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May They Play: *Soule v. Connecticut Association of Schools, Inc.*, Title IX, and a Policy of Inclusion for High School Transgender Athletes Without Prerequiring Hormone Therapy or Puberty Blockers

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MAY THEY PLAY: SOULE V. CONNECTICUT ASSOCIATION OF SCHOOLS, INC., TITLE IX, AND A POLICY OF INCLUSION FOR HIGH SCHOOL TRANSGENDER ATHLETES WITHOUT PREREQUIRING HORMONE THERAPY OR PUBERTY BLOCKERS

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INTRODUCTION

Transgender youths should have the same opportunity to participate in high school athletics as their peers without prerequiring hormone therapy or puberty blockers, and Title IX of the Education Amendments Act of 1972 is the source of law for that protection. In *Soule et al. v. Connecticut Association of Schools, Inc. et al.*,¹ four Connecticut high school girls filed a federal discrimination lawsuit complaining that the Connecticut Interscholastic Athletic Conference (“CIAC”) is violating Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2020).² The complaint alleges that the CIAC is denying high school girls equal opportunities for participation and success in athletic activities as a result of the statewide, CIAC policy that protects the opportunities of transgender students to participate in high school athletics,³ and that the CIAC

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¹ Verified Complaint for Declaratory and Injunctive Relief and Damages, *Soule et al. v. Conn. Ass’n of Sch., Inc. et al.*, No. 3:20-cv-00201 (D. Conn. 2020); see generally Shayna Medley & Galen Sherwin, *Banning Trans Girls from School Sports Is Neither Feminist Nor Legal*, ACLU (Mar. 12, 2019), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal>; see generally Dave Zirin, *Transphobia’s New Target Is the World of Sports*, NATION (Mar. 5, 2019), <https://www.thenation.com/article/archive/trans-runner-daily-caller-terry-miller-andraya-yearwood-martina-navratilova>. See also Trudy Ring, *Connecticut Suit Targets Trans Female Student Athletes*, ADVOCATE (Feb. 13, 2020), <https://www.advocate.com/transgender/2020/2/13/connecticut-suit-targets-trans-female-student-athletes>.

² Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”). 20 U.S.C. § 1681(a).

³ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *Soule et al. v. Conn. Ass’n of Sch.s, Inc. et al.*, No. 3:20-cv-00201 (D. Conn. Apr. 17, 2020), ECF No. 21 ¶¶ 4–5.

As a result, in scholastic track competition in Connecticut, more boys than girls are experiencing victory and gaining the advantages that follow, even though postseason competition is nominally designed to ensure that equal numbers of boys and girls

member schools executing the policy have cost these complainant girls top finishes in races and possibly college scholarships because the policy enables transgender girls to compete against them.⁴ Frankly, it is sad that high school athletics are being reduced to: whose kid is good enough to get a scholarship? Nonetheless, in this federal lawsuit, transgender youths are defending their right to equal opportunity in education against a challenge alleging that their participation in high school athletics—as their true gender identities—violates Title IX because of a claim that their participation amounts to discrimination against cisgender high school athletes with whom they compete.⁵

This lawsuit purports to use Title IX, and the power of the U.S. Department of Education's Office of Civil Rights, to justify discrimination against transgender youths.⁶ That the protections of Title IX could be wielded to discriminate against transgender youths does disservice to the historic, hard fought progress toward gender equality, particularly in athletics; such an argument is not grounded in sound civil rights law and legal interpretation, but instead in animus and unfounded fears of fraud. The CIAC policy allowing

advance to higher levels of competition. In the state of Connecticut students who are born female now have materially *fewer* opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born male. This reality is discrimination against girls that directly violates the requirements of Title IX: 'Treating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes'.

McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 295 (2d Cir. 2004).

⁴ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶ 108.

The real-world result of the CIAC Policy is that in Connecticut interscholastic track competitions, while highly competitive girls are experiencing the no doubt character-building 'agony of defeat,' they are systematically being deprived of a fair and equal opportunity to experience the 'thrill of victory.' A transgender athlete advocate recently wrote in an op-ed that this should be accepted because part of competitive sports is 'learning to lose.' A policy such as the CIAC Policy that ensures that girls get *extra* lessons in losing, however, cannot be reconciled with Title IX.

See *Reference Guide for Transgender Policy*, CIAC TRANSGENDER POLICY, https://www.casciac.org/pdfs/Principal_Transgender_Discussion_Quick_Reference_Guide.pdf (last visited Oct. 25, 2020).

