

## UNIFORM RULES: ADDRESSING THE DISPARATE RULES THAT DENY STUDENT-ATHLETES THE OPPORTUNITY TO PARTICIPATE IN SPORTS ACCORDING TO GENDER IDENTITY

### INTRODUCTION

Grade-school and college playing fields have long been segregated on the basis of sex. For decades, male and female students were afforded the opportunity to participate in interscholastic athletic competitions on teams determined by their biological gender. Recently, “an increasing number of high school- and college-aged [students are publicly] identifying as transgender (or trans), meaning that their internal sense of their gender identity is different from the gender they were assigned at birth.”<sup>1</sup> The emergence of openly transgender students in grade schools and colleges, in general, has resulted in vastly disparate rules promulgated by school districts to address how transgender individuals fit into the traditional operation of the education system.<sup>2</sup> For the states that have enacted policies that address transgender students’ participation in interscholastic athletics, the guidance varies widely, and some states’ policies are so discriminatory that they effectively deny transgender students’ participation on their schools’ sports teams. While the issue of transgender individuals’ participation in sports has not been the most visible issue con-

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1. Pat Griffin & Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes*, NCLR (Oct. 4, 2010), <http://www.wiaa.com/ConDocs/Con550/TransgenderStudentAthleteReport.pdf>.

2. See, e.g., Emanuella Grinberg, *Bathroom Access for Transgender Teen Divides Missouri Town*, CNN (Sept. 5, 2015, 3:37 PM), <http://www.cnn.com/2015/09/03/living/missouri-transgender-teen-feat/> (addressing a Missouri town’s reaction to a transgender student’s use of the bathroom and locker room that conformed with the student’s gender-identity); Ed Payne & John Newsome, *US: Illinois Transgender Student Must Get Full Locker Room Access*, CNN (Nov. 3, 2015, 6:21 PM), <http://www.cnn.com/2015/11/03/us/illinois-school-district-transgender-ruling/> (discussing Illinois resolution to allow a transgender teen to use the locker room according to his gender identity for mandatory physical education class); Gabrielle Sorto, *Students Protest Growing over Gender-Equal Dress Codes*, CNN (Feb. 25, 2016, 12:43 PM), <http://www.cnn.com/2016/02/25/living/dress-code-protests-irpt/> (discussing student reactions to protest a school board’s decision not to revise a decades-old dress code that may violate state gender-rights law).

templated by school policies affecting transgender students,<sup>3</sup> the issue has been cast into the spotlight even more after former Olympic decathlon gold medalist Caitlyn Jenner announced last year that she had transitioned to a woman.<sup>4</sup>

This comment explores where transgender individuals currently fit in our existing binary world of sex-segregated athletics and argues that transgender student-athletes should be allowed to participate in sports on the basis of their gender identity. The disparate rules, enacted by state high school athletic associations, that currently exist effectively deny transgender student-athletes the opportunity to participate in sports in some states—an opportunity guaranteed to them under federal law. Part I of this comment explores the tradition of sex-segregation that has had a pervasive presence in sports throughout our history and reveals how that makes it even more difficult for transgender individuals to fit into the currently existing binary world of male and female sports teams. That section also defines the terms used throughout the article. Part II addresses student-athletes' rights to participate on the gender-specific team of their choice as required by the sex-discrimination prohibitions of Title IX of the Education Amendments of 1972 ("Title IX"). Part III describes traditional challenges raised by opponents of transgender student-athletes' rights to participate on the sports team associated with their gender identity. Part IV provides an overview of the disparate policies currently held by state athletic associations, the National Collegiate Athletic Association, and the International Olympic Committee. Part V proposes a system of uniform rules that would allow schools to avoid liability by complying with Title IX and would allow student-athletes to participate in athletics according to their gender identity, regardless of the gender listed on their birth certificate or whether they are receiving hormone or other medical treatments. Finally, the comment concludes by reiterating the importance of having a uniform policy that allows student-athletes to participate in interscholastic athletic activities

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3. See, e.g., Leah Libresco, *Seven Other States Are Considering Restricting Bathrooms for Transgender People*, FIVETHIRTYEIGHT (Apr. 6, 2016, 4:50 PM), <http://fivethirtyeight.com/features/with-north-carolina-seven-other-states-are-considering-restricting-bathrooms-for-transgender-people/> (detailing the thirty-two bills currently pending regarding the use of restrooms by transgender individuals in the United States).

4. Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (July 2015), <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>.

because disparate and discriminatory policies have the effect of denying transgender student-athletes the opportunity to participate in sports programs altogether.

## I. BACKGROUND

### A. *Tradition of Sex-Segregation in Sports*

The domain of sports has traditionally belonged mainly to men. Throughout history, team sports have consciously segregated men and women and provided them with separate teams, rules, and even individualized sports to promote qualities that society believed were inherent in members of each sex.<sup>5</sup> For example, participation in all male sports, like football, engendered traditional masculine qualities such as aggression, physicality, and dominance.<sup>6</sup> Female sports teams, on the other hand, historically “emphasized fitness and socializing rather than competition,” and “required modest and restrictive attire,” reflecting the belief at the time that female participation in athletics was a social event.<sup>7</sup> Organizers developed different rules for male and female sports that emphasized the distinctiveness between the male and female participants.<sup>8</sup>

As a result of the civil rights movement, women’s participation in sports became slightly more integrated.<sup>9</sup> However, in practice, “sport still remains predominantly segregated on the basis of sex.”<sup>10</sup> For example, Title IX, which is meant to protect against sex discrimination, expressly allows schools to offer separate athletic programs for male and female students as long as those programs provide equal opportunities to members of each gender, and an equal amount of resources and support are expended on each gender’s athletic opportunities.<sup>11</sup>

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5. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 4 (2011).

6. *Id.*

7. *Id.*

8. *Id.* at 4–5.

9. *Id.* at 5.

10. *Id.*

11. See 34 C.F.R. § 106.41(a)–(c) (2015).

There is an expansive history of sports being segregated into exclusively male or exclusively female teams. With increasing attention being paid to transgender issues, the place for transgender individuals to participate within sports' gender-based dichotomies is less than clear. Transgender individuals disrupt the traditional binary existence of sports teams, and where their participation fits in has been neither clearly nor consistently addressed by the existing legal system.

