Title VII.”⁶⁵

The issue of whether “sex” includes “gender identity” came to the forefront in recent Title VII litigation, *Bostock v. Clayton County*. The Supreme Court granted certification to decide whether firing an employee because of their status as homosexual or transgender violated Title VII’s prohibition of discrimination on the basis of sex.⁶⁶ The Court combined three cases that posed the same essential facts: “An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no other reason than the employee’s homosexuality or transgender status.”⁶⁷

The employees argued that their termination for being homosexual or transgender constituted discrimination on the basis of sex.⁶⁸ While the employers conceded that the employees were in fact fired because of their status as homosexual and transgender, the employers responded that termination of employment on the basis of an employee’s sexual orientation or gender identity was not discrimination on the basis of sex under Title VII.⁶⁹ The employers asserted that at the time Congress drafted Title VII, few people would have understood sex to include homosexuals or transgender persons.⁷⁰ They further argued that, since Title VII’s enactment, Congress has not opted to expand or amend Title VII to include protections for transgender or homosexual

⁶² *Jennings v. Univ. of N.C.*, 482 F.3d 686, 691 (4th Cir. 2007).

⁶³ *Id.* at 695.

⁶⁴ 979 F. Supp. 248, 248 (S.D.N.Y. 1997).

⁶⁵ *Id.* at 250.

⁶⁶ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1738.

⁶⁹ *Id.* at 1745.

⁷⁰ *Id.* at 1749.

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persons.⁷¹ In response to this argument, the employees claimed that sex, “even in 1964, bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.”⁷²

Justice Neil Gorsuch wrote the majority opinion for the Court in a 6-3 decision that stunned many due to the conservative nature of the Supreme Court.⁷³ The Court held that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁷⁴ In reaching its conclusion, the Court applied a textualist approach and described Title VII discrimination as “an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex.”⁷⁵ To demonstrate its reasoning, the Court provided an example:

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.⁷⁶

In this scenario, the “but for” cause of the employee’s termination or discriminatory action is sex. Moreover, the Court noted that transgender status is “inextricably bound up with sex,”⁷⁷ so to discriminate on the basis of being transgender is to discriminate on the basis of sex.

Under the framework presented by the majority, it seems that discrimination on the basis of sex arguably prohibits sex-segregated bathrooms, locker rooms, and dress codes because “but for” the individual’s gender at birth, an employer’s exclusion of transgender persons would not be tolerated. Justice Alito, in a dissenting opinion, cautioned that the majority’s opinion allows for just that. Justice Alito asserted that, with regards to “[b]athrooms, locker rooms, and other things of that kind[,]’ . . . transgender persons will be able to argue that

⁷¹ *Id.* at 1747.

⁷² *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

⁷³ *Id.* at 1737.

⁷⁴ *Id.* at 1741.

⁷⁵ *Id.* at 1740.

⁷⁶ *Id.* at 1741.

⁷⁷ *Id.* at 1742.

they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify.”⁷⁸

Specifically, Justice Alito noted that this framework could allow for transgender women to compete in sports on the basis of their gender identity. In dissent, he identified “another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.”⁷⁹ Justice Alito, therefore, seems to read the majority’s opinion as creating precedent that discrimination on the basis of sex prohibited by Title IX includes discrimination on the basis of gender identity. The next Section details one way in which courts have already relied on the Court’s interpretation of Title VII in *Bostock* when interpreting Title IX.

E. *Grimm v. Gloucester County*

In the absence of Supreme Court guidance on what discrimination on the basis of sex means under Title IX, courts hearing Title IX cases are likely to rely on the Supreme Court’s interpretation of Title VII discrimination on the basis of sex to include discrimination on the basis of gender identity.⁸⁰ At the time this Comment is being written, two ongoing cases pose two related questions: whether a restrictive transgender student-athlete policy in Idaho violates Title IX and whether an inclusive transgender student-athlete policy in Connecticut violates Title IX.⁸¹ Already, courts have relied on *Bostock*’s interpretation of “sex” in cases alleging that restrictions on transgender students’ ability to access bathrooms according to their gender identity violates Title IX.⁸²

One notable case is *Grimm v. Gloucester County School Board*.⁸³ Gavin Grimm is a transgender male student who graduated from Gloucester High School in 2017.⁸⁴ Gavin filed a lawsuit in response to a discriminatory bathroom policy that required transgender students to use “alternative private” restroom facilities or to use restrooms

⁷⁸ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778–79 (2020) (Alito, J., dissenting).

⁷⁹ *Id.*

⁸⁰ See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (noting that courts rely on Title VII when interpreting what “sex” means under Title IX); see also *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

⁸¹ See *Barnes*, *supra* note 1.

⁸² *E.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

⁸³ 972 F.3d 586 (4th Cir. 2020).

⁸⁴ *Id.* at 593, 601.

