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COMMENTS

THE TRANSGENDER STUDENT-ATHLETE: IS THERE A FOURTEENTH AMENDMENT RIGHT TO PARTICIPATE ON THE GENDER-SPECIFIC TEAM OF YOUR CHOICE?

KRISTA D. BROWN*

I. INTRODUCTION

Two years ago, the U.S. Soccer Federation forced a state youth soccer association to allow an eleven-year-old girl named Jazz to play on the girls' travel team.¹ Jazz had been banished from the all-girls soccer team because she was born a male.² She was diagnosed with Gender Identity Disorder (GID) at age three and was allowed to transition to a girl at age five.³ Once she gained the right to play on the girls' soccer team, Jazz said, "[s]occer is something I hope to do for the rest of my life."⁴ Now, two years later, Jazz is probably preparing to enter high school, where she may be facing another hurdle to play soccer, at least for the girls' team.

The legal rights of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community have been hotly contested issues over the past decade. These issues have ranged from discrimination to the rights of gays and lesbians to legally marry.⁵ Emerging issues in this field include the rights of transgender men and

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¹ Pablo S. Torre & David Epstein, *The Transgender Athlete*, SPORTS ILLUSTRATED, May 28, 2012, at 72, available at <http://www.si.com/vault/2012/05/28/106195901/the-transgender-athlete> (Jazz's last name and state were withheld in the original article at the request of the parents to protect Jazz).

² *Id.* at 71-72.

³ *Id.*

⁴ *Id.* at 72.

⁵ See, e.g., *United States v. Windsor*, 570 U.S. ___, 1 (2013); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

women to use public facilities that conform to their gender identities.⁶ A related issue is whether transgender athletes have the right to play on the team of their choice, meaning the team that conforms to their gender identity. Some athletic entities, such as the International Olympic Committee (IOC) and the National Collegiate Athletic Association (NCAA), have already instituted transgender policies to relieve these issues.⁷ However, there is no overarching rule governing the entities with over seven million transgender athletes⁸—high school athletic associations. Some associations allow athletes to freely choose which team they would like to play for; others have certain criteria that must be met before a student-athlete can play on the team that is different than the athlete's birth-sex; while other associations have decided to only allow student-athletes to play on their birth-sex teams or have no policy at all.⁹

This Comment will discuss the constitutional validity of high school athletic associations' rules regarding transgender student-athletes and whether transgender student-athletes have a Fourteenth Amendment right to play on the team that conforms to their gender identity. Part II will define what it means to be transgender and discuss transgender athletes throughout history. Part III will highlight rules regarding transgender athletes that the NCAA, the IOC, and various state high school athletic associations have implemented. Part IV will discuss the Fourteenth Amendment rights of transgender athletes to choose which gender-specific team they want to play for. Finally, Part V recommends policies regarding transgender student-athletes that should be implemented by high school athletic associations so as to not infringe on transgender student-athletes' constitutional rights.

⁶ See, e.g., *Michaels v. Akal Sec., Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954, *1–4 (D. Colo. June 24, 2010); *Goins v. W. Grp.*, 635 N.W.2d 717, 720 (Minn. 2001); *Doe v. Clenchy*, No. CV-09-201, 2011 Me. Super. LEXIS 70, *3–5 (Me. Super. Ct. Apr. 1, 2011).

⁷ See Torre & Epstein, *supra* note 1, at 67. See generally NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES, NCAA (2011), [hereinafter NCAA TRANSGENDER POLICY] available at http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

⁸ NAT'L FED'N OF STATE HIGH SCH. ASS'N, 2012–13 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY RESULTS, 54 (2013), available at http://www.nfhs.org/ParticipationStatics/PDF/2013-14%20NFHS%20Handbook_pgs52-70.pdf.

⁹ Elizabeth M. Ziegler & Tamara Isadora Huntley, "It Got Too Tough to Not Be Me": Accommodating Transgender Athletes in Sport, 39 J.C. & U.L. 467, 488 (2013).

II. DEFINING TRANSGENDER & THE HISTORY OF TRANSGENDER ATHLETES

Transgender is the general term used to describe any person whose gender identity is different from their assigned sex at birth.¹⁰ The term transgender encompasses those individuals who have undergone sex-reassignment surgery or hormone therapy, and those who have not.¹¹ Transgender differs from intersex, which describes an individual who has both male and female genitalia.¹² A transgender person may be diagnosed with Gender Identity Disorder (GID).¹³ GID is personified in people who experience “great discomfort regarding [their] actual anatomic gender.”¹⁴ Symptoms of GID include a desire to become the opposite sex, disgust with one’s own genitals, depression, and anxiety.¹⁵