⁵ "Cisgender" is an adjective denoting or relating to a person whose sense of personal identity and gender corresponds with their birth sex. Cisgender is a class of gender identities where there is a match between an individual's gender identity and the behavior or role considered appropriate for one's sex. See *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, APA, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Oct. 25, 2020); see also *Cisgender*, LEXICO DICTIONARY, <https://www.lexico.com/en/definition/cisgender> (last visited Oct. 25, 2020); see generally Sunnive Brydum, *The True Meaning of the Word 'Cisgender'*, ADVOCATE (Jul. 31, 2015), <https://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender>.

⁶ See generally *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Oct. 25, 2020) ("The U.S. Department of Education's Office for Civil Rights (OCR) enforces, among other statutes, Title IX of the Education Amendments of 1972").

transgender high school students to play on sex-separated sports teams consistent with their gender identity is precisely the kind of equal opportunity in education Title IX is meant to provide, not deny.

Transgender students have different experiences in middle and high school than their classmates.⁷ These experiences are filled with confusion, harassment, and isolation.⁸ Given this environment, it is not surprising they are less likely to become involved in the extracurricular activities that many of their cisgender classmates enjoy.⁹ Participation in high school sports has been a bright line of exclusion in their school communities when compared to their cisgender peers and this exclusion must change if there is to ensure equal opportunity in education.¹⁰

⁷ See generally *Gender Affirming and Inclusive Athletics Participation*, GLSEN (Sept. 2020), <https://www.glsen.org/activity/transgender-inclusion-high-school-athletics>; EMILY A. GREYTAK ET AL., HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS (GLSEN 2009), <https://files.eric.ed.gov/fulltext/ED505687.pdf>; AUSTIN INDEP. SCH. DIST. DEP'T OF RESEARCH AND EVALUATION PUBL'N, TRANSGENDER STUDENTS' SCHOOL PERCEPTIONS AND EXPERIENCES (Nov. 2017), https://www.austinisd.org/sites/default/files/dresurveys/17.03_Transgender_students_school_perceptions_and_experiences_0.pdf; Madeline Will, *When School's a Battleground for Transgender Kids, Teachers Learn to Protect, Affirm Them*, EDUC. WK. (Sept. 16, 2019), <https://www.edweek.org/ew/articles/2019/09/18/when-schools-a-battleground-for-transgender-kids.html>.

⁸ See generally *Gender Affirming and Inclusive Athletics Participation*, *supra* note 7; see generally GREYTAK ET AL., *supra* note 7. See Katherine Schreiber, *Why Transgender People Experience More Mental Health Issues*, PSYCH. TODAY (Dec. 6, 2016), <https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201612/why-transgender-people-experience-more-mental-health>; See generally Sabra L. Katz-Wise et al., *Transactional Pathways of Transgender Identity Development in Transgender and Gender Nonconforming Youth and Caregivers from the Trans Youth Family Study*, 18(3) INT'L J. TRANSGENDERISM 243 (2017); see generally SHANNAN WILBER ET AL., CWLA BEST PRACTICE GUIDELINES, CHILD WELFARE LEAGUE OF AMERICA (2006), http://www.njjn.org/uploads/digital-library/resource_403.pdf; see generally Marissa Higgins, *LGBT Students Are Not Safe At School*, THE ATLANTIC (Oct. 18, 2016), <https://www.theatlantic.com/education/archive/2016/10/school-is-still-not-safe-for-lgbt-students/504368/>; see generally Ryan Thoreson, *Like Walking Through a Hailstorm*, HUM. RTS. WATCH (Dec. 7, 2016), <https://www.hrw.org/report/2016/12/08/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools>.

⁹ Medley & Sherwin, *supra* note 1 (“When girls are pushed out of sports, they miss out on the community building, leadership skills, and all of the other benefits that being part of a team can offer. This is particularly harmful for transgender students, who face detrimental effects on their physical and emotional wellbeing when they are pushed out of affirming spaces and communities”). See generally Chris Mosier, *Op-ed: Pushing Trans Youth Away From Sports is Harmful*, OUT (Jan. 15, 2019), <https://www.out.com/sports/2019/1/15/trans-athletes-south-dakota-chris-mosier>; see generally Jody L. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults*, UCLA SCHOOL OF LAW WILLIAMS INST. (Sept. 2019), <https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/>; see generally JOSEPH KOSCIW ET AL., THE 2017 NATIONAL SCHOOL CLIMATE SURVEY (GLSEN 2018), <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>; see generally Marta Evelia Aparicio-García et al., *Health and Well-Being of Cisgender, Transgender and Non-Binary Young People*, INT'L J. ENV'T RSCH. & PUB. HEALTH (Sept. 28, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6209926/> (last visited Oct. 25, 2020); see generally EMILY A. GREYTAK ET AL., FROM TEASING TO TORMENT: SCHOOL CLIMATE REVISITED (GLSEN 2016), <https://files.eric.ed.gov/fulltext/ED574775.pdf>; see generally Higgins, *supra* note 8.