### B. *Transgender Individuals—Identification and Legal Gender*

The term “transgender” in this article describes people whose gender identity differs from their birth sex.<sup>12</sup> Gender identity is a “person’s internal, personal sense of being a man or a woman (or someone outside of that traditional gender binary).”<sup>13</sup>

Transgender people experience a persistent and authentic difference between their birth sex and their understanding of their own gender.<sup>14</sup> “For some people, this leads to emotional distress,” which often can be relieved by freely expressing their gender identity and living according to their internal sense of self “and, for some, making a physical transition from one gender to another.”<sup>15</sup> Some transgender individuals choose to undergo hormone therapy or have sexual reassignment surgery as part of their transition.<sup>16</sup> However, hormones can have an impact on some people’s emotional state and appropriate hormone regimens vary widely among different individuals. Others choose not to take hormones at all for personal or medical reasons.<sup>17</sup> Additionally, hormone therapy is only covered by some medical insurance companies, and most sex reassignment surgeries are not covered at all. Thus, medical treatments for transgender individuals are realistically unattainable for many people, even if they would choose to undergo some form of treatment to conform more physi-

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12. *Transgender FAQ*, GLAAD, <http://www.glaad.org/transgender/transfaq> (last visited Dec. 16, 2016).

13. *Id.*

14. *Understanding Transgender: Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUALITY 2 (May 2009), [http://www.transequality.org/sites/default/files/docs/resources/NCTE\\_UnderstandingTrans.pdf](http://www.transequality.org/sites/default/files/docs/resources/NCTE_UnderstandingTrans.pdf).

15. *Id.*

16. *Id.* at 3–4.

17. *Id.* at 4.

cally to their gender identity.<sup>18</sup> There are also societal costs associated with transitioning to conform to one's gender identity, including discrimination, prejudice, and harassment.<sup>19</sup> Thus, while all transgender individuals experience a conflicting sense of inner-self that is different from their birth sex, many transgender individuals cannot or choose not to make physical changes to conform with their gender identity. Instead, they choose to be identified by pronouns reflecting their gender identity and participate in their daily activities—to the extent possible—according to their internal gender identity.

## II. STUDENTS' RIGHTS TO PARTICIPATE ON THE GENDER-SPECIFIC TEAM OF THEIR CHOICE

### A. *Entitlements Provided by Title IX*

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex.<sup>20</sup> The statute provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>21</sup> The statute defines a program or activity to include “all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education,”<sup>22</sup> as well as the operations of local educational agencies or other school systems.<sup>23</sup> A “local educational agency” is defined as

a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools, or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.<sup>24</sup>

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18. *Id.*

19. *See id.* at 5.

20. *See* 20 U.S.C. §§ 1681–1688 (2012).

21. *Id.* § 1681(a).

22. *Id.* § 1687(2)(A).

23. *Id.* § 1687(2)(B).

24. 20 U.S.C. § 7801(26)(A) (2012).

Thus, Title IX applies to universities, elementary and secondary schools, state school boards, and state athletic associations that receive any federal funds.

While Title IX does not explicitly mention sports, the implementing regulations specifically name and prohibit discrimination in athletics. In general, the regulation provides that

[n]o 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 [of federal funds], and no recipient [of federal funds] shall provide any such athletics separately on such basis.<sup>25</sup>

But the regulation does allow schools that receive federal funds to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>26</sup> Thus, schools can create gender-segregated teams, but individuals cannot be denied the opportunity for equal participation in sports on the basis of their sex. Therefore, Title IX’s prohibition of discrimination on the basis of sex requires that transgender individuals be permitted to fully participate in school athletics, regardless of their birth sex or their gender identity.

Courts and the Department of Education (“DOE”) have held that Title IX prohibits discrimination and harassment against transgender individuals. For example, in 1997, a United States District Court held that a transgender student enrolled at New York University was protected against sex-based discrimination under Title IX.<sup>27</sup> In *Miles v. New York University*, the plaintiff filed formal grievances against her graduate professor after he made unwelcome sexual advances toward her and the University failed to respond to her complaints.<sup>28</sup> After filing the formal grievances with the University’s harassment committee, the plaintiff was treated in a hostile manner by professors and administrators at the school and, as a result, the plaintiff dropped out of her doctoral program without completing it.<sup>29</sup> The plaintiff was a biologi-

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25. 34 C.F.R. § 106.41(a) (2015).

26. *Id.* § 106.41(b).

27. *Miles v. New York Univ.*, 979 F. Supp. 248, 248 (S.D.N.Y. 1997).

28. *Id.* at 249.

29. *Id.*

cal male who was admitted to school as a female while in the process of fully transitioning to a female.<sup>30</sup> The court was faced with the question of whether Title IX provided protection for a biological male who had been subjected to discriminatory conduct while perceived as female.<sup>31</sup> The court held that the student was entitled to protection based on Title IX because the professor's conduct related to "sex and sex alone," which was precisely the type of behavior that Title IX was enacted to deter.<sup>32</sup> Thus, the court held that transgender students are afforded protection from sex-based discrimination under Title IX.<sup>33</sup> More recently, in 2011, another district court held that "harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX."<sup>34</sup>

The DOE issued a "Dear Colleague" letter on October 26, 2010, focusing on harassment and bullying in the elementary and secondary school context.<sup>35</sup> The DOE stated in the letter that the legal principles involved apply to postsecondary institutions covered by Title IX as well.<sup>36</sup> The DOE stated that "[h]arassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."<sup>37</sup> The letter also provided that harassment for "failing to conform to stereotypical notions of masculinity and femininity" is considered sex discrimination under Title IX.<sup>38</sup> The letter affirmatively states that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender ("LGBT") students, from sex discrimination."<sup>39</sup> The DOE used an example of a male student who was harassed by his peers for not conforming to gender-based stereotypes of teenage boys and was denied the opportunity to participate in the drama

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30. *Id.* at 248.

31. *Id.* at 249.

32. *Id.* at 250.

33. *See id.*

34. *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011).

35. Russlynn Ali, *Dear Colleague Letter: Harassment and Bullying*, U.S. DEPT OF EDUC. 1 (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

36. *Id.* at 1.

37. *Id.* at 2.