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matching their biological gender.⁸⁵ The school's discriminatory bathroom policy meant that Gavin could not use the men's restroom despite his male gender identity.⁸⁶ The policy was adopted only after Gavin had used the bathroom for two months and the school began to receive complaints from parents.⁸⁷ As a result of this policy, Gavin "suffered from stigma, from urinary tract infections from bathroom avoidance, and from suicidal thoughts that led to hospitalization."⁸⁸

Gavin's lawsuit alleged that the school's policy requiring transgender students to use alternative private restrooms or the restroom according to their biological sex instead of the bathroom matching their gender identity violates transgender students' rights under both the 14th Amendment and Title IX.⁸⁹ In response to his Title IX claim, the court found that the school had excluded Gavin on the basis of his sex because the school could not have excluded him from using his desired bathroom in the absence of mentioning his sex assigned at birth.⁹⁰ Therefore, sex was a "but for" cause in his discrimination.⁹¹ For example, Gavin would be free to use the men's room had he been born biologically male, but because Gavin was born biologically female and transitioned to male, he was precluded from participation based on his gender identity. Ultimately, the court concluded that a Title IX violation had occurred.⁹²

The court reasoned that in drafting Title VII and Title IX, Congress focused on individual discrimination and not just discrimination between groups.⁹³ The court cited *Bostock* as further evidence that Congress anticipated unexpected applications to emerge because of this drafting.⁹⁴ The court's consideration of *Bostock* and Title VII in this Title IX case is further evidence that courts will look at *Bostock's* interpretation of Title VII when deciphering transgender athletes' rights under Title IX.

⁸⁵ *Id.* at 599–601.

⁸⁶ *Id.* at 593, 601.

⁸⁷ *Id.* at 593.

⁸⁸ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020).

⁸⁹ *Id.* at 601.

⁹⁰ *Id.* at 616–17.

⁹¹ *Id.*

⁹² *Id.* at 619.

⁹³ *Id.* at 619 n.18.

⁹⁴ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 n.18 (4th Cir. 2020).

F. *Transgender Athlete Inclusion Dilemma in the Aftermath of Bostock*

Title IX's failure to define discrimination on the basis of sex has resulted in different presidential administrations reaching alternative conclusions on whether or not discrimination on the basis of sex includes discrimination on the basis of gender identity. In the absence of a definition of "sex," courts are likely to use case law interpreting discrimination on the basis of "sex" under Title VII. Because the Court in *Bostock* found that discrimination on the basis of sex encompasses discrimination on the basis of gender identity, there is now precedent that Title IX also prohibits discrimination on the basis of gender identity.

While the Biden administration has yet to issue any Dear Colleague Letter or rulemakings on the inclusion of transgender athletes, President Biden signed an executive order on his first day in office indicating discrimination on the basis of sex included discrimination on the basis of gender identity.⁹⁵ Recently, the OCR also issued a notice of interpretation of Title IX in light of *Bostock v. Clayton County*.⁹⁶ The notice of interpretation expresses "that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity . . ."⁹⁷

The question still remains, however, on *how* best to incorporate transgender athletes in sports teams in accordance with their gender identity. The following Part surveys various policies regarding the incorporation of transgender athletes into sex-segregated sports teams. It identifies policies from sports associations internationally, domestically, and locally.

III. POLICIES FOR INCORPORATING TRANSGENDER ATHLETES INTO SPORTS

This Part describes policies that various sports organizations and state governments have implemented for the inclusion of transgender athletes. It explains that major athletic organizations, such as the National College Athletic Association (NCAA) and International Olympic Committee (IOC), have successfully implemented policies that include transgender athletes. It further introduces various high school policies

⁹⁵ See Raby, *supra* note 6.

⁹⁶ Suzanne B. Goldberg, *Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, U.S. DEP'T OF EDUC. (June 22, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

⁹⁷ *Id.* at 4.

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that yield different outcomes on whether transgender athletes can participate in sports according to their gender identity.

A. *National and International Organizations Use of Testosterone to Regulate Transgender Athletes*

This Section outlines the policies that the NCAA and the IOC have implemented. It explains that both organizations allow transgender athletes to compete on sex-segregated sports teams in accordance with their gender identity after suppressing their testosterone hormone. While both policies are based on testosterone, each policy has separate and unique requirements.

1. The NCAA's Guidance on Transgender Athlete Inclusion

In 2011, the NCAA, a private association of member colleges and organizations, "provid[ed] guidance to NCAA athletic programs" in an effort "to ensure [that] transgender student-athletes [have] fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge."⁹⁸ The NCAA's guidance provides advice for implementing regulations for transgender persons to compete safely.⁹⁹ The guidance is informed by medical research while simultaneously contemplating safety and fairness concerns for cisgender athletes.¹⁰⁰ The NCAA previously followed a program that allowed athletes to participate on a sex-segregated team in accordance with their gender recognized by the state.¹⁰¹ Because many states provided differing guidelines for gender identification, the policy led to inconsistencies.¹⁰² Furthermore, ongoing confusion surrounding transgender athletes existed amongst coaches who lacked information regarding transgender participation, including "what pronouns . . . to use"; "where a transgender student should change clothes for practice or competition"; and "what bathroom or shower that student should use."¹⁰³

The new policies set out different standards for transgender men and transgender women. A transgender male "who has received a medical exception for treatment with testosterone . . . may compete on a men's team, but is no longer eligible to compete on a women's team

⁹⁸ NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 4 (2011) [hereinafter NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES], https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* at 2, 5, 15.