Currently, there is no way to calculate the precise number of transgender people in the United States, but the Williams Institute at the University of California Los Angeles School of Law estimates the number to be 700,000.¹⁶ Due to the difficulty of determining the population of transgender people in the United States, it is even more difficult to determine how many transgender student-athletes there are. Between 2006 and 2012, Karen Morrison, the NCAA’s Director of Gender Initiatives and Student-Athlete Well-Being, reported that she had received forty transgender-related inquiries from universities, prospective student-athletes, and attorneys.¹⁷ There are also no recent studies that provide data on the prevalence of GID, but some European countries estimate that one in 30,000 men and one in 100,000 women seek sex-reassignment.¹⁸

Although it is difficult to ascertain the number of transgender athletes, there have been well publicized instances of transgender athletes “coming out” while they were still participating in athletics, either professionally or collegiately. In 1975, Renée Richards, formerly Richard Raskind, successfully sued the U.S. Tennis Association for his¹⁹ right to compete as a female in the U.S.

¹⁰ *Transgender 101*, GLAAD, <http://www.glaad.org/transgender> (last visited Dec. 2, 2014).

¹¹ Torre & Epstein, *supra* note 1, at 67.

¹² *Id.* at 68.

¹³ *When You Don’t Feel at Home with Your Gender*, WEBMD, <http://www.webmd.com/sex/gender-identity-disorder> (last visited Dec. 2, 2014).

¹⁴ *Id.*

¹⁵ *Gender Identity Disorder (Symptoms)*, PSYCHOL. TODAY, (last visited Dec. 2, 2014).

¹⁶ Torre & Epstein, *supra* note 1, at 67.

¹⁷ *Id.*

¹⁸ *Gender Identity Disorder (Causes)*, PSYCHOL. TODAY, <http://www.psychologytoday.com/conditions/gender-identity-disorder?tab=Causes> (last visited Dec. 2, 2014).

¹⁹ For purposes of eliminating confusion throughout the paper, I will use the pronoun that identifies a person’s birth-sex, unless otherwise stated.

Open.²⁰ In 2010, Lana Lawless, who underwent sex-reassignment surgery in 2005, filed suit against the Ladies Professional Golf Association (LPGA) to challenge its “Female at Birth” bylaw.²¹ The suit was subsequently dropped when the LPGA changed its rules.²² In November 2010, Kye Allums, a starting guard on George Washington University’s women’s basketball team, came out before her junior year and became the only openly transgender Division I athlete.²³ Most recently, Fallon Fox, a transgender female mixed martial artist, became the first openly transgender fighter.²⁴

III. SELECTED RULES & POLICIES REGARDING TRANSGENDER ATHLETES

There are a wide array of policies and rules regarding transgender athletes in the sports community. The IOC was the first entity to institute a rule regarding transgender athletes. In 2004, the IOC ruled that if an athlete wanted to compete against those who are not of their birth-sex, then the athlete must undergo sex-reassignment surgery and two years of hormone therapy.²⁵ The NCAA has taken a different stance on transgender athletes, allowing transgender athletes to participate in sex-segregated sports if the athlete’s use of hormone therapy is consistent with the NCAA’s policies and medical standards.²⁶ Under NCAA rules, a female-to-male transgender student-athlete who has received a medical exception for testosterone treatment can compete on a men’s team, but can no longer compete for a women’s team.²⁷ On the other hand, a male-to-female athlete must have documented testosterone-suppression treatment for at least a year before he can compete on a women’s team; however, during this period he may still continue to compete on a men’s team.²⁸

Some high school athletic associations have also incorporated policies pertaining to transgender student-athletes into their rules. California has, by far,

²⁰ Torre & Epstein, *supra* note 1, at 67.

²¹ *Id.* at 67-68

²² *Id.*

²³ *Id.* at 68.

²⁴ Cyd Zeigler, *Fallon Fox Comes out as Trans Pro MMA Fighter*, OUTSPORTS (Mar. 5, 2013), <http://www.outsports.com/2013/3/5/4068840/fallon-fox-trans-pro-mma-fighter>.

²⁵ Torre & Epstein, *supra* note 1, at 70.

²⁶ NCAA TRANSGENDER POLICY, *supra* note 7, at 13.

²⁷ *Id.*

²⁸ *Id.*

the most liberal policy regarding transgender athletes. The California Interscholastic Federation (CIF) already has a transgender policy in its bylaws.²⁹ In addition to the CIF policy, the state recently passed a law that allows transgender student-athletes the absolute choice of which gender-specific team they would like to play for.³⁰ The law also gives students the right to choose which bathrooms and locker rooms they would like to use.³¹

Currently, no other state has instituted a law regarding transgender students or student-athletes, but some state athletic associations have addressed the issue. For instance, the Colorado High School Activities Association (CHSAA) dictates that a “transgender student-athlete’s home school will perform a confidential evaluation to determine the gender assignment for the prospective student-athlete.”³² The CHSAA reviews these eligibility decisions in accordance with their approved appeals procedures.³³