38. *Id.* at 7–8.

39. *Id.* at 8.

club, part of the school's education program.<sup>40</sup> The DOE stated that "the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX" and that "the school had an obligation to take immediate and effective action to eliminate the hostile environment" created by such gender-based discrimination.<sup>41</sup>

Following the same logic, if a student is denied the opportunity to participate in a school's athletic activity or program because the student is transgender and fails to conform to stereotypical notions of masculinity or femininity, that student's exclusion from participating in sports would be considered sex discrimination under Title IX. Unless the student has the opportunity to participate, the school could be liable for its discriminatory practices. Of course, opponents will say that the student has the opportunity to participate on the team of his or her birth sex. However, traditional arguments for requiring student-athletes to compete on those teams do not present a rational argument for denying students the right to participate according to their gender identity<sup>42</sup> and denying them this right could only be considered sex discrimination.

In a "Questions and Answers" statement issued by the DOE on Title IX and single-sex elementary and secondary classes and extracurricular activities, the DOE stated that:

[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.<sup>43</sup>

If transgender students are granted opportunities to participate in school programs and activities in single-sex classes in a manner that is consistent with their gender identity, the same right

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40. *Id.*

41. *Id.*

42. *See infra* Part III (refuting arguments against transgender student-athletes participating in sports according to their gender identity).

43. Catherine E. Lhamon, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEP'T OF EDUC. 1, 25 (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

should be granted to transgender student-athletes that want to participate on their school's single-sex athletic teams.

*B. Title IX's Requirements Are Informed and Supported By Title VII Cases*

To lend further support to this argument, federal courts and administrative agencies have applied extensive precedent under Title VII of the Civil Rights Act of 1964 (“Title VII”) regarding discrimination against transgender individuals based on sex, including nonconformity with sex stereotypes and gender identity, to sex discrimination claims under Title IX. Title VII prohibits discrimination by employers on the basis of sex, race, color, national origin, and religion.<sup>44</sup> Precedent shows that “federal courts have looked to Title VII precedent to inform their analyses of sexual discrimination claims under Title IX.”<sup>45</sup> Pertinent case law on Title VII claims evidences that transgender individuals are provided protection against sex-based discrimination under that Title.<sup>46</sup>

For example, in *Glenn v. Brumby*, a case out of the Eleventh Circuit, the plaintiff was born a biological male, identified as a female, and was diagnosed with Gender Identity Disorder.<sup>47</sup> When Glenn was hired by her employer, she was—in all outward respects—a male, but began taking steps to transition from male to female while employed by the Georgia General Assembly's Office of Legislative Counsel.<sup>48</sup> Glenn was terminated because, according to her employer, “Glenn's intended gender transition was inappropriate, . . . it would be disruptive, and . . . it would make

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44. See 42 U.S.C. § 2000e–2(a) (2012).

45. *Howell v. North Cent. Coll.*, 320 F. Supp. 2d 717, 720 (N.D. Ill. 2004).

46. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 255 (1989) (holding that harassment based on sex stereotyping constituted discrimination on the basis of sex under Title VII); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737–38 (6th Cir. 2005) (holding that a transgender police-officer's demotion was motivated by his failure to conform to sex stereotypes in violation of Title VII); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004) (holding that a transgender firefighter who felt forced by city officials to resign when he began expressing a more non-gender-conforming identity at work was the subject of discrimination and qualified for Title VII protection); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303–08 (D.D.C. 2008) (holding that an employer who rescinded a job offer after the transgender applicant informed a supervisor that the applicant intended to start presenting as a female and to ultimately undergo transgender surgery violated Title VII).

47. *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011).

48. *Id.*

Glenn's coworkers uncomfortable."<sup>49</sup> The court ruled that Glenn's termination due to her gender identity and subsequent transition constituted sex-based discrimination under Title VII.<sup>50</sup> The court held that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype."<sup>51</sup> The court went further to state that "[a]n individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual."<sup>52</sup> Overall, the court held that "discriminatory state action could not stand on the basis of gender stereotypes."<sup>53</sup>

Because courts rely on Title VII precedent to analyze discrimination "on the basis of sex" under Title IX,<sup>54</sup> the same principles apply to transgender students at schools that receive federal funding. Under these laws, all students, whether transgender or not, are protected from discrimination on the basis of gender stereotypes. Because Title IX protects all students against sex-based discrimination that would preclude participation on school athletic teams, they cannot be denied to transgender students.

### III. CONFRONTING ARGUMENTS AGAINST TRANSGENDER STUDENT-ATHLETES PARTICIPATING IN SPORTS ACCORDING TO THEIR GENDER IDENTITY

School districts have a legal obligation to provide students with a non-discriminatory educational environment and may not treat individuals differently on the basis of sex with regard to any aspect of the services, benefits, or opportunities they provide.<sup>55</sup> It follows that transgender student-athletes cannot be denied the opportunity to participate in interscholastic athletic activities

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49. *Id.*

50. *Id.* at 1317.

51. *Id.* at 1318.

52. *Id.* at 1319.

53. *Id.*

54. *See, e.g.,* Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (stating that "[i]n reviewing claims of discrimination brought under Title IX . . . courts have generally adopted the same legal standards that are applied to such claims under Title VII"); Howell v. North Cent. Coll., 320 F. Supp. 2d 717, 720 (N.D. Ill. 2004) (analyzing actionability of the plaintiff's Title IX claim under Title VII precedent).

55. *See* 20 U.S.C. § 1681(a) (2012); 34 C.F.R. § 106.31(a)–(b) (2015).

solely based on their perceived gender non-conformity. In order to avoid sex-based discrimination regarding which gender-specific sports team an individual can play on, school districts should allow student-athletes to participate on the gender-specific sports team that matches their gender identity to the greatest extent possible. Opponents to allowing transgender students to compete according to their gender identity commonly cite two main concerns with allowing individuals to compete on teams different from their birth sex.