¹⁰¹ *Id.* at 5, 28, 29.

¹⁰² *Id.* at 4.

¹⁰³ *Id.* at 4.

without changing that team status to a mixed team.”¹⁰⁴ A transgender female “being treated with testosterone suppression medication . . . may continue to compete on a men’s team but may not compete on a women’s team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.”¹⁰⁵ As is evident by these policies, there is a strong emphasis on testosterone and more limitations and qualifications for participation on women’s teams.

Testosterone, a hormone produced by both men and women,¹⁰⁶ is at the center of these policies because medical evidence has shown that testosterone “builds muscle” and allows for clear performance advantages. Testosterone affects everything from muscle size and strength to the size of the heart.¹⁰⁷ Every one of these effects usually results in men having a performance advantage in sporting competitions.¹⁰⁸ For example, women with testosterone levels higher than the norm for cisgender women during the Olympics achieved success at a far higher rate than women with only normal testosterone production.¹⁰⁹ The policy requiring one year of testosterone suppression treatment before participation on women’s teams are a result of the fear that the inclusion of transgender women will be detrimental to cisgender women.¹¹⁰

2. The Olympics’ Transition to Testosterone Regulation

The IOC is the National Olympic Committees’ governing body and is responsible for organizing the Winter and Summer Olympics.¹¹¹ In 2004, the IOC became the first sports organization to allow transgender individuals to participate in sports on the basis of their gender identity.¹¹² Prior to the implementation of this policy, all female athletes competing were required to undergo sex-verification.¹¹³ Sex-

¹⁰⁴ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 13.

¹⁰⁵ *Id.*

¹⁰⁶ Gina Kolata, *Does Testosterone Really Give Caster Semenya an Edge on the Track?*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/health/caster-semenya-testosterone.html?searchResultPosition=10>.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*

¹¹⁰ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 7.

¹¹¹ *Overview*, INT’L OLYMPIC COMM’N, <https://olympics.com/ioc/overview> (last visited Nov. 18, 2021).

¹¹² Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletes*, 21 SETON HALL J. SPORTS & ENT. L. 1, 21 (2011).

¹¹³ *Id.* at 21 n.116.

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verification is notoriously used as a humiliation tactic.¹¹⁴ The process may involve chromosomal tests, blood samples, or urine samples to verify an athlete's sex.¹¹⁵ After years of verifying athletes' gender, the IOC never found a man to be posing as a woman for the sake of competing in women's sports at an advantage.¹¹⁶

Although sex-verification did not find transgender athletes, transgender athletes were still closely regulated and forced to comply with rigorous procedures before becoming eligible to compete in the Olympic games. Replacing the sex-verification policy, the new policy in 2004 allowed transgender athletes to compete on sex-segregated sports teams in accordance with their gender identity only after undergoing sex reassignment surgery.¹¹⁷ Sex reassignment surgery is an invasive procedure that removes external genitalia and gonads.¹¹⁸ The 2004 policy further required "legal recognition of their assigned sex [be] conferred by the appropriate official authorities."¹¹⁹ Moreover, transition had to also be accompanied by hormonal therapy "for a sufficient length of time to minimize gender related advantages . . ."¹²⁰ This policy had the effect of restricting transgender athletes' ability to participate due to burdensome legal and medical fees.

In 2015, the IOC revised these policies in response to growing awareness of gender identity to ensure that the Olympics did not bar transgender athletes from meaningful participation in sports.¹²¹ In its 2015 guidance document, the IOC, like the NCAA, focused on inclusion while maintaining fair competition for cisgender women.¹²² Most importantly, the guidance document eliminated surgical reassignment

¹¹⁴ Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

¹¹⁵ *Id.*

¹¹⁶ *See id.* The invasive process did, however, find intersex athletes. *See id.* Intersex describes the condition of many of whom only learned of this condition for the first time after undergoing the sex-verification process. *See id.* The discussion of intersex athletes is outside the scope of this Comment.

¹¹⁷ *Statement of the Stockholm Consensus on Sex Reassignment in Sports*, INT'L OLYMPIC COMM'N (Nov. 12, 2013), https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 1–2 (Nov. 2015) [hereinafter IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM], https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

¹²² *Id.*

as a requirement for athletes to compete with their desired gender.¹²³ Moreover, it noted that sexual reassignment is no longer consistent with notions of human rights.¹²⁴ Also, like the NCAA, the IOC set forth different policies for transgender men than transgender women.¹²⁵ Transgender men are free to compete in the male category without any restrictions.¹²⁶ Unlike the NCAA, the IOC makes no mention of testosterone supplements for transgender men.