The Connecticut Interscholastic Athletic Conference (CIAC) recently changed its rules regarding transgender student-athletes.³⁴ In the past, the CIAC required student-athletes to undergo sex-reassignment surgery before being allowed to participate as anything other than their birth-sex.³⁵ The CIAC reformed its transgender policy before the 2013–14 academic year.³⁶ The new policy mandates that the school district determines a student-athlete’s eligibility to participate in gender-specific sports based on school records and daily life activities.³⁷ It is also the school district’s responsibility to verify that a student-athlete’s gender identification is bona fide and not for the purpose of gaining an unfair competitive advantage.³⁸ Under CIAC rules, once the issue of gender

²⁹ CAL. INTERSCHOLASTIC FED’N GUIDELINES FOR GENDER IDENTITY PARTICIPATION, 2014–15 CIF CONSTITUTION & BYLAWS, 86 (last visited Dec. 2, 2014), *available at* http://www.cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf.

³⁰ Tom Verdin, *California’s Transgender-Student Law: Kids Can Choose Bathrooms, Sports Teams*, CHRISTIAN SCI. MONITOR (Aug. 12, 2013), <http://www.csmonitor.com/USA/Latest-News-Wires/2013/0812/California-s-transgender-student-law-Kids-can-choose-bathrooms-sports-teams>.

³¹ *Id.*

³² COLO. HIGH SCH. ACTIVITIES ASS’N, 2013–2014 HANDBOOK CONSTITUTION & BYLAWS, art. 3.3 (last visited Dec. 2, 2014), *available at* <http://www2.chsaa.org/about/pdf/2013Handbook.pdf>.

³³ *Id.*

³⁴ *See* CONN. INTERSCHOLASTIC ATHLETIC CONFERENCE, HANDBOOK 2013–2014, 15 (last visited Dec. 2, 2014) [hereinafter CIAC HANDBOOK] *available at* www2.chsaa.org/home/pdf/StateStauteHandbook.pdf.

³⁵ 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, 26 (2011).

³⁶ *See generally* CIAC HANDBOOK, *supra* note 34.

³⁷ *Id.* at 15.

³⁸ *Id.*

identification has been settled, the gender classification remains consistent throughout the course of high school eligibility.³⁹

Perhaps one of the harshest policies regarding transgender student-athletes comes from the Georgia High School Association (GHSA). The GHSA dictates that “[a] student’s gender is determined by the gender noted on his/her certificate at birth.”⁴⁰ The GHSA does not provide any other directives concerning transgender student-athletes.⁴¹ However, GHSA Executive Director Ralph Swearngin did state that there is an appeal process if someone’s gender orientation is “not traditional.”⁴²

IV. DISCUSSION OF THE FOURTEENTH AMENDMENT

Transgender student-athletes may have a Fourteenth Amendment right to choose which gender-specific teams they want to play for. In pertinent part, the Fourteenth Amendment provides that a state shall not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴³ Violation of the Fourteenth Amendment requires state action, which happens when a state actor abridges procedural due process, substantive due process, or equal protection rights.⁴⁴ However, deprivation of these rights can be adjudicated differently depending on the level of judicial scrutiny courts give to certain issues.⁴⁵ Therefore, to determine if transgender student-athletes have a Fourteenth Amendment right to play on the gender-specific team of their choice, there must first be an analysis of whether high school athletic associations are state actors. Then, it must be determined which level of judicial scrutiny a court will apply to this type of case. Finally, it must be determined if a transgender student-athlete’s

³⁹ *Id.*

⁴⁰ GA. HIGH SCH. ASS’N, CONSTITUTION & BY-LAWS 2014–2015, By-Law 1.47, <https://www.ghsa.net/ghsa-constitution-and-laws#by-law-1.40> (last visited Dec. 2, 2014) [hereinafter GHSA CONSTITUTION].

⁴¹ *See id.*

⁴² Todd Holcomb, *GHSA Amendment Disappoints Transgender Advocacy Group*, PREP ZONE HIGH SCHOOL SPORTS (Apr. 23, 2013), <http://blogs.ajc.com/georgia-high-school-sports/2013/04/24/ghsa-amendment-disappoints-transgender-advocacy-group/>.

⁴³ U.S. CONST. amend. XIV, § 1.

⁴⁴ *See generally* Civil Rights Cases, 109 U.S. 3, 17 (1883).

⁴⁵ *City of Cleburne v. Cleburne Living City Ctr., Inc.*, 473 U.S. 432, 439–41 (1985) (describing that legislators generally have wide latitude when enacting statutes. However, legislative classifications based on race and gender will be subject to strict and intermediate scrutiny, respectively.).

procedural due process, substantive due process, or equal protection rights could possibly be violated by policies regarding transgender athletes.