First, opponents argue that allowing transgender females to compete on female sports teams would create an unfair competitive advantage for the transgender female, and thereby decrease the opportunities available for traditional biological females to participate in interscholastic athletics.<sup>56</sup> Second, opponents claim that physical differences between the sexes increase the risk of injury for female athletes that would be forced to compete against transgender females.<sup>57</sup> However, the courts have already addressed these concerns, albeit in slightly different contexts, and found that these concerns do not provide a legitimate reason for preventing elementary or secondary school students from participating on a gender-specific sports team that does not align with their birth gender.<sup>58</sup>

A. *Unfair Competitive Advantage and the Diminution of Opportunities for Female Athletes*

The most common concern cited by opponents of allowing student-athletes to participate on the gender-specific team of their choice is that transgender females possess physically superior attributes that would allow them to dominate female sporting events, thus allowing them to take over the realm of women's sports. While one of Title IX's main goals is to promote female participation in athletic competition, it is unlikely that transgender females will deprive biological female athletes the opportunity to participate in sports.<sup>59</sup>

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56. See *infra* Part III.A.

57. See *infra* Part III.B.

58. See *id.*

59. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 277 (2013).

The National Center for Transgender Equality estimates that 1.4 million Americans are transgender.<sup>60</sup> This relatively small ratio of the population—which includes both transgender males and transgender females—does not pose a substantial risk to Title IX’s goal of providing opportunities for female students to participate in sports. Courts have also realized that allowing male participation on all-female teams does not meaningfully jeopardize the objectives of Title IX.<sup>61</sup> For example, in *Attorney General v. Massachusetts Interscholastic Athletic Association*, the court held that physical differences between males and females are “not so clear or uniform as to justify a rule in which sex is” an absolute bar to male participation on female teams.<sup>62</sup> The court explained that “[t]he general male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases approach those of the most talented men.”<sup>63</sup> The court held that “[c]lassification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo ‘archaic and overbroad generalizations.’”<sup>64</sup> Thus, courts are not impressed by the claim that the alleged physical prowess of male athletes should prevent them from participating on a female sports team. By the same logic, a transgender female should not be precluded from participation on the female sports team with which she gender identifies.

Courts have also held that allowing male participation on previously all-female sports teams does not pose a threat of sudden male influx and domination of those sporting events.<sup>65</sup> The same logic holds true for transgender participation on sports teams. Because transgender individuals comprise such a small portion of

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60. See *Understanding Transgender People FAQ*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/issues/resources/understanding-transgender-people-faq> (last visited Dec. 16, 2016).

61. Skinner-Thompson & Turner, *supra* note 59, at 277.

62. 393 N.E.2d 284, 293 (Mass. 1979).

63. *Id.*

64. *Id.* (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

65. See, e.g., *Gomes v. R.I. Interscholastic League*, 469 F. Supp. 659, 666 (D.R.I. 1979) (holding that there was no evidence that the inclusion of a male on the previously all-female volleyball team would “lead to a sudden male influx or domination of Rhode Island interscholastic volleyball”); *Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d at 294 (holding that fears that would be “swamping of girls’ teams by boys of skill and prowess superior to those of girls” were overblown).

the population and male participants that have been permitted by the courts to participate on all-female sports teams have not “swamp[ed the] girls’ teams,”<sup>66</sup> it logically follows that allowing student-athletes to participate in sports according to their gender identity would not create a meaningful interference in athletic opportunities for female athletes. If transgender individuals’ athletic abilities permit them to qualify for a spot on the sports team of their choice, there is no rational objection to prevent their participation on the basis of preserving competitive physical advantages or opportunities for female athletes.

B. *Physical Differences Between the Sexes and the Increased Risk of Injury*

The other big concern of opponents is that transgender males will be injured as a result of playing with athletes who were born as biological males or that biological females competing with transgender females will be injured. These same concerns were cited in the past in an attempt to justify restricting females from participating in sports altogether or from participating on all-male sports teams when no female equivalent was offered.<sup>67</sup> For example, in *Force v. Pierce City R-VI School District*, a thirteen-year-old middle school student claimed that the school district’s refusal to allow her the opportunity to participate on her school’s eighth grade football team was based solely upon the fact that she was a female rather than a male.<sup>68</sup> The court rejected the argument that female students should be excluded from participating on the all-male football team because of safety concerns by stating that “some 13 year old females could safely play eighth grade football in mixed sex competition, and some 13 year old males could not.”<sup>69</sup> Thus, the court held that there was no valid reason for the wholesale exclusion of female student-athletes from participating in football because the risk of injury was not a valid justification.<sup>70</sup> The court in *Force* held that the student should have the chance to display her abilities for an opportunity to par-

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66. See *Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d at 294.

67. *Skinner-Thompson & Turner*, *supra* note 59, at 274.

68. 570 F. Supp. 1020, 1021–22 (W.D. Mo. 1983).

69. *Id.* at 1029.

70. *Id.* at 1030–31.

ticipate on the team and there was no “justification to deny that privilege to someone simply because she [was] a female rather than a male.”<sup>71</sup>

Courts have routinely rejected arguments that physical differences between the sexes justify exclusion of females from otherwise all-male sports teams.<sup>72</sup> Especially for students in elementary and secondary school, physical differences between males and females are relatively minimal and some female students are more inherently athletic than their male peers. That does not mean a less athletic male does not have the right to try out for a male team, or a female does not have the right to try out for the female team. Likewise, transgender student-athletes should not be precluded from participating on the sports team associated with their gender identity because of any perceived risk of increased injury for any student. Like the plaintiff in *Force*, transgender student-athletes should be able to try-out for the gender-specific team that matches their gender identity and be afforded the opportunity to play based on their athletic abilities, not their biological gender.

#### IV. CURRENT PARTICIPATION POLICIES

Across the United States, school athletics associations establish the policies that determine participation on sex-segregated athletic teams for each state. As a result of this state-autonomous rule-making process, there are no uniform rules for transgender student-athletes to participate in interstate competitions, and these disparate rules can impact student-athletes who move to other states or transfer schools and effect conference and tournament eligibility criteria. There are currently fifteen states with inclusive school policies for transgender student-athletes which

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71. *Id.* at 1031.