¹⁰ See *Gender Affirming and Inclusive Athletics Participation*, *supra* note 7; see Erin E. Buzuvis, *As Who They Really Are: Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 LAW & INEQ. 341 (2016), <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1205&context=lawineq>.

Across the country, state legislatures,¹¹ high schools and high school athletic associations,¹² colleges and the National Collegiate Athletic Association,¹³ are responding to the challenge of providing transgender youths equal opportunity in education through participation in LGBTQ programs,¹⁴ accommodations in physical education classes,¹⁵ and providing opportunities to participate in other extra-curricular activities, such as interscholastic and intercollegiate athletics.¹⁶ Twenty states have policies that ensure transgender students can participate in sports on a team or in competition based on their gender identity.¹⁷ Seventeen states have policies that prohibit participation by transgender student athletes, and thirteen states have no standard, public policies that guide transgender inclusion in sports.¹⁸ And, regardless of a jurisdiction's approach to provide equal opportunity in education to transgender youths, high school transgender athletes are needing to defend their opportunities to participate in sports.¹⁹

Consider, in February 2020, in *Soule*, where the four Connecticut girls complain the statewide CIAC policy on transgender athletes has cost them top finishes in races and possibly college scholarships because the policy allows

¹¹ 2020 Legislative Tracker: Anti-Transgender Legislation, FREEDOM FOR ALL AMERICANS, <https://www.freedomforallamericans.org/2020-legislative-tracker/2020-anti-transgender-legislation/> (last visited Oct. 25, 2020).

¹² High School Transgender Athlete Policies, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Oct. 25, 2020).

¹³ NAT'L COLLEGIATE ATHLETIC ASS'N: OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 2 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [hereinafter NCAA TRANSGENDER HANDBOOK].

¹⁴ *In School*, THE TREVOR PROJECT, https://www.thetrevorproject.org/trvr_support_center/in-school/ (last visited Oct. 25, 2020); *LGBTQ Youth Programs – At – A – Glance*, CDC, <https://www.cdc.gov/lgbthealth/youth-programs.htm> (last visited Oct. 25, 2020); MASS. GEN. LAWS ANN. ch. 76, § 5 (West 2012) (“The Safe Schools Program for LGBTQ Students was founded in 1993 by the Department of Elementary and Secondary Education and the Governor’s Commission on Gay and Lesbian Youth. Responding to evidence indicating increased levels of suicidality and other risk behaviors among gay and lesbian students, the Safe Schools Program provides a range of services designed to help schools implement”).

¹⁵ See *States with Policy Guidance for Transgender and Gender Diverse Students*, GENDER INCLUSIVE SCHS., <https://www.genderinclusiveschools.org/gender-inclusive-policy-builder-transgender> (last visited Oct. 25, 2020); see AM. CIV. LIBERTIES UNION, *SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS* (2015), https://www.aclu.org/sites/default/files/field_document/schools.in_transition.2015.pdf.

¹⁶ *Participation of Transgender Athletes in Collegiate Sport Clubs*, CSUS, https://www.csus.edu/student-life/student-organizations/sports-recreation/_internal/_documents/transgender-policy-long-policy.pdf (last visited Oct. 25, 2020); *High School Transgender Athlete Policies*, *supra* note 12; *Participation of Transgender Athletes in Sport Clubs and Intramural Sports*, COLORADO, <https://www.colorado.edu/recreation/sites/default/files/attachedfiles/Participation%20of%20transgender%20athletes%20guidelines%20FINAL%20wout.pdf> (last visited Oct. 25, 2020).

¹⁷ *Transgender Inclusion in High School Athletics*, GLSEN, <https://www.glsen.org/sites/default/files/2019-10/GLSEN-Transgender-Inclusion-High-School-Athletics.pdf> (last visited Oct. 25, 2020); see generally *Gender Affirming and Inclusive Athletics Participation*, *supra* note 7.

¹⁸ *Transgender Inclusion in High School Athletics*, *supra* note 17; See generally *Gender Affirming and Inclusive Athletics Participation*, *supra* note 7.