On the contrary, transgender female athletes are eligible to compete in the Olympics as females when the following conditions are satisfied: the athletes must consistently self-declare that their gender identity is a female for a period of four years and the athlete's "total testosterone level in serum [must be] below 10 nmol/L for at least 12 months prior to her first competition . . ." ¹²⁷ "The athlete's total testosterone level in serum must [then] remain below 10 nmol/L throughout the period of desired eligibility to compete in the female category."¹²⁸ Most females "have natural testosterone levels of 0.12 to 1.79 nanomoles per liter . . . while the typical male range after puberty is much higher, at 7.7 to 29.4 nanomoles per liter."¹²⁹ Requiring a transgender woman's testosterone to be below 10 nmol/L, a low level for a man, is an effective means of suppressing the competitive advantage that testosterone gives to men.

Unlike the NCAA, which requires one year of hormone treatment, the IOC has a higher threshold before competition occurs since self-declaration must be consistent for four years.¹³⁰ Furthermore, the IOC approach has been critiqued because of the difficulty for athletes to maintain testosterone levels and the time required for athletes to get their serum below 10 nmol/L, which often takes more than one year of hormone therapy treatment.¹³¹

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM, *supra* note 121, at 2.

¹²⁸ *Id.* at 1–2.

¹²⁹ Geneva Abdul, *This Intersex Runner Had Surgery to Compete. It Has Not Gone Well*, N.Y. TIMES (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-and-field.html>.

¹³⁰ IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM, *supra* note 121, at 2.

¹³¹ *See id.* at 2–3.

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B. *High School Policies by State*

This Section outlines the varying policies that states have adopted to regulate transgender athletes' participation in high school sports around the country. Generally, there are three types of regulations most frequently adopted by states regarding transgender participation: inclusive policies, conditional policies, and discriminatory policies.¹³² Currently, sixteen states have adopted inclusive policies, nine states have conditional policies, and sixteen states have discriminatory policies.¹³³ Nine of the discriminatory states ban transgender youth participating all together.¹³⁴ Notably, ten states have yet to issue any policy or best practices guidelines at all (evidence of the novelty of the issue).¹³⁵

1. Inclusive Policies

Inclusive policies help facilitate the full inclusion of transgender athletes in sports. These policies largely allow transgender athletes to participate in sports consistent with their gender identity in virtually all circumstances.¹³⁶ California is one of sixteen states that have adopted a fully inclusive policy.¹³⁷ California's policy provides that "[a]ll students should have the opportunity to participate in CIF [high school sports] activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records."¹³⁸ Connecticut has adopted a similar fully inclusive policy.¹³⁹ While the inclusive policy in Connecticut led to transgender women achieving great success in high school sports, including victories in state championships, the law has been challenged as both a violation of cisgender women's rights under Title IX and the Equal Protection Clause.¹⁴⁰

¹³² See *High School Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> (last visited Nov. 18, 2021) (describing various high school policies).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See CAL. EDUC. CODE § 221.5(f) (Deering 2021).

¹³⁸ GUIDELINES FOR GENDER IDENTITY PARTICIPATION, CALIFORNIA INTERSCHOLASTIC FED'N 92 (2019–2020), https://13248aea-16f8-fc0a-cf26a9339dd2a3f0.filesusr.com/ugd/2bc3fc_75388a5135094dd999ac5a57bead97b7.pdf.

¹³⁹ See Barnes, *supra* note 1.

¹⁴⁰ Michael Levenson & Neil Vigdor, *Inclusion of Transgender Student Athletes Violates Title IX, Trump Administration Says*, N.Y. TIMES (May 29, 2020), <https://www.ny-times.com/2020/05/29/us/connecticut-transgender-student-athletes.html>.

2. Conditional Policies

Nine states allow for transgender participation in sports, but they condition participation on the ability of the transgender athlete to comply with certain guidelines and conditions.¹⁴¹ These policies add obstacles for transgender people seeking to compete, but also ensure that competition remains fair and competitive.¹⁴² Many cisgender women argue that transgender women's participation is to their disadvantage because transgender athletes may enjoy a biological advantage.¹⁴³ Kentucky provides an example of a conditional policy.¹⁴⁴

Kentucky provides an example of a conditional policy that imposes a high procedural threshold before an athlete can compete in sports on the basis of their gender identity.¹⁴⁵ The relevant Kentucky policy provides that unless legally reassigned, students should compete based on their sex assigned at birth.¹⁴⁶ A student can compete in athletics based on their reassigned gender when sex reassignment was undergone before puberty or after puberty if (1) surgical anatomical changes have been made; (2) hormonal therapy has been administered in a verifiable manner for a sufficient length of time; and (3) if hormonal treatment stops, the student will be required to compete in sports based on their biological sex.¹⁴⁷

Kentucky's policy is conditional because it can be expensive and time-consuming to receive an updated birth certificate, and, as mentioned above, surgical reassignment is inconsistent with human rights and is a major surgery for a high-school-age athlete to undergo.¹⁴⁸ In some instances, these conditional obstacles, although not a categorical ban on transgender athletes, have the effect of barring them from participating in accordance with their gender identity.¹⁴⁹ Many of these policies, such as this one, remain significantly more restrictive than the current NCAA and IOC policies, which allow transgender athletes to participate without undergoing any surgical changes.