A. High School Athletic Associations as State Actors

Fourteenth Amendment rights “cannot be impaired by the wrongful acts of individuals [that] are unsupported by state authority.”⁴⁶ These wrongful acts are “simply a private wrong” that can be presumably resolved by the laws of the state.⁴⁷ However, there are some circumstances where private action can be considered that of the state if “there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself.”⁴⁸ Therefore, a high school athletic association must be proven to be a state actor before a transgender athlete may seek damages because the athlete has not been allowed to participate in the gender-specific sport of the athlete’s choice. The Supreme Court addressed whether a high school athletic association could be considered a state actor in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*.⁴⁹ In that case, the Court held that the association should be treated as a state actor because of the “pervasive entwinement of state school officials in the structure of the association”⁵⁰ The association consisted of mostly public schools that were represented by school officials acting within their official capacities during school hours.⁵¹ Additionally, the state education board acknowledged the association’s authority, and the school board, were represented in association committees.⁵² However, the Court’s ruling in this case did not render every state athletic association a state actor.⁵³ Some factors that may be considered when determining whether an athletic association is a state actor are: (1) whether the association administrators are the public schools’ administrators; (2) whether the association is composed of public schools within the same state; (3) whether the association is composed mostly of public schools, as opposed to private schools; (4) whether administrators within the association are state employees; and (5) whether the state school board is involved with the athletic association.⁵⁴ If a

⁴⁶ *Civil Rights Cases*, 109 U.S. at 17.

⁴⁷ *Id.*

⁴⁸ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

⁴⁹ *See generally* 531 U.S. 288 (2001).

⁵⁰ *Id.* at 290–91.

⁵¹ *Id.* at 298–99.

⁵² *Id.* at 300.

⁵³ *See, e.g., Bukowski v. Wis. Interscholastic Athletic Ass’n*, 2007 WI App 1, ¶ 1, 726 N.W.2d 356.

⁵⁴ *See Brentwood Acad.*, 531 U.S. at 298–300.

high school athletic association is found to be a state actor, then it is subject to Fourteenth Amendment scrutiny.

B. What Level of Scrutiny Will Be Applied to Transgender Student-Athletes?

The Supreme Court has found that Fourteenth Amendment analyses require different levels of scrutiny to be applied to certain protected classes.⁵⁵ For instance, a statute based on race will be subject to strict scrutiny, which mandates that a statute must be narrowly tailored to address a compelling government purpose.⁵⁶ It is not clear which level of scrutiny would be applied to transgender student-athletes.⁵⁷ It has been proposed that Fourteenth Amendment challenges concerning the rights of transgender people should be analyzed under heightened scrutiny, which is how gender discrimination is analyzed.⁵⁸ Under heightened review, a high school athletic association would have to prove that a rule prohibiting a transgender student-athlete from playing on the gender-specific sport of his choice is substantially related to an important objective of the association.⁵⁹ However, the Supreme Court has been hesitant to expand the “definition of gender for the purposes of categorizing sexual minorities.”⁶⁰

Nevertheless, discrimination against a transgender person may still be analyzed under heightened scrutiny because the athlete may be considered a “discrete and insular minorit[y],” originally discussed in a footnote in *United States v. Carolene Products Co.*⁶¹ The Supreme Court later defined discrete and insular minorities as people who have been historically discriminated against, have a lack of political power, and have immutable characteristics.⁶² It can be argued that transgender men and women meet these requirements. Transgender people have been historically discriminated against as most have been, or will be, the target of a hate crime.⁶³ Transgender people are four times as likely to live in

⁵⁵ *City of Cleburne v. Cleburne Living City Ctr., Inc.* 473 U.S. 432, 439–441 (1985).

⁵⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 322–27(2003).

⁵⁷ See Buzuvis, *supra* note 35, at 30.

⁵⁸ *Id.*

⁵⁹ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁶⁰ Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 901 (2007).

⁶¹ See 304 U.S. 144, 144, 152, 153 n.4 (1938) (citations omitted). See generally Elkind, *supra* note 60.

⁶² *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

⁶³ Dylan Wade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 256–57 (2005).

poverty, cannot serve in the U.S. Armed Forces, and 90% have reported experiencing discrimination in the workplace.⁶⁴ Additionally, many transgender women (male-to-female) have been murdered simply because they are transgender.⁶⁵ The transgender community's lack of political power is epitomized by the fact that only four states explicitly protect employment discrimination against transgender people; "California is the only state" that protects transgender "students from discrimination and harassment"; and "[t]here [are] no laws protect[ing] transgender people" from health care discrimination.⁶⁶ Lastly, being a transgender person is arguably an immutable characteristic, which has been defined by the Supreme Court as a characteristic "determined solely by the accident of birth."⁶⁷ While some transgender people do not experience gender nonconformity until adulthood, most can trace these feelings to their earliest memories and adolescence; it can be argued that being transgender cannot be changed, especially for those who experienced transgender feelings from childhood.⁶⁸ The argument that being transgender is an immutable characteristic would be strengthened if a person has been diagnosed with GID, which is a disorder recognized by the American Psychological Association.⁶⁹