¹⁹ See Zirin, *supra* note 1; See Ring, *supra* note 1.

transgender girls, like Terry Miller and Andraya Yearwood, to participate.²⁰ The CIAC policy follows a Connecticut state anti-discrimination law requiring students to be treated in school according to the gender with which they identify,²¹ which means athletes must be permitted to compete according to their expressed gender identity as opposed to their sex assigned at birth.²²

Compare to Idaho, where in March 2020, the state legislature passed House Bill HB500, requiring transgender women and girls, who choose to play sports, to play sports as the gender assigned at birth.²³ A similar law has been in effect in Texas since 2016,²⁴ where multi-year state champion and undefeated wrestler Mack Beggs was forced to wrestle with girls after courts ruled he may play sex-separated sports only according to his sex assigned at birth, which was female.²⁵ While Mack Beggs adhered to that court ruling, parents of those girls challenged the outcome, trying to remove him from competition citing an unfair

²⁰ See Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶¶ 2-3.

²¹ MIDDLETOWN PUB. SCHS., REGULATION 5145.53(A) (Aug. 23, 2016), <https://portal.ct.gov/media/SDE/HealthEducation/middletownaccommodatingtransgenderandnonconformingyouthpdf.pdf?la=en>, [hereinafter MIDDLETON PUB. SCHS. REGULATION]; See *Reference Guide for Transgender Policy*, *supra* note 4.

²² MIDDLETON PUB. SCHS. REGULATION, *supra* note 21.

²³ House Bill 500, or the Fairness in Women's Sports Act, bars transgender girls and women from playing on female high school and college sports teams. See Nathan Brown, *Federal Judges Hear Arguments on Transgender Sports, Birth Certificate Laws*, POST REG. (July 22, 2020), https://www.postregister.com/news/government/federal-judges-hear-arguments-on-transgender-sports-birth-certificate-laws/article_20a15b9a-b7ae-5e2e-97b0-3a7a817f4501.html; See also Associated Press, *Two Civil Rights Groups File Lawsuits Challenging Idaho's New Law Banning Transgender Women from Competing in Female Sports*, DAILY MAIL (Apr. 15, 2020), <https://www.dailymail.co.uk/news/article-8222353/Federal-lawsuit-challenges-Idahos-transgender-sports-ban.html>; See also *Female Athletes to NCAA: Protect Women's Sports*, SAVE WOMEN'S SPORTS, <https://savewomenssports.com/to-the-ncaa> (last visited Oct. 24, 2020) (Over 300 women athletes signed a letter to the NCAA asking the Association to not take action against Idaho for its decision to ban transgender athletes from competing in athletics); See also Trudy Ring, *Martina Navratilova Supports Idaho Ban on Trans Female Athletes*, THE ADVOCATE, (Aug. 3, 2020), <https://www.advocate.com/transgender/2020/8/03/martina-navratilova-supports-idahos-ban-trans-female-athletes>; See also Dawn Ennis, *Read the Names of the 300+ Women Athletes Who Signed a Letter From an Anti-Trans Group to the NCAA*, OUTSPORTS (Aug. 2, 2020), <https://www.outsports.com/2020/8/2/21351786/ncaa-300-women-athletes-signatories-letter-save-womens-sports-transgender-inclusion> (The signers support Idaho's law barring transgender females from competing in women's and girls' interscholastic sports); See also Trudy Ring, *Trump Administration Backs Idaho's Anti-Trans School Sports Law*, THE ADVOCATE (June 22, 2020), <https://www.advocate.com/transgender/2020/6/22/trump-administration-backs-idahos-anti-trans-school-sports-law>.

²⁴ John Wright, *Texas Districts Pass UIL Restriction on Trans Athletes*, TEX. OBSERVER (Feb. 25, 2016), <https://www.texasobserver.org/trans-student-athlete-uil-discrimination/> (stating that in February 2016, Texas school superintendents voted to use a student's birth certificate to determine a student athlete's gender for participation in sports. The legislative council of the University Interscholastic League (UIL), the governing body for Texas high school sports, recommended the amendment, which was approved by Texas Education Commissioner Mike Morath, and took effect in August 2016).

²⁵ See Kent Babb, *Transgender Wrestler Mack Beggs Identifies as a Male. He Just Won the Texas State Girls Title*, WASH. POST (Feb. 25, 2017), https://www.washingtonpost.com/sports/highschools/meet-the-texas-wrestler-who-won-a-girls-state-title-his-name-is-mack/2017/02/25/982bd61c-fb6f-11e6-be05-1a3817ac21a5_story.html.

competitive advantage from his hormone treatments, which were a part of his medically supervised transition, to treat his gender dysphoria condition.²⁶ As such, a seemingly simple question arose: “if he can’t wrestle with girls, and he can’t wrestle with boys . . . where exactly should he wrestle?”²⁷

Connecticut is one of twenty states that require schools to allow transgender student athletes to compete on sports teams consistent with their gender identities.²⁸ Connecticut, and the other states with an inclusive policy for high school sports participation, has it right. To provide equal benefits, to prevent sex-based discrimination in high school education programs, and to further equality through that education, transgender youths should have the same opportunity to participate in high school athletics as their peers. And, this participation should permit these youths to live as their true selves without prerequiring hormone therapy or puberty blockers for these transgender youths.