¹⁴¹ See Barnes, *supra* note 1.

¹⁴² *Id.*

¹⁴³ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 4.

¹⁴⁴ POLICY TRANSGENDER PARTICIPATION, KENTUCKY HIGH SCHOOL ACTIVITIES ASS'N, 2019-2020 KHSAA HANDBOOK, https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_accb4ead49cc4efd8e46da5478649831.pdf.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM, *supra* note 121, at 2.

¹⁴⁹ *Id.*

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3. Discriminatory Policies

Discriminatory policies limit transgender athletes' ability to compete on sports teams consistent with their gender identity by restricting the athletes' participation to their biological sex assigned at birth, by posing many obstacles before qualifying for participation on the basis of their gender identity, or by barring participation entirely.¹⁵⁰ Delaware and Idaho provide examples of discriminatory policies.

Transgender athletes in Delaware are free to compete on teams based on their gender identity when: (1) the student provides an official record of reassigned sex such as a passport or birth certificate;¹⁵¹ (2) a physician certifies the student "has had appropriate clinical treatment for transition to the reassigned sex";¹⁵¹ (3) a physician certifies "that the student is in the process of transition to the reassigned sex";¹⁵² (4) the school makes a determination of student's sex assignment;¹⁵³ and (5) the determination of the student's sex assignment remains in effect for the remainder of their high school eligibility.¹⁵⁴ This discriminatory policies is similar to former IOC policies that required require medical treatment via sex reassignment and humiliating tactics such as sex verification before an athlete could compete based on their gender identity.

Other discriminatory states ban transgender athletes outright. Idaho, for example, has imposed a categorical ban on transgender athletes competing in sports in accordance with their gender identity.¹⁵⁵ "The law mandated that all participants, including transgender athletes, answer a form about their sex, surgical procedures, medications and even whether they have had organs, like testes, removed. Any dispute in an athlete's eligibility required a physical, genetic or hormonal exam conducted by a physician."¹⁵⁶ The first of its kind, the Idaho ban was met with fierce opposition and remains the subject of ongoing litigation.¹⁵⁷

¹⁵⁰ See *High School Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> (last visited Sept. 22, 2021).

¹⁵¹ FAQ DIAA 1009.5.1.0, 1009 DIAA HIGH SCHOOL INTERSCHOLASTIC ATHLETICS, 40 https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_1e2b96c9b7c8470fa60ea6cd3730da71.pdf.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Gillian R. Brassil & Jere Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

The various policies overviewed in this Part enable transgender athletes to participate—or not participate—in high school sports, college sports, and even the Olympics when athletes can meet certain requirements. Associations for high school sports participation in each state have laid out various protocols and procedures for transgender athletes wishing to compete in sports teams in accordance with their gender identity. Some high school associations embrace transgender athletes and welcome them to participate in accordance with their gender identity, while other states make such participation virtually impossible. The NCAA and IOC have successfully incorporated transgender athletes into some of the most elite athletic competitions through the regulation and suppression of testosterone. These various policies inform the decision as to which policy is the best to prevent discrimination on the basis of sex and protect the interests of both cisgender athletes and transgender athletes.

IV. HOW SHOULD TRANSGENDER FEMALE ATHLETES BE REGULATED?

Bostock's Title VII framework clarifies that courts can interpret “sex” under Title IX to include gender identity. If interpreted consistently with Title VII, Title IX prohibits discrimination on the basis of gender identity in school and in school activities, including participation in sports. This Part proposes that the Department of Education adopt new regulations in line with the current NCAA regulations requiring one year of hormone suppression for transgender women before becoming eligible to compete in sports consistent with their gender identity. This conclusion relies on both social and medical science demonstrating that transgender athletes can fairly compete after one year of hormone suppression and that failure to allow transgender athletes to compete is detrimental to the health and well-being of those athletes. Requiring one year of hormone suppression for transgender athletes will minimize the natural competitive advantage the athletes enjoyed as biological males allowing for fair and safe competition for transgender and cisgender women.

This Part first explains that allowing transgender athletes to compete in sports on the basis of their gender identity can help suppress intense feelings of gender dysphoria. This Part then argues that testosterone suppression therapy is an effective means for transgender female athletes to lower their natural testosterone levels to create fair athletic competition for transgender and cisgender athletes. Lastly, this Part discusses the significant social benefits that sports participation provides.