While it seems that a transgender person would be considered a discrete and insular minority under the Supreme Court's three requirements, the Court has shown an unwillingness to recognize new suspect classes.⁷⁰ In fact, some courts have already held that transgender people are not a part of a suspect class.⁷¹ Therefore, it is likely that a Fourteenth Amendment attack based on transgender student-athletes would be analyzed under rational review. Rational review requires that government action be rationally related to a legitimate government purpose.⁷² Consequently, rational review analysis generally leads courts to rule in favor of the government entity (as may be likely in this case), and courts have

⁶⁴ *Transgender 101*, GLAAD, <http://www.glaad.org/transgender/trans101> (last visited Dec. 2, 2014).

⁶⁵ *Vade*, *supra* note 63, at 256.

⁶⁶ *Id.* at 259–60.

⁶⁷ *Frontiero*, 411 U.S. at 686.

⁶⁸ *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression*, AM. PSYCHOL. ASS'N, 2 (2011) [hereinafter APA] available at <http://www.apa.org/topics/lgbt/transgender.pdf>.

⁶⁹ *Id.* at 3.

⁷⁰ *Buzuvis*, *supra* note 35, at 31.

⁷¹ *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1300 (N.D. Ga. 2010).

⁷² *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

historically given judicial deference to the judgment of high school athletic associations.⁷³ However, the Supreme Court has limited the deference it gives to government entities under rational review when it involves laws or policies that affect the rights of homosexuals.⁷⁴ This type of rational review may also be extended to analyze laws and regulations that affect transgender student-athletes.

C. Substantive Due Process Merits

Substantive due process prohibits a government entity from abridging rights protected by the Constitution, such as property or liberty, without some reasonable relation to a government purpose.⁷⁵ In *Goss v. Lopez*, which involved students' suspension from school, the Supreme Court held that students have a protected property interest in the educational process.⁷⁶ Although athletics have been found to be a part of the educational process, courts have consistently held that there is not a protected property interest in participating in a single year of interscholastic athletic competition.⁷⁷ However, this rule is not absolute, as some courts have found a cognizable property interest in a single year of athletic competition under certain circumstances.⁷⁸ For instance, a court in Florida found that basketball was essential in providing the plaintiff "an impetus to his general scholastic and social development and rehabilitation from his prior problems as a juvenile delinquent."⁷⁹ While a property interest in a single year of athletic competition may only be cognizable under limited circumstances, courts have recognized that "total exclusion" from athletic activities for a "lengthy period of time" could be enough to implicate due process.⁸⁰

In addition to a property interest, a transgender student may also have a protected liberty interest in being allowed to play on the team that conforms to the athlete's gender identity. The *Goss* court held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] Clause must be satisfied."⁸¹ A transgender student chooses to live as the gender with

⁷³ MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 47 (3d ed. 2013).

⁷⁴ See generally *Lawrence v. Tex.*, 539 U.S. 558 (2003).

⁷⁵ *Pierce*, 268 U.S. at 535.

⁷⁶ 419 U.S. 565, 576 (1975).

⁷⁷ See, e.g., *Tiffany v. Ariz. Interscholastic Ass'n*, 726 P.2d 231, 234 (Ariz. Ct. App. 1986).

⁷⁸ *Id.* at 235.

⁷⁹ Fla. High Sch. Activities Ass'n v. Bryant, 313 So. 2d 57, 57 (Fla. Dist. Ct. App. 1975).

⁸⁰ *Pegram v. Nelson*, 469 F. Supp. at 1140.

⁸¹ *Goss*, 419 U.S. 565, 574 (1975) (citations omitted).

which the student identifies. This choice may include not only changing one's name or the way one dresses, but also the desire for others to recognize the student as the desired gender identity by using the student-athlete's chosen name and the proper pronouns.⁸² Forcing a transgender athlete to play on the athletic team that conforms to the athlete's birth-sex, instead of the one consistent with the athlete's gender identity, is incompatible with the reputation the athlete has probably sought to implement in every other aspect of the athlete's life. A transgender student's reputation as the sex consistent with the student's gender identity should be a constitutionally protected liberty interest, especially if a student can prove that the gender identification is genuine and not for the purpose of gaining a competitive advantage.

Because courts have generally found that there is not a protectable property interest in playing athletics, it is unlikely that transgender student-athletes will effectively assert this right if they are denied the right to participate on the gender-specific team of their choice. However, there is a liberty interest in one's reputation that would be deprived if a transgender student was not allowed to participate on the athletic team consistent with the student's gender identity. A transgender person attempts to build a reputation as the gender with which the person identifies. If the athlete is forced to play on the team that identifies with his or her birth-sex, it will be contrary to the reputation the athlete has built and, thus, deprives the athlete of the liberty interest he or she has in his or her reputation.