Transgender youths face hardships in obtaining medical treatment for their condition.²⁹ Psychiatrists and endocrinologists are reluctant to provide hormone therapy to youths under sixteen years old,³⁰ because hormone therapy has significant contraindications for developing youths,³¹ and also because most members of the medical field believe persons this young might not be able to appreciate the finality of this decision.³² Because a substantial number of high school students are under the age of sixteen, an important survey of this paper

²⁶ See *Transgender Texas Wrestling Star Raises Difficult Questions Over Competition Rules for Students on Steroids*, JONATHAN TURLEY (Feb. 28, 2017), <https://jonathanturley.org/2017/02/28/texas-wrestling/comment-page-2/> (examining the legal implications of steroid use among transgender high school athletes).

²⁷ Nick Crabbs, *With Anti-trans Bills, Idaho Legislators Put Aside Common Sense, Ignore Businesses and Waste Taxpayer Dollars*, IDAHO BUS. REV. (Mar. 17, 2020), <https://idahobusinessreview.com/2020/03/17/with-anti-trans-bills-idaho-legislators-put-aside-common-sense-ignore-businesses-and-waste-taxpayer-dollars/>; see also Ring, *supra* note 23.

²⁸ *Transgender Inclusion in High School Athletics*, *supra* note 17 (“[As of] 2019, twenty states have policies that ensure transgender students can participate in sports on a team or in competition based on their gender identity. Seventeen states have policies that prohibit participation by transgender student athletes and thirteen states have no standard, public policies that guide transgender inclusion in sports.” The states with policies that support participation by transgender athletes are: Arizona, California, Colorado, Connecticut, Florida, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. Also, the District of Columbia has policies supportive of transgender athletes in school).

²⁹ See Laura L. Kimberly et al., *Ethical Issues in Gender-Affirming Care for Youth*, 142 J. AM. ACAD. PEDIATRICS (2018), <https://pediatrics.aappublications.org/content/142/6/e20181537>.

³⁰ See Cary S. Crall, MD & Rachel K. Jackson, *Should Psychiatrist Prescribe Gender-Affirming Hormone Therapy to Transgender Adolescents?*, 18 AMA J. ETHICS 1086 (2016), <https://journalofethics.ama-assn.org/article/should-psychiatrists-prescribe-gender-affirming-hormone-therapy-transgender-adolescents/2016-11> (explaining some of the ethical challenges physicians face when caring for trans children); see also Marta R. Biziv et al., *Gender Dysphoria: Bioethical Aspects of Medical Treatment*, 2018 BIOMED RSCH. INT’L (June 13, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6020665/>.

³¹ See Amy C. Tishelman et al., *Serving Transgender Youth: Challenges, Dilemmas and Clinical Examples*, PRO. PSYCH. RSCH. PAPER (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4719579/>.

³² See *id.*

is the data-based recommendation that high school athletic associations should provide equal opportunity in education to their transgender athletes without prerequiring hormone replacement therapy.

Athletics has a history of gender discrimination.³³ Antidiscrimination statutes have been enacted to correct male-dominated bias in athletics through Title IX and its implementing regulations.³⁴ Not only has Title IX helped women and girls progress toward equality on the playing field,³⁵ we see its practical use in the classroom, as well.³⁶ For example, under Title IX, bullying that is born out gender-based discrimination is prohibited.³⁷ And, this is particularly important because in recent years, there has been an unsettling trend of high suicide rates of gay, bisexual, and transgendered youths,³⁸ and how

³³ Before the enactment of Title IX in 1972, schools often emphasized boys' athletic programs "to the exclusion of girls' athletic programs," and vastly fewer girls participated in competitive interscholastic athletics than did boys. *See Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3rd Cir. 1993); *see also Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) (female high school student brings a class action law suit challenging the constitutionality of a Colorado High School Athletic Association that limited participation in soccer to males); *see also Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) (female student brought Title IX class action law suit against state university and individual defendants seeking to force university to field intercollegiate women's fast pitch softball and women's soccer teams); *see also Michael J. Lenzi, The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. UNIV. L. REV. 841, 846 (2018), <https://www.wcl.american.edu/impact/lawwire/the-trans-athlete-dilemma-a-constitutional-analysis-of-high-school-transgender-student-athlete-policies/the-trans-athlete-dilemma/>.