72. *See, e.g., id.* (holding that there was no valid justification for excluding female students from playing football); *Nat'l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 36–37 (N.J. Super. Ct. App. Div. 1974) (stating that there was “substantial credible evidence . . . that girls of ages 8–12 are not as a class subject to a materially greater hazard of injury while playing baseball than boys of that age group”); *Darrin v. Gould*, 540 P.2d 882, 892 (Wash. 1975) (en banc) (concluding that “[b]oys 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. Moreover, the fact that some boys cannot meet the team requirements is not used as a basis of disqualifying those boys that do meet such requirements.”).

require no hormones treatments or surgery.<sup>73</sup> Sixteen states require certain medical documentation that acts as an impediment to students' participation on a sports team that matches their gender identity.<sup>74</sup> There are seven states that have discriminatory policies for transgender student-athletes, requiring changes to birth certificates, sex reassignment surgery, or hormone treatment with mandatory waiting periods before students are able to participate on a gender-specific sports team that they identify with.<sup>75</sup> Eleven states currently do not have a policy governing the participation of transgender student-athletes.<sup>76</sup>

#### A. *Inclusive Policies*

California was one of the first states to create an inclusive policy for transgender student-athletes and its policy remains one of the most liberal in the United States.<sup>77</sup> The California Interscholastic Federation policy says “[a]ll students should have the opportunity to participate in [California Interscholastic Federation] activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”<sup>78</sup> The rule provides guidance on changing the student’s eligibility for participation in interscholastic athletics in a gender that does not match the student’s birth gender.<sup>79</sup> The California Interscholastic Federation provides for an eligibility hearing no later than five school business days before the first interscholastic contest that is the subject of the petition.<sup>80</sup> The hearing is held in front of at least three individuals, with at least one of them being from the physical or mental health profession category familiar with the medical realities experienced by transgender individuals.<sup>81</sup> The appealing

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73. High School Policies, TRANSATHLETE.COM, <http://www.transathlete.com/k-12> (last visited Dec. 16, 2016).

74. *See id.*

75. *Id.*

76. *Id.*

77. Lawrence J. Altman, *California Leads the Way—Legal Protections for Missouri and Kansas Transgender Students*, TRANSAS CITY, <http://transascity.org/california-leads-the-way/> (last visited Dec. 16, 2016).

78. CAL. INTERSCHOLASTIC FED’N, CONSTITUTION & BYLAWS, GUIDELINES FOR GENDER IDENTITY PARTICIPATION 88 (2016), [http://cifstate.org/governance/constitution/Constitution\\_and\\_Bylaws.pdf](http://cifstate.org/governance/constitution/Constitution_and_Bylaws.pdf) (last visited Dec. 16, 2016).

79. *Id.*

80. *Id.*

81. *Id.*

student need only provide a current transcript or school registration information, documentation of the student's consistent gender identification (which can be in the form of affirmed written statements from the student and/or parent, guardian, or health care provider) and any other pertinent documentation or information the student would like to include.<sup>82</sup> In California, once the student has been granted eligibility to participate in interscholastic athletics consistent with his or her gender identity, the eligibility is granted "for the duration of the student's participation and does not need to be renewed every sports season or school year."<sup>83</sup> California keeps all discussion and documentation regarding the change of eligibility proceedings sealed unless the student and family make a specific request.<sup>84</sup>

To further expand the inclusivity of California's interscholastic policy, California Assembly Bill 1266 was approved, and it went into effect on January 1, 2014.<sup>85</sup> Now codified as section 221.5(f) of the California Education Code, the statute allows students to participate in athletics and sex-segregated activities in accordance with their gender identity.<sup>86</sup> Specifically, the law provides that "[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."<sup>87</sup>

Other states with inclusive transgender student-athlete policies include Florida, Washington, Nevada, Wyoming, Colorado, South Dakota, Minnesota, Virginia, Maryland, Vermont, New Hampshire, Massachusetts, Rhode Island, and Connecticut.<sup>88</sup> The Florida High School Athletic Association's Gender Identification Participation Policy states that "[a]ll eligible students should have the opportunity to participate in interscholastic athletics in a manner that is consistent with their gender identity and ex-

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82. *Id.*

83. *Id.*

84. *Id.*

85. S. No. 1266, 2013 Leg., Reg. Sess. (Ca. 2013); see also *VICTORY! CA Bill Will Ensure the Success and Well-being of Transgender Students*, TRANSGENDER LAW CTR. (Mar. 4, 2013), <http://transgenderlawcenter.org/archives/3544>.

86. CAL. EDUC. CODE § 221.5(f) (Deering 2016).

87. *Id.*

88. K-12 Policies, TRANSATHLETE.COM, <http://www.transathlete.com/k-12> (last visited Dec. 16, 2016).

pression, irrespective of the gender listed on a student's birth certificate and/or records."<sup>89</sup> Florida's policy provides a similar method of review as California by requiring a Gender Identity Eligibility Committee, composed of at least one person from the physician or mental health category, to review information provided by the student to determine his or her gender identity as it pertains to interscholastic athletic participation.<sup>90</sup> Like California, "[w]hen there is sufficient documentation and confirmation of a student's consistent gender identity and expression, the eligibility committee will affirm the student's eligibility to participate in [the Florida High School Athletic Association] consistent with the student's gender identification and expression."<sup>91</sup> Once such eligibility has been granted, it is binding for the duration of the student's participation in "every sport season of every school year" and all discussion and documentation regarding the proceeding will be kept confidential.<sup>92</sup>

#### B. *Policies Requiring Medical Documentation*

Some states have provided athletic policies that do not expressly prohibit transgender individuals from participating on the gender-specific team that matches their gender identity, but have placed requirements of proof on the students that create a barrier to participating in interscholastic athletics free from sex-based discrimination. For example, the Illinois High School Association's policy addressing transgender student participation requires the student to provide medical documentation and assert the advantages that they would gain by being allowed to participate in interscholastic athletics in accordance with their gender identity.<sup>93</sup> The Illinois policy requires students and/or their parents to notify their individual school administrator or athletic director that the student has a different gender identity than the

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89. FLA. HIGH SCH. ATHLETIC ASS'N, ADMINISTRATIVE POLICIES OF THE FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC. § 4.3 (2016-17), [http://www.fhsaa.org/sites/default/files/attachments/2010/09/16/node-235/1617\\_handbook\\_policies\\_revised\\_0.pdf](http://www.fhsaa.org/sites/default/files/attachments/2010/09/16/node-235/1617_handbook_policies_revised_0.pdf).

90. *Id.* § 4.3.4.

91. *Id.* § 4.3.6.