A. *Sports Participation as a Treatment for Gender Dysphoria.*

Transgender athletes should be allowed to compete consistent with their gender identity to combat gender dysphoria. Many transgender individuals “experience ‘gender dysphoria,’ which is ‘characterized by significant and substantial distress as a result of their birth-determined sex being different from their gender identity.’”¹⁵⁸ Gender dysphoria is characterized by severe anxiety, depression, and even suicide.¹⁵⁹ “Attempted suicide rates in the transgender community are over 40%.”¹⁶⁰ In fact, transgender persons are nearly *nine times* more likely to attempt suicide than the general population.¹⁶¹

Gender dysphoria is acutely felt by transgender people throughout puberty because during this period “their bodies diverge further from their gender identity.”¹⁶² One study of transgender students showed that 77 percent of respondents “known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff.”¹⁶³ Furthermore, another 17 percent of students “reported having left a school due to severe mistreatment.”¹⁶⁴ Moreover, this collectively negatively affects transgender students’ ability to receive an education and perform well in school.¹⁶⁵

Transgender people experiencing gender dysphoria tend to be incredibly receptive to treatment for their dysphoria.¹⁶⁶ Treatment for gender dysphoria includes counseling, social transitioning, such as changing one’s name or pronoun to be in accordance with their gender identity, and/or hormone therapy.¹⁶⁷ Allowing transgender athletes to compete in sports consistent with their gender identity will also ease transgender athletes’ gender dysphoria. Competing in activities consistent with their gender identity will allow transgender athletes to feel more at home in their bodies, which can help combat feelings of suicide and depression, and help improve transgender athletes’ performance in school.

¹⁵⁸ *Hecox v. Little*, 479 F. Supp. 3d 930, 945 (D. Idaho 2020).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 945–46.

¹⁶¹ SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 114 (2016) (emphasis added).

¹⁶² *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020).

¹⁶³ *Id.* at 597.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* Studies show that students who experienced significant harassment had significantly lower grade point averages. *See id.* at 597.

¹⁶⁶ *Hecox v. Little*, 479 F. Supp. 3d 930, 945 (D. Idaho 2020).

¹⁶⁷ Brief for America Academy of Pediatrics et al. as Amici Curiae Supporting Appellee at 8, *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 U.S. Dist. LEXIS 149442 (D. Idaho Aug. 17, 2020).

Implementing a regulation requiring one year of hormone suppression will be significant for high school athletes because during puberty, transgender athletes are more inclined to feel the contrast between their biological sex and their gender identity. During puberty, a transgender female may experience a deepening voice, while a transgender man may develop breasts or begin their menstrual cycle.¹⁶⁸ These biological changes only further exacerbate that their body is at odds with their gender identity, which represents their true sense of self and identity.¹⁶⁹ Hormone therapy can help counter some of the natural biological effects that result from sex assigned at birth.¹⁷⁰ It can effectively prevent the deepening of a voice, developing increased muscle mass, and growing facial hair that normally marks puberty.¹⁷¹ Not only does it allow transgender females to combat gender dysphoria by allowing the athletes to prevent the development of physical features not matching their gender identity, but it also helps eliminate the difference in testosterone between biological men and women that could potentially create a competitive advantage in sports.

B. Testosterone Suppression Eliminates Competitive Advantages for Transgender Women

Cisgender women have asserted that allowing transgender women to compete in women's teams gives them a competitive advantage. Hormone therapy is one way to mitigate any competitive advantage that transgender athletes may enjoy. Promulgating Title IX regulations that require one year of hormone therapy for transgender women who choose to compete on women's sports teams will protect cisgender women from an unfair advantage because testosterone suppression can effectively eliminate the differences between biological men and women.¹⁷²

A 2015 study of transgender female runners by Joanna Harper reveals that "[s]even of the eight [transgender female runners participating in the study] experienced a substantial reduction in running speed upon transition."¹⁷³ The reduction in speed for the transgender athletes was attributed to their "vastly reduced testosterone levels," which also reduced "strength, speed, and virtually

¹⁶⁸ *Id.* at 16–17.

¹⁶⁹ *Id.* at 8.

¹⁷⁰ *Id.* at 22.

¹⁷¹ *Id.*

¹⁷² Joanna Harper, *Race Times for Transgender Athletes*, 6 J. OF SPORTING CULTURES AND IDENTITIES 1, 6 (2015).

¹⁷³ *Id.* at 3.

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every other component of athletic ability” for the women.¹⁷⁴ These findings refute contentions that transgender women sustain a competitive advantage over cisgender women after a year of hormone suppression.¹⁷⁵ This study also results in an endorsement of NCAA rules which require one year of hormone testosterone suppression for transgender women seeking to compete in women’s sports.¹⁷⁶ Because hormone therapy can effectively equalize any pre-existing biological advantage, requiring one year of hormone therapy before transgender women can compete in women’s sports will not result in discrimination against cisgender women.