³⁴ Title IX of the Education Amendments of 1972, 20 U.S.C §§ 1681–1688 (2000). Title IX was designed to eliminate significant "discrimination against women in education." *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 766 (9th Cir. 1999). Title IX applies in full force to athletic programs sponsored by recipients of federal financial assistance: "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a).

³⁵ "[B]etween 1972 and 2011, girls' participation in high school athletics increased from approximately 250,000 to 3.25 million students." U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. PROTECTING CIVIL RIGHTS, ADVANCING EQUITY 33 (Apr. 2015), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf>; *see also NAT'L COLLEGIATE ATHLETIC ASS'N, 45 YEARS OF TITLE IX THE STATUS OF WOMEN IN INTERCOLLEGIATE ATHLETICS* (2017), http://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf (explaining the history of Title IX).

³⁶ U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS, *supra* note 35.

³⁷ *Davis v. Monroe*, 526 U.S. 629 (1999) (stating that a Title IX cause of action is available if a federally funded school is shown to have been indifferent, had actual knowledge and, "that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school").

³⁸ *See Research Brief: Fostering the Mental Health of LGBTQ Youth*, THE TREVOR PROJECT (May 30, 2019), <https://www.thetrevorproject.org/2019/05/30/research-brief-fostering-the-mental-health-of-lgbtq-youth/>; *see also Mark L. Hatzenbuehler, The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youths*, 127(5) J. AM. ACAD. PEDIATRICS 896 (May 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3081186/>.

Lesbian, gay, and bisexual youth were significantly more likely to attempt suicide in the previous 12 months, compared with heterosexuals (21.5% vs 4.2%). Among lesbian, gay, and bisexual youth, the risk of attempting suicide was 20% greater in unsupportive environments compared to supportive environments. A more supportive social environment was significantly associated with fewer suicide attempts, controlling for sociodemographic variables and multiple risk factors for suicide attempts, including

inclusive the social environment is appears associated to the risk for suicide attempts over and above individual-level risk factors.³⁹ Because of its history and use to ensure equality,⁴⁰ Title IX is the available source of law to provide equality and inclusion in high school sports transgender youths, socializing kids and helping them experience situations and challenges (both internal and external) that mirror “real life” experiences.

Section I of this paper presents the transgender legal issues in *Soule*. Then, in Section II, this paper discusses transgender discrimination and why Title IX needs to protect transgender youths because they do not have the same opportunities as their cisgender peers; and, because of this glaring inequality, programs are currently forming to help support and battle bias and misconceptions that go along with being transgender. This section ends with a look to existing inclusive policies in the non-high school arena, including some professional sports policies⁴¹ and the NCAA’s stance on transgender issues in the collegiate setting,⁴² and how high school programs can benefit from the similar inclusive policies that recognize gender dysphoria and provide accommodations for the young age of the athletic participants in high school.

Section III discusses the legal basis for the arguments presented in *Soule*, what the current interpretations of the Title IX are, and how the purpose of Title IX could be incorporated into setting policies of inclusion. Section IV explains how the current debate on transgender youths’ rights to educational opportunities in athletics can be complicated.⁴³ In cases concerning transgender

depressive symptoms, binge drinking, peer victimization, and physical abuse by an adult.

see also Jody L. Herman et al., *supra* note 9.

³⁹ See *Research Brief: Fostering the Mental Health of LGBTQ Youth*, *supra* note 38; see also Hatzenbuehler, *supra* note 38; see also Herman et al., *supra* note 9.

⁴⁰ See *U.S. Department of Education Issues Guidance Clarifying Title IX Protections for Transgender Students*, GLSEN (Apr. 29, 2014), <https://www.glsen.org/news/dept-ed-title-ix-protects-trans-students>.

Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. . . . Make no mistake: transgender students are protected by Title IX, and the U.S. Department of Education stands ready to help them,’ said GLSEN Executive Director Eliza Byard. ‘We thank the Department of Education, Secretary Arne Duncan and Assistant Secretary for Civil Rights Catherine Lhamon for making this commitment so clear’.

⁴¹ Katie Thomas, *L.G.P.A. Will Allow Transgender Player to Compete*, N. Y. TIMES (Dec 1,2010), www.nytimes.com/2010/12/02/sports/golf/02lpga.html. (“L.G.P.A. have voted to eliminate the tour’s requirement that players be ‘female at birth’ and to allow transgender athletes to compete, less than two months after a transgender woman sued the tour in federal court, arguing that the rule violated California civil rights law”).