92. *Id.*

93. ILL. HIGH SCH. ASS'N, POLICY AND SCHOOL RECOMMENDATIONS FOR TRANSGENDER PARTICIPATION § 34 (2016-17), [http://www.ihsa.org/documents/forms/current/IHSA\\_Policies.pdf](http://www.ihsa.org/documents/forms/current/IHSA_Policies.pdf).

gender listed on the student's school records or birth certificate.<sup>94</sup> The student would then provide documentation for the school to use in order to make a participation ruling.<sup>95</sup> The policy requires the student to submit proof of the student's legal gender identity with the school, medical documentation (including evidence of hormonal treatments, sexual reassignment surgery, counseling, consultation with medical personnel, etc.), and gender identity related advantages for approved participation on the gender-specific team.<sup>96</sup> Once the school administrator has collected that information, it is submitted to the Illinois High School Association, who will make a ruling on the student's gender identity for the selected athletics or school activities that the student would like the opportunity to participate in if they are selected through the team try-out process.<sup>97</sup> The Illinois High School Association would then issue a participation ruling either allowing or disallowing the student to participate in that selected activity's try-outs according to his or her gender identity.<sup>98</sup>

In Iowa, the Iowa High School Athletic Association issued a transgender participation policy, but the policy focuses only on transgender male student-athletes.<sup>99</sup> The policy provides that "[t]he transgender student at an Iowa High School Athletic Association member school who identifies as male, despite having been born with female genitals, shall be allowed to fully compete as a male as long as he consistently identifies as a male at school, home and socially."<sup>100</sup> The policy completely disregards transgender female students who, presumably, would only be allowed to participate on a team according to her birth sex.<sup>101</sup> In this way, the Iowa High School Athletic Association requires all transgender student-athletes who choose to publicly identify with their internal sense of being male or female to participate in interscholastic athletics as a male.

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. IOWA HIGH SCH. ATHLETIC ASS'N, TRANSGENDER STATEMENT, <http://www.iahsaa.org/wp-content/uploads/2014/04/Transgender-Guidelines.pdf> (last visited Dec. 16, 2016).

100. *Id.*

101. *See id.*

The Missouri State High School Activities Association allows transgender students the ability to participate in sex-separated interscholastic sports so long as the athlete's use of hormone therapy is consistent with current medical standards.<sup>102</sup> The policy states:

A trans male (female to male) student-athlete who has undergone treatment with testosterone for gender transition may compete on a boys team but is no longer eligible to compete on a girls team without changing the team status to a mixed team . . . A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a boys team but may not compete on a girls team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment."<sup>103</sup>

Missouri's policy is modeled off of the National Collegiate Athletic Association Transgender Policy and requires hormone treatment for any transgender student-athlete that would like to participate in interscholastic athletics.<sup>104</sup>

While these state policies do allow student-athletes to compete on a team according to their gender identity, students are required to provide medical proof of their gender identity, which creates a hurdle based on sex-discrimination that a student must overcome before participating on the gender-specific team of their choice. Iowa even precludes transgender females from participating on a female-only sports team while allowing transgender men the opportunity to join a men's athletic team.<sup>105</sup>

### C. *Discriminatory Policies*

Other states have adopted discriminatory policies regarding transgender student-athletes' participation that effectively prevents transgender student-athletes from participating on a gender-specific team of their choice.

The Georgia High School Association's bylaws state that "[a] student's gender is determined by the gender noted on his/her

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102. MO. STATE HIGH SCH. ACTIVITIES ASS'N, 2015–2016 MSHSAA OFFICIAL HANDBOOK § 37 (87th ed. 2015), <http://www.mshsaa.org/resources/pdf/1516Handbook.pdf>.

103. *Id.*

104. *Id.*; see *infra* Part IV.D.1.

105. See *supra* text accompanying notes 99–100.

certificate at birth.”<sup>106</sup> The state does not provide for an appeals process, and requires students to participate on the sports team of their birth gender regardless of their gender identity.<sup>107</sup>

The New Mexico Activities Association policy has a similar provision and states that an athlete must play on the team of the gender listed on his or her birth certificate.<sup>108</sup> However, in New Mexico, sexual reassignment surgery is required to change a birth certificate.<sup>109</sup> Thus, participation on gender-specific sports teams matching a student’s gender identity is impossible, except in the unlikely event that a student undergoes an intensive and expensive medical procedure. In reality, few elementary or secondary school students would go through with such a procedure, and very few doctors are willing to perform a sexual reassignment surgery on someone so young.<sup>110</sup> Even college-age students are unlikely to have such a procedure performed because of medical and financial limitations.

Finally, in Idaho, the Idaho High School Activities Association allows transgender students to participate in interscholastic athletics consistent with the student’s gender identity under the following conditions:

- a. A female-to-male transgender student athlete who is taking a medically prescribed hormone treatment under a physician’s care for the purposes of gender transition may participate only on a boys team.
- b. A male-to-female transgender student athlete who is not taking hormone treatment related to gender transition may participate only on a boys team.
- c. A male-to-female transgender student athlete who is taking medically prescribed hormone treatment under a physician’s care for the purposes of gender transition may participate on a boys team at any time, but must complete one year of hormone treatment related to the gender transition before competing on a girls team.<sup>111</sup>

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106. GA. HIGH SCH. ASS’N, CONSTITUTION AND BY-LAWS § 1.47 (2015), <http://www.ghsa.net/sites/default/files/documents/Constitution/Constitution2015-16Complete.pdf>.

107. *Id.* However, girls may play on a boys’ team when no girls’ team is offered. *Id.*

108. N.M. ACTIVITIES ASS’N, BYLAWS § 6.1, [http://www.nmact.org/file/Section\\_6.pdf](http://www.nmact.org/file/Section_6.pdf) (last visited Dec. 16, 2016).

109. N.M. STAT. ANN. § 24-14-25(D) (2009).

110. Lisa Fletcher, *Transgender Americans Face Dearth of Sexual Reassignment Surgeons*, ALJAZEERA AM. (Aug. 28, 2015, 7:45 AM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/8/28/transgender-doctor-shortage-surgery-america.html>.