C. Transgender Athlete Inclusion has Social and Mental Health Benefits

Allowing transgender athletes to compete in sports on the basis of their gender identity will promote the overall well-being of the athlete. Participation in sports as an adolescent tends to have many long-term beneficial effects for athletes even after the competition ends.¹⁷⁷ Students who are involved in sports tend to receive better grades in school.¹⁷⁸ After graduating high school, female student athletes are more likely than female non-student athletes to attend college.¹⁷⁹ Student athletes are typically able to employ important aspects of sports such as teamwork and hard work successfully once joining the workforce.¹⁸⁰

Excluding or severely limiting transgender athletes’ ability to compete in sports on the basis of their gender identity can have the effect of excluding transgender athletes from sports entirely as many transgender athletes may not feel comfortable participating on a team that does not match their true sense of inner self. This means that transgender athletes would be denied these important benefits of sports and may never be fully integrated into society. Denial of these benefits

¹⁷⁴ *Id.* at 6.

¹⁷⁵ *See id.*

¹⁷⁶ Joanna Harper, *Do Transgender Athletes Have an Edge? I Sure Don’t*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/opinions/do-transgender-athletes-have-an-edge-i-sure-dont/2015/04/01/ccacb1da-c68e-11e4-b2a1-bed1aaea2816_story.html.

¹⁷⁷ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 9.

¹⁷⁸ Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High-School Sport Participation on Females’ Educational Attainment*, 38 YOUTH SOCIETY 443, 444 (June 1, 2007).

¹⁷⁹ *Id.* at 447.

¹⁸⁰ *See* Kevin M. Kniffin, Brian Wansink & Mitsuru Shimizu, *Sports at Work: Anticipated and Persistent Correlates of Participation in High School Athletics*, 22 J. OF LEADERSHIP AND ORGANIZATIONAL STUDIES 217, 227 (2014).

is discrimination of the exact nature that Title IX seeks to preclude. Implementing Title IX regulations that allow transgender athletes to participate consistent with their gender identity will allow for broader societal benefits.

V. EXCLUDING TRANSGENDER ATHLETES LACKS LEGITIMATE BASIS

Opponents to the inclusion of transgender athletes rely on assumptions that the participation of transgender athletes will automatically result in an unfair opportunity for cisgender athletes. Many of these arguments for exclusion are assumptions that fail to consider the relatively small number of transgender athletes, plausible solutions for maintaining fairness, and the inherently unequal nature of sports as they currently exist. This Part details and rebuts arguments for denying transgender athletes the opportunity to compete in athletics consistent with their gender identity.

A. Scholarships and Locker Rooms

Opponents to allowing transgender persons to compete consistently with their gender identity argue that inclusion will result in the loss of scholarships for cisgender women.¹⁸¹ They argue that cisgender women cannot fairly compete against transgender women¹⁸² who might benefit from being bigger, faster, and stronger because of their status as biologically male. Believing that transgender women possess a biological advantage, they fear transgender women may be more qualified for athletic scholarships, which could mean less scholarship opportunities available to cisgender women. This argument, however, is not entirely well-founded. The number of transgender women seeking athletic scholarships is substantially less as compared to the number of cisgender women seeking the same opportunities. As a result, this impact would not be significant to cisgender women. This argument is also entirely overinclusive in that it assumes all transgender women will be taller, stronger, and faster. The reality is that while, on average, biological men are taller, stronger, and faster than biological women, there are many instances where the opposite is true, and women are taller, stronger, and faster than men.¹⁸³

Individuals who are opposed to allowing transgender female athletes to compete in women's sports also argue that allowing transgender athletes to compete in sports consistent with their gender identity poses a locker room and bathroom usage challenge for those

¹⁸¹ Brassil & Longman, *supra* note 155.

¹⁸² *Id.*

¹⁸³ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 7.

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athletes.¹⁸⁴ Opponents argue that cisgender women should not be forced to share a bathroom or locker room with transgender women as the experience of sharing a bathroom or locker room with a biological male can be traumatizing for victims of sexual assault.¹⁸⁵ Schools can address the issue surrounding bathroom and locker room usage with the simple solution of individual changing rooms and bathrooms that maintain privacy. For example, the National Intramural Recreational Sports Association now requires: “[e]very locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them.”¹⁸⁶ Providing private spaces in locker rooms provides not only for the needs of transgender athletes, but also for cisgender athletes who may desire more privacy.¹⁸⁷ Several New York schools have also refitted locker rooms with privacy screens, an inexpensive and effective solution for achieving privacy.¹⁸⁸

B. Promote Competitive Fairness

Opponents of transgender inclusion stress the importance of sex segregation in sports to allow cisgender women to compete on a fair playing field. The competitive fairness debate typically focuses on the biological differences between men and women that usually provide men with a competitive advantage when it comes to sports.¹⁸⁹ Arguments rest on three main assumptions. First, “transgender women are not ‘real women’ and therefore not deserving of an equal competitive opportunity.”¹⁹⁰ However, the decision to live in accordance with one’s gender identity is a deeply personal and significant decision.¹⁹¹ Gender identity is an essential aspect of a person’s identity, and the gender identity of a transgender person is just as strong and real as the gender identity of any individual.