⁴² See generally NCAA TRANSGENDER HANDBOOK, *supra* note 13.

⁴³ See generally Katie Barnes, *The Battle Over Title IX and Who Gets to Be a Woman in Sports: Inside the Raging National Debate*, ESPN (June 23, 2020), https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate.

persons, their sexual orientation is not at issue. However, this paper will consider the impact the recent U.S. Supreme Court case *Bostock v. Clayton County, Georgia*, No. 17–1618 (Argued October 8, 2019—Decided June 15, 2020)⁴⁴ will have on the *Soule* matter. The focus of this article is on gender and what persons perceive their gender to be and whether the civil rights laws protect that right. Yet, although Title IX protects the rights of transgender youths to participate in sex-separated high school athletics as their true gender identity without the prerequisite of hormone treatment, what then? There will be recommendations that high school student athletic programs should consider.

In Section V recommends a high school policy similar to the policy the NCAA adopted to better include transgender athletes into collegiate athletics yet tailored to accommodate for high school youths' relatively young ages, namely without prerequiring hormone treatment or puberty blockers. These recommendations will just be a start for providing equal opportunity in education in high schools for transgender youths.⁴⁵ Younger transgender youths have a longer road to achieve stability in establishing their natural gender because they are processing what it means to be a certain gender.⁴⁶ There is a conflict with societal norms and what is happening to a transgender youth both physically and mentally.⁴⁷ The average teenager must cope with changes in their bodies, along with hormones and emotions never before experienced.⁴⁸ A transgendered youth will experience similar feelings of physical and emotional change, coupled with an internal conflict as to why these changes seem “wrong.”⁴⁹ Assuming transgendered youths understand at an early age their

⁴⁴ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (US 2020) (Certiorari to the United States Court of Appeals for the Eleventh Circuit, decided “with No. 17–1623, *Altitude Express, Inc., et al. v. Zarda et al.*, as Co-Independent Executors of the Estate of Zarda, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit”). See *Bostock v. Clayton Cty.*, No. 17–1618., slip op. at 1 (U.S. June 15, 2020).

⁴⁵ For example, additional issues include the need for gender neutral facilities such as bathrooms and locker rooms, mandatory training for teachers and coaches on gender issues, particularly training for acceptance and tolerance.

⁴⁶ See KOSCIW ET AL., *supra* note 9 (discussing the many challenges relating to personal development transgender youths).

⁴⁷ See Lisa R. Miler & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 WILEY SOC'L F. 809, 811 (Sept. 30, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5044929/>.

⁴⁸ See Sarah Jayne Blakemore et al., *The Role of Puberty in the Developing Adolescent Brain*, 31 HUM. BRIAN MAPPING 926, 927 (June 30, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3410522/>.

⁴⁹ See Melissa Healy, *Treating Transsexual Kids: Wait for, Then Delay Puberty to Treat*, L.A. TIMES (Sept. 17, 2009), https://latimesblogs.latimes.com/booster_shots/2009/09/transsexual-kids-wait-for-then-delay-puberty-to-treat.html (““Transsexual persons experiencing the confusion and stress associated with feeling ‘trapped’ in the wrong body look to endocrinologists for treatment that can bring relief and resolution to their profound discomfort,” said Dr. Wylie Hembree, a Columbia University endocrinologist who chaired the committee drafting the guidelines”); see also DEBRA W. HAFFNER, *FACING FACTS: SEXUAL HEALTH FOR AMERICA’S ADOLESCENTS*, NAT’L COMM’N ON ADOLESCENT SEXUAL HEALTH 12 (1995).

[T]his report summarizes the deliberations, findings, and recommendations of the National Commission on Adolescent Sexual Health. Worth noting, this report’s

instinctual gender and want to live in-line with that gender identity, society and natural development cause suppression of that achievement.⁵⁰ There is an ongoing debate as to whether young teens should receive hormone replacement therapy due to lack of physical and mental maturity.⁵¹ Another concern about hormone replacement therapy for transgendered youths is the stigma that this is a medical treatment for mental illness and the associated reluctance by the youths, their parents, and their medical professionals for a child to take on the impact of such social stigma.⁵²