111. IDAHO HIGH SCH. ACTIVITIES ASS’N, RULES & REGULATIONS, Rule 11-3(a–c), <http://>

The Idaho High School Activities Association rule requires a male-to-female student-athlete to submit a request, along with a doctor's letter including personal treatment information, to the Executive Director, who will then make a determination whether the student is eligible to participate in interscholastic athletic activities under the above criteria.<sup>112</sup> The Idaho rule also has a sense of finality in that it requires a student to consistently participate on teams of the gender they initially select in all sports for the duration of his or her high school career.<sup>113</sup>

In these states, the athletics association's discriminatory policy means that a transgender athlete has little chance of participating in sports while in school because he or she is prevented from participating on the sports team with which the student gender identifies, solely on the basis of sex.

#### D. *Self-Governed Organizations*

There are a number of self-governed organizations that also have created transgender policy statements, although they are not directly subject to Title IX's requirements. Such organizations have issued guidance on the participation of transgender athletes that they hope will guide their members and will lead to uniform participation rules within the organization.

##### 1. National Collegiate Athletic Association

The National Collegiate Athletic Association ("NCAA") is a member-led organization dedicated to the well-being and lifelong success of college athletes.<sup>114</sup> The NCAA's national office's responsibilities include interpreting and supporting member legislation and managing programs that benefit student-athletes.<sup>115</sup>

While the NCAA is comprised of "member schools" that receive federal funding, the Supreme Court has held that the NCAA is

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[//www.idhsaa.org/manage/articlefiles/56-Rules%20and%20regs%20.pdf](http://www.idhsaa.org/manage/articlefiles/56-Rules%20and%20regs%20.pdf) (last visited Dec. 16, 2016).

112. *Id.* Rule 11-3(d).

113. *Id.* Rule 11-3(f).

114. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Dec. 16, 2016).

115. *Id.*

not considered a recipient of federal funds just because it receives dues from member schools that do receive federal money.<sup>116</sup> As a result of that ruling, the NCAA is not subject to Title IX's prohibitions against sex discrimination.<sup>117</sup> However, the NCAA has always maintained a commitment to gender equality, and has stated that the organization attempts to be in compliance with Title IX on a voluntary basis.<sup>118</sup> In accordance with these efforts, the NCAA has instituted certain policies to achieve Title IX compliance.<sup>119</sup> In 2011, the NCAA issued a handbook which laid out the organization's commitment to the inclusion of transgender student-athletes in the athletic programs at its member schools.<sup>120</sup>

The NCAA's policy on transgender student-athlete participation requires transgender student-athletes to undergo hormonal treatment for gender transition is as follows:

A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.

A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition 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.<sup>121</sup>

Any transgender student-athlete who is not taking hormone treatment is required to participate in sex-separated sports according to his or her assigned birth gender.<sup>122</sup> That means that unless a student-athlete has had medical treatment in the form of

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116. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999).

117. See 20 U.S.C. § 1681 (2012).

118. Linda Greenhouse, *N.C.A.A. Triumphs in Civil Rights Suit in Supreme Court*, N.Y. TIMES, Feb. 24, 1999, at D4.

119. See, e.g., *The Title IX Coordinator and Athletics Compliance*, NCAA, [https://www.ncaa.org/sites/default/files/Title\\_IX%2BCoordinators%2B-%2BNCAA%2Bresource%2B2011.pdf](https://www.ncaa.org/sites/default/files/Title_IX%2BCoordinators%2B-%2BNCAA%2Bresource%2B2011.pdf) (last visited Dec. 16, 2016).

120. *NCAA Inclusion of Transgender Student-Athletes*, NCAA: OFFICE OF INCLUSION 2 (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

121. *Id.* at 13.

122. *Id.*

mandatory hormone regimens, he or she would be required to participate on the sports term according to birth sex, regardless of gender identity. The NCAA requires hormone therapy for transgender female student-athletes because the organization regards hormone treatment as sufficient to neutralize any source of gender-related physical advantage that may be relevant in the sport.<sup>123</sup> The NCAA based this judgment on medical evidence suggesting that one year of testosterone suppression treatment decreases an individual's muscle mass and puts that individual in the "spectrum of physical traits . . . of their transitioned gender."<sup>124</sup>

## 2. International Olympic Committee

Concerns about the participation of transgender athletes is not limited to the United States. The International Olympic Committee ("IOC") held a Consensus Meeting in November 2015 to discuss sex reassignment, hyperandrogenism, and how to determine in which category—male or female—an individual is able to compete.<sup>125</sup> The Committee sought to ensure, as much as possible, that transgender athletes would not be excluded from the opportunity to participate in athletics while still guaranteeing fair competition.<sup>126</sup> The IOC's Consensus is designed to be a recommendation—not rules or regulations—for international sports federations to follow.<sup>127</sup> Many of the countries that send athletes to compete in the Olympics do not currently have rules on the eligibility of transgender individuals, and the IOC hopes that its guidelines will encourage countries to put regulations in place that will ensure fair competition and provide transgender athletes the opportunity to compete.<sup>128</sup>

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123. *Id.* at 8, 13.

124. *Id.* at 7, 13.

125. INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2 (2015) [hereinafter IOC CONSENSUS], [http://www.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

126. *Id.* at 2–3.

127. Associated Press, *IOC Rules Transgender Athletes Can Take Part in Olympics Without Surgery*, THE GUARDIAN (Jan. 24, 2016), <http://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery>.

128. *Id.*

Previously, the IOC's guidelines required sexual reassignment surgery for all transgender athletes followed by at least two years of hormone therapy in order to be eligible to compete.<sup>129</sup> Now, surgery is no longer a requirement for transgender athletes to compete, according to the IOC guidelines.<sup>130</sup> The IOC members agreed that a different set of guidelines should be taken into account by sports organizations when determining eligibility to participate on male or female teams, because requiring surgical anatomical changes as a pre-condition to participation is not necessary to preserve fair competition and might be inconsistent with developing legislation and notions of human rights.<sup>131</sup> The IOC's most recent guidelines allow individuals who transition from female to male to compete in the male category "without restriction."<sup>132</sup> However, individuals who transition from male to female are only eligible to compete in the female category under certain conditions.<sup>133</sup> The guidelines require that "[t]he athlete has declared that her gender identity is female [and t]he declaration cannot be changed, for sporting purposes, for a minimum of four years."<sup>134</sup> She must also demonstrate that her testosterone level is below a certain level for at least twelve months before her first competition and throughout the period of desired eligibility to compete in the female category.<sup>135</sup> The guidelines allow testing of transgender female athletes to monitor their compliance with these conditions.<sup>136</sup> If a transgender female athlete's testosterone levels are tested and register above the prescribed limit, that athlete would be suspended from eligibility for female competition for twelve months.<sup>137</sup>