D. Procedural Due Process Merits

The Supreme Court has found that a government entity "determin[ing] unilaterally and without process" that a person should be deprived of a protected right "collides with the requirements of the Constitution."⁸³ In *Goss*, an Ohio law empowered public school principals to suspend students up to ten days or expel them for misconduct.⁸⁴ Expelled students and their parents appealed their punishment to the Board of Education.⁸⁵ However, the suspended students were not afforded the opportunity to appeal their suspension.⁸⁶ The Supreme Court held that "total exclusion from the educational process for more than a trivial period," such as a ten day suspension, was substantial enough to implicate due

⁸² See *APA*, *supra* note 68, at 3.

⁸³ *Goss*, 419 U.S. at 575.

⁸⁴ *Id.* at 567.

⁸⁵ *Id.*

⁸⁶ *Id.*

process.⁸⁷ Thus, a state cannot deprive a student of the educational process unless the student has had an opportunity to be heard.⁸⁸

The holding in *Goss* does not necessarily mean that a high school or an athletic association must allow a transgender athlete to participate in the gender-specific sport of the athlete's choice. As will be discussed, a high school athletic association may have a legitimate reason to bar a transgender student from participating on the athletic team that conforms with the athlete's gender identity. However, there must still be an opportunity for a transgender student to be heard before the property interest—in the opportunity to participate in interscholastic athletics, or the liberty interest in maintaining the athlete's reputation as the gender with which the athlete identifies—is taken away. The opportunity to be heard includes being given “some kind of notice and afforded some kind of hearing.”⁸⁹

E. Equal Protection Merits

The equal protection of laws prohibits government entities from treating similarly situated people differently when the discrimination is unrelated to a legitimate government interest.⁹⁰ As discussed earlier, a court would probably not find that transgender students are a suspect class for the purposes of Fourteenth Amendment analysis. However, the majority of courts have found that “discrimination against a transgendered individual because of [his or her] failure to conform to gender stereotypes constitutes discrimination on the basis of sex.”⁹¹ Prohibiting a transgender student from participating on the gender-specific team that conforms to the student's gender identity could constitute discrimination because the student is not conforming to the gender stereotype of the team to play for. As a result, the high school athletic association would be required to prove that this discrimination is substantially related to an important government interest.⁹²

Even if a high school athletic association allowed transgender student-athletes to participate on the athletic team of their choice, the athletic association could still face Equal Protection challenges; particularly, if it employs a policy

⁸⁷ *Id.* at 576.

⁸⁸ *Id.*

⁸⁹ *See id.* at 579.

⁹⁰ *Eisenstadt v. Baird*, 405 U.S. 438, 446–47 (1972) (citations omitted).

⁹¹ *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010). *See also* *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. 06-16907, 325 Fed. Appx. 492, 493 (9th Cir. Apr. 14, 2009); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

⁹² *Craig v. Boren*, 429 U.S. 190, 197 (1976).

similar to the one the NCAA implemented.⁹³ The NCAA allows transgender men (female-to-male) to participate on male teams immediately, while transgender women (male-to-female) have to take testosterone suppression for at least one year before they can participate on female teams.⁹⁴ A high school athletic association, unlike the NCAA, may be considered a state actor and, thus, subject to Equal Protection scrutiny.⁹⁵ Transgender female student-athletes (male-to-female) could argue that they are being treated differently than a similarly situated group because they are not allowed to play immediately on the female athletic teams, while transgender male student-athletes are allowed to play on the male athletic teams immediately. This kind of discrepancy would seemingly run contrary to what the Equal Protection Clause purports to protect. However, as will be discussed *infra*, a high school athletic association may have legitimate reasons for this kind of discrepancy.

In addition to Due Process claims, transgender student-athletes may have cognizable Equal Protection claims against high school athletic associations. Policies that do not allow transgender student-athletes to play on the gender-specific athletic teams that conform with their gender identity may constitute discrimination because the policies punish transgender individuals for not conforming with gender stereotypes, a possible violation of the Equal Protection Clause. Additionally, a high school athletic association that does allow transgender students to play on the athletic team of their choice may still be subject to Equal Protection challenges if it treats male-to-female transgender students differently than female-to-male transgender student-athletes.

F. *Defenses to Abrogation of Fourteenth Amendment Rights*

Although it may seem that transgender students who are not allowed to play on the gender-specific teams conforming with their gender identity have Fourteenth Amendment Due Process and Equal Protection rights abrogated, these rights, as with all constitutional rights, are not absolute.⁹⁶ A high school athletic association has legitimate reasons for denying a transgender student-athlete the right to play on the team that is consistent with the student's gender identity. In fact, courts have historically given substantial deference to high school athletic associations' rule making authority.⁹⁷ Generally, courts have found that high school athletic associations have a legitimate interest in the

⁹³ See generally NCAA TRANSGENDER POLICY, *supra* note 7.