Second, “[b]eing born with a male body automatically gives a transgender woman an unfair advantage when competing against non-transgender women.”¹⁹² This argument does not hold up in context.

¹⁸⁴ See *id.* at 20 (stating that transgender athletes, “should be able to use the locker room, shower, and toilet facilities in accordance with the students’ gender identity”).

¹⁸⁵ *Id.* at 19.

¹⁸⁶ Erin E. Buzuvis & George B. Cunningham, *Better Locker Rooms: It’s Not Just a Transgender Thing*, THE CONVERSATION (Mar. 26, 2017), <https://theconversation.com/better-locker-rooms-its-not-just-a-transgender-thing-74023>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 7–8.

¹⁹⁰ *Id.* at 7.

¹⁹¹ *Id.*

¹⁹² *Id.*

Transgender females who have transitioned at a young age do not experience male puberty.¹⁹³ Male puberty is when most men develop an athletic advantage over women.¹⁹⁴ In the absence of male puberty, there is less of an equity concern than if the transition had occurred after puberty.¹⁹⁵ Furthermore, transgender athletes come in various physical shapes and sizes despite the stereotype that they are unusually tall and muscular.¹⁹⁶ As discussed above, while on average, men do tend to be taller, faster, and stronger, this is an overinclusive standard that fails to account for the fact that many transgender women have undergone substantial hormone therapy and suppression, some even before hitting puberty which diminishes any initial advantage.¹⁹⁷ Even if this assumption were to be true, the advantage transgender women potentially could possess would be eliminated after one year of hormone suppression.¹⁹⁸

Third, men will claim to be transgender women just for the sake of being able to compete in women's sports programs.¹⁹⁹ This argument remains a false narrative that has never been proven to be true.²⁰⁰ This assumption's error is evident in light of the IOC's sex verification process which never, in a 40-year history, found any men to be posing as women.²⁰¹ Instead, these sex verification tests were utilized as a humiliation tactic and to exclude intersex athletes.²⁰²

C. Competition Consistent with Biological Sex is Not Fair

Adopting a restrictive regulation that requires people to compete only on the basis of their biological sex could also result in unequal competition for cisgender athletes. This is because transgender males would be forced to compete in female sports despite likely undergoing testosterone enhancement as part of their transition from female to

¹⁹³ *Id.*

¹⁹⁴ *See id.* (explaining that "transgender girls who medically transition at an early age do not go through a male puberty, and therefore their participation in athletics as girls does not raise the same equity concerns that arise when transgender women transition after puberty").

¹⁹⁵ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 7.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 8.

¹⁹⁹ *Id.* at 7.

²⁰⁰ *Id.* at 8.

²⁰¹ NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, *supra* note 98, at 8.

²⁰² *Id.*

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male.²⁰³ Texas wrestler Mack Beggs, a transgender male, is forced to “wrestle[] against girls and dominates his competitions.”²⁰⁴ His participation in female sports resulted in arguments that this was discriminatory to cisgender women. This is because transgender men’s testosterone injections as part of their transition from female to male amount to taking “a performance-enhancing banned substance.”²⁰⁵ The Texas law seeking to protect fair competition for cisgender women by excluding transgender female athletes, thus, had the reverse effect since it permitted the inclusion of transgender men. For this reason, a conditional policy that allows transgender females to compete after one year of hormone suppression would better preserve competition and fairness for cisgender women.

VI. CONCLUSION

If interpreted consistently with Title VII sex discrimination cases, Title IX prevents discrimination against transgender individuals. Sex-segregated sports teams is a complicated area to integrate the inclusion of transgender athletes because segregation is permitted to allow for fair opportunity and to prevent discrimination on the basis of sex. Nonetheless, implementing Title IX regulations that allow transgender athletes to compete after one year of hormone suppression will maintain fair opportunity for all athletic participants and protect transgender athletes from discrimination on the basis of sex. One year of hormone suppression will have the effect of reducing any inherent biological advantage. At the same time, the regulation will allow transgender athletes, a small minority, to combat intense feelings of gender dysphoria and reap the social benefits of participation in organized sports. Although not initially contemplated when Title IX was passed, this is the exact type of discrimination—the notion of an inferior place in society—that Title IX sought to prevent.

²⁰³ Katelyn Burns, *Texas School Officials Don’t Understand Transgender Athletes*, WASH. POST (May 4, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/05/04/texas-school-officials-dont-understand-transgender-athletes/>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*