The members of the Consensus do not plan to send the guidelines for approval by the IOC executive board.<sup>138</sup> However, the Consensus was driven by social and political changes within member countries and is the IOC's attempt to adapt to the mod-

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129. *Id.*

130. IOC CONSENSUS, *supra* note 125, at 2–3.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Associated Press, *supra* note 127.

ern legislation around the world, which no longer imposes surgery as a legal requirement to participate on sports teams according to an individual's gender identity.<sup>139</sup>

## V. PROPOSAL

As evidenced by the extremely different policies that govern transgender athletic participation within the United States, a uniform rule should be required that would allow student-athletes the opportunity to participate in sports according to their gender identities. By adopting a single national policy for all elementary and secondary school athletic programs, educators can ensure that student-athletes and teams will not run into problems due to inconsistent state rules for conference, tournament, or national competitive tournament eligibility. The adoption of a single national standard will also enable an easier transition for transgender students who move to another state while they are still in school. College athletic programs would also benefit from a uniform policy because a uniform rule that applies to every state would ensure that all member schools of the NCAA apply the same standards when determining transgender student-athlete participation. It would also allow college athletes to transfer to college programs in other states without the possibility of having their eligibility revoked for participating on the gender-specific team they had been playing on. However, separate rules for student-athletes in elementary and secondary schools and those in college programs would be permissible.

Elementary and secondary school districts should adopt a uniform rule that allows transgender student-athletes to compete on the gender-specific sports team of their choice, regardless of the gender on their birth certificate or whether they are receiving any form of medical treatment. In the elementary and secondary school setting, students are guaranteed the availability of a public school education and a corresponding opportunity to participate equally in all school programs and activities. At this level, the focus should be on full participation in athletics for all students. Additionally, physical differences that some people believe are inherent in biological gender are less disparate at these ages

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139. *Id.*

than they are for college-level athletes. The time of eligibility to participate in elementary and secondary school athletic programs is also limited, so requiring a certain time period for medical treatment to become effective would prohibit a student's participation in interscholastic athletics.

At the collegiate level, physical differences between males and females can be more apparent, so the NCAA and its member schools have an interest in requiring hormonal treatment to level the playing field for transgender athletes who would like to participate on the gender-specific team of their choice. The availability of a "medical redshirt" year, which allows student-athletes to be a member of a sports team for one year without participating in any competitions and still retain the full length of eligibility to participate in collegiate sports, also provides a window of time for college athletes to comply with NCAA policies without being denied the opportunity to participate on the gender-specific team of their choice.<sup>140</sup> Unlike elementary and secondary school, access to a college education is not a guarantee for all people. Thus, colleges would be afforded more deference under Title IX to regulate transgender student-athletes' participation standards to ensure fair and inclusive interscholastic athletic competition. Thus, states should adopt a policy for collegiate level athletes that allows transgender male student-athletes to participate on male sports teams that align with their gender identity and allows transgender female student-athletes to participate on female sports teams after completing one year of hormone therapy and maintaining that planned treatment for the duration of the eligibility to compete on that team. Such a policy would allow college students to compete on the gender-specific team that relates to their gender identity, while addressing concerns inherent in physical differences between the sexes at that post-pubescent age and neutralizing any sort of age- or gender-related physical advantage.

Adopting and effectively implementing a uniform anti-discrimination policy at both the elementary/secondary and collegiate levels that explicitly includes sexual orientation helps schools protect against potential liability for sex-based discrimi-

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140. *Transfer Terms*, NCAA, <http://www.ncaa.org/student-athletes/current/transfer-terms> (last visited Dec. 16, 2016).

nation under Title IX while, at the same time, ensuring that all athletes can participate free from harassment and discrimination. Athletic programs affiliated with educational institutions have a responsibility, beyond those of professional sports programs and organizations like the IOC, to look beyond the value of competition to promote broader educational goals of participation, inclusion, and equal opportunity. “Because high schools and colleges must be committed to those broader educational goals, they should not unthinkingly adopt policies developed for adult Olympic and professional athletes.”<sup>141</sup> Accordingly, elementary and secondary schools should adopt a uniform participation policy that allows transgender student-athletes to participate on the gender-specific team of their choice, as it relates to their gender identity, and collegiate level schools should attempt to ensure participation based on gender identity to the extent that it is compatible with legitimate concerns relating to gender-specific differences in college-aged individuals.

#### CONCLUSION

Transgender student-athletes have the right under Title IX to participate in interscholastic athletics free from sex-based discrimination. Typical arguments for excluding transgender student-athletes from participating on the gender-specific sports team that relates to their gender identity, namely that transgender females would have a competitive advantage over other female athletes or that mixing transgender students onto traditionally sex-segregated teams creates an increased risk of injury, have been found by the courts to be unconvincing justifications for excluding individuals from participating on sports teams on the basis of gender.<sup>142</sup> The disparate state of current policies governing transgender individuals’ participation in interscholastic athletics<sup>143</sup> creates the need for a uniform national rule that would protect schools from liability for sex discrimination and allow student-athletes to participate on sports teams according to their gender identity.

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141. See Griffin & Carroll, *supra* note 1, at 12.

142. See *supra* Part III.A–B.

143. See *supra* Part IV.

Accordingly, the most equitable solution would be to provide two sets of uniform rules—one for elementary and secondary school student-athletes, and one for collegiate level athletes. Elementary and secondary school students should be afforded the opportunity to participate on the gender-specific sports team that match their gender identity, regardless of the gender on their birth certificate or whether they are receiving medical treatment. Collegiate level transgender male athletes should be allowed to compete on male sports teams that align with their gender-identity, while collegiate level transgender female athletes should be allowed to compete on female sports teams after completing one year of hormone therapy (administered during a medical “redshirt” year, if necessary) and maintaining that therapy for the duration of their eligibility period.

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