⁹⁴ Id. at 13.

⁹⁵ See generally Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

⁹⁶ See Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1271 (11th Cir. 2004).

⁹⁷ MITTEN ET AL. *supra* note 73, at 47.

health and safety of their student-athletes and maintaining competitive balance, which may justify rules that infringe on certain constitutionally protected rights so long as these rules are rationally related to those interests.⁹⁸ These holdings are mostly in regard to rules such as age limit restrictions, transfer rules, and outside competition rules.⁹⁹ However, courts have shown less deference when it comes to issue of gender discrimination.¹⁰⁰

A high school athletic association's justification for denying a transgender student the opportunity to play for the gender-specific team of the athlete's choice would probably center on health, safety, and competitive balance concerns. These concerns are not completely unfounded, due to the differences in testosterone and estrogen levels between men and women.¹⁰¹ Because of these differences, men typically outperform women in athletic events by 11%–18%.¹⁰² Men are generally taller and have more muscle mass; less body fat; greater aerobic, anaerobic, and lung capacity; and more strength than women.¹⁰³ Therefore, allowing a male-to-female transgender student to play on a female team may give the female transgender student a competitive advantage over opposing teams. Conversely, a female-to-male transgender student would be subject to health and safety risks when playing against males that are probably bigger, stronger, and faster than she is. A high school athletic association would also have an interest in making sure a student does not gain a competitive advantage by abusing a transgender athlete policy. While a high school athletic association may be justified in limiting a transgender student's Due Process rights because of health, safety, and competitive balance concerns, an athletic association would still have to give the student an opportunity to be heard before limiting these rights.¹⁰⁴

Under most circumstances, health and safety risks and competitive balance concerns would be enough to overcome challenges under the Fourteenth Amendment's Due Process Clause. However, while courts have found that transgender individuals are not a part of a suspect class, the majority of courts will analyze discrimination against transgender individuals the same way as

⁹⁸ *Id.*

⁹⁹ *See, e.g.,* Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 226–227 (Ind. 1997); Letendre *ex rel.* v. Mo. State High Sch. Activities Ass'n., 86 S.W.3d 63, 65 (Mo. Ct. App. 2002); Tiffany v. Ariz. Interscholastic Ass'n, 726 P.2d 231, 234 (Ariz. Ct. App. 1986).

¹⁰⁰ *See, e.g.,* Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1022 (W.D. Mo. 1983).

¹⁰¹ Ziegler & Huntley, *supra* note 9, at 474.

¹⁰² *Id.* at 474-75.

¹⁰³ *Id.*

¹⁰⁴ *See* Goss v. Lopez, 419 U.S. 565, 579 (1975).

gender discrimination for purposes of Equal Protection challenges if the discrimination is due to the individual's inability to conform to gender stereotypes.¹⁰⁵ Under Equal Protection jurisprudence regarding gender equity in high school athletics, courts have found that categorically denying underrepresented sexes the opportunity to play on an athletic team because of health and safety concerns is not substantially related to that objective.¹⁰⁶ For instance, in *Force by Force v. Pierce City R-VI School District*, a thirteen-year-old girl, who had previously been involved in swimming, basketball, and football, was denied the opportunity to try out for the seventh-grade football team because the school board was concerned about the safety of girls playing a male-dominated sport, although they acknowledged that the plaintiff probably could compete with the boys.¹⁰⁷ The court ruled that the school district could not deny the plaintiff the opportunity to try out because of a "blanket rule" that makes assumptions about the abilities of a particular gender.¹⁰⁸ The court in *Force* recognized that certain individuals may be atypical, and these types of determinations should be made on a case-by-case basis.¹⁰⁹

The same reasoning should apply to transgender student-athletes who want to play on the athletic teams that are consistent with their gender identity. It is possible that a male-to-female transgender person is smaller and weaker than the typical male, so his presence on the female team would not give him a competitive advantage over opposing teams. It is also possible that a female-to-male transgender athlete has above average skill and size, so her presence on a male athletic team would not pose health and safety risks. In addition, not allowing transgender student-athletes to play on the gender-specific team of their choice could have effects that would directly undermine the efforts of the high school athletic associations to maintain health, safety, and competitive balance. A female who is transitioning to a male and is forced to compete on women's teams could possibly be taking supplements that increase her testosterone, which would give her a competitive advantage over her biologically female competitors. Considering that one's health and safety risks and ability to have a competitive advantage can be determined by ever-changing factors, a high school athletic association should not be able to implement a blanket rule denying transgender athletes the opportunity to play on the team of the athlete's choice. These determinations should be made on a case-by-case basis, so as to

¹⁰⁵ Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010).

¹⁰⁶ See *Force by Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1028 (W.D. Mo. 1983).

¹⁰⁷ *Id.* at 1022–23.

¹⁰⁸ *Id.* at 1028.

¹⁰⁹ *Id.* at 1029.

not violate the Equal Protection Clause of the Fourteenth Amendment.

While a high school athletic association may have a legitimate interest in limiting a transgender student-athlete's Due Process rights due to health, safety, and competitive concerns, the association still must give the student an opportunity to be heard before those rights are taken away. Additionally, even if an athletic association is justified in limiting a transgender student's Due Process rights, it will not be justified under an Equal Protection analysis if it institutes a blanket rule disallowing transgender student-athletes the right to play on the team that is consistent with the athlete's gender identity. Under an Equal Protection analysis, a high school athletic association has to determine this issue on a case-by-case basis.

V. RECOMMENDATIONS FOR HIGH SCHOOL ATHLETIC ASSOCIATIONS

Although transgender students may have protected Due Process and Equal Protection rights in the opportunity to participate in athletics on the gender-specific team that is consistent with their gender identity, there are ways high school athletic associations can structure their transgender policies so they will not infringe on a student's rights. Athletic associations have a legitimate interest in limiting health and safety risks and maintaining competitive balance, so they do not have to incorporate a rule as liberal as California's law allowing students to freely choose which gender-specific team they want to play for.¹¹⁰ However, an athletic association should not implement a rule as stringent as the GHSA rule. This rule most certainly violates a transgender student's Fourteenth Amendment rights because it does not allow a student any latitude when deciding which gender-specific team the athlete would like to play for.¹¹¹ At the very least, a transgender student would not have the opportunity to be heard because the GHSA rule does not have an appeals process.¹¹² Although the Executive Director of the GHSA said there would be an appeals process, this option is not written into the rulebook, so it is unclear if a transgender student would actually be afforded an appeals process.¹¹³

A policy like the IOC's or the NCAA's would be impractical for a high school athletic association. It would be unreasonable for a high school athletic association to require a teenager to undergo sex-reassignment before playing on the gender-specific team of the athlete's choice, which is required under IOC

¹¹⁰ Verdin, *supra* note 30.

¹¹¹ GHSA CONSTITUTION, *supra* note 40, at By-Law 1.47.

¹¹² *See id.*

¹¹³ Holcomb, *supra* note 42.

rules.¹¹⁴ Adopting a policy like the NCAA's would make a high school athletic association vulnerable to Equal Protection scrutiny because the NCAA treats male-to-female transgender people differently than female-to-male transgender people.¹¹⁵

The best transgender policy would be one that resembles the CIAC's policy. The CIAC's policy does not implement a blanket rule forcing all students to play on the team that identifies their birth-sex.¹¹⁶ The policy allows gender identity to be determined on a case-by-case basis, which would satisfy Equal Protection challenges.¹¹⁷ The CIAC's policy also allows for an appeals process, which would satisfy the need for procedural Due Process.¹¹⁸ The CIAC protects itself from health and safety risks, and competitive imbalances, by reserving the right to deny a student's request and maintaining that once gender identity has been determined it remains the same throughout a student's high school career.¹¹⁹

VI. CONCLUSION

A transgender student-athlete has a Due Process right to participate in the gender-specific sport of the athlete's choice. There is potentially a constitutionally protected property interest in transgender students' participation on the team that conforms with their gender identities because denial of this opportunity effectively prevents them from participating for more than one academic year. While there is no protected property interest in a single year of participation in athletics, some courts have suggested that continuous deprivation may implicate due process. In addition to a property interest, a transgender student will also have a protected liberty interest in maintaining the student's reputation as that of the gender the student identifies with instead of the student's birth-sex. A transgender student would also have a procedural Due Process right in the opportunity to be heard before a protected interest can be taken away. In addition to a violation of Due Process rights, a high school athletic association may also violate Equal Protection if it does not allow a transgender student to play on the team of the student's choice. This restriction would discriminate against transgender students because it would punish them for not conforming to gender stereotypes, which is a violation of Equal Protection.

¹¹⁴ Torre & Epstein, *supra* note 1, at 70.

¹¹⁵ See NCAA TRANSGENDER POLICY, *supra* note 7, at 13.

¹¹⁶ CIAC HANDBOOK, *supra* note 34, at 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Because transgender students have Fourteenth Amendment rights to play on the gender-specific team of their choice, high school athletic associations should adopt policies that address transgender student-athletes. These policies should mirror those of the CIAC, which allow transgender students to request to play on the gender-specific team of their choice. The high school athletic association reserves the right to deny the request, which a student could then appeal. Additionally, once a student's gender has been determined by the athletic association, it cannot be changed. A policy such as this does not infringe on a transgender person's procedural or substantive Due Process rights or Equal Protection rights and also gives the high school athletic association the ability to limit health and safety risks and maintain competitive balance.