Outlining these concerns: where would a transgender youth fit in high school sports and what recommendations allow the recognition that there are biological and physiological differences transgender youths must endure in their journeys to complete gender affirmation? The recommendations will begin with guidelines that enhance current school policy of respect and promote safety and a healthy learning environment, because transgender youths are in a unique situation, especially when it comes to sports because rules of the game might include restrictions for competitive safeguards, particularly in contact sports. The guidelines will have to explain fully proper methods needed to include all

recommendations for policymakers include: '(1) recognize that sexual development is an essential part of adolescence and develop public policies consistent with research about adolescent development, adolescent sexuality, and program effectiveness; (2) support parents and families as integral members of efforts to improve adolescent sexual health; (3) support comprehensive sexuality education, which includes human development, relationships, personal skills, sexual behavior, sexual health, and sexuality and culture; (4) provide a full range of confidential sexual and reproductive health services tailored for adolescents and encourage cultural messages that support sexual health and responsible sexual relationships; (5) support research on adolescent sexuality and provide funding for coordinated and integrated adolescent programs; (6) respond to the diverse sexual health needs of adolescents, including the disenfranchised, disabled, and gay and lesbian adolescents; (7) involve youth in program planning and implementation; and (8) value and respect adolescents'.

⁵⁰ See *Gender Identity*, HUMAN DISEASE AND CONDITIONS F., <http://www.humanillnesses.com/Behavioral-Health-Fe-Mu/Gender-Identity.html> (last visited Oct. 20, 2020).

In the broadest sense, gender identity refers to each person's own sense of being male or female. We form our gender identities quite naturally. Almost always our gender identities match up to the sexual body parts we have. Most people develop a sense that they are male or female within the first few years of life, and it is generally believed that the majority of children have acquired this sense by the age of 3. . . . Some people, however, experience confusion over their gender identities. This confusion sometimes leads to a condition known as gender identity disorder. Gender or sex role identity refers to the various attitudes and behaviors that are considered normal and appropriate for people of a particular sex. These attitudes and behaviors vary between cultures and societies and involve a set of expectations about how females and males should think, act, and feel.

⁵¹ See Healy, *supra* note 49.

⁵² *Id.*; See also Stephen M. Rosenthal, *Approach to the Patient: Transgender Youth: Endocrine Considerations*, 99 J. CLINICAL ENDOCRINOLOGY & METABOLISM 4379, 4383-85 (Aug. 20, 2014), <https://doi.org/10.1210/jc.2014-1919>.

student athletes, while keeping fairness on the playing field. This balance must include both student athletes, who are taking hormone replacement therapy, and those youths, who are unable to do so.

I. TRANSGENDER LEGAL ISSUES PRESENTED IN *SOULE ET AL. V. CONNECTICUT ASSOCIATION OF SCHOOLS, INC. ET AL.*

This lawsuit arises out of a complaint the *Soule* Plaintiffs made to the Department of Education Office of Civil Rights alleging that the Connecticut Association of Schools operating as Connecticut Interscholastic Athletic Conference is violating Title IX. The CIAC follows a policy of allowing transgender students to play on sex-separated sports teams that are consistent with their gender identity, if they meet certain criteria.⁵³ The CIAC policy titled “Transgender Participation” governs eligibility “for students who have a gender

⁵³ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, ¶¶ 71–76 (citing CONN. INTERSCHOLASTIC ATHLETIC CONF., 2020–2021 CIAC HANDBOOK art 9, sect. B (2020), <http://www.casciac.org/ciachandbook/> [hereinafter CIAC HANDBOOK]).

The CIAC is committed to providing transgender student-athletes with equal opportunities to participate in CIAC athletic programs consistent with their gender identity. Hence, this policy addresses eligibility determinations for students who have a gender identity that is different from the gender listed on their official birth certificates.

The CIAC has concluded that it would be fundamentally unjust and contrary to applicable state and federal law to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes. Therefore, for purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student’s eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the CIAC, it is verifying that it has determined that the students listed on a gender specific sports team are entitled to participate on that team due to their gender identity and that the school district has determined that the expression of the student’s gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.

Students who wish to participate on a CIAC gender specific sports team that is different from the gender identity listed on the student’s current school records are advised to address the gender identification issue with the local school district well in advance of the deadline for athletic eligibility determinations for a current sports season. Students should not be permitted to participate in practices or to try out for gender specific sports teams that are different from their publicly identified gender identity at that time or to try out simultaneously for CIAC sports teams of both genders.

Nothing in this policy shall be read to entitle a student to selection to any particular team or to permit a student to transfer from one gender specific team to a team of a different gender during a sports season. In addition, the CIAC shall expect that, as a general matter, after the issue of gender identity has been addressed by the student and the school district, the determination shall remain consistent for the remainder of the student’s high school sports eligibility. The CIAC has concluded that this criteria is sufficient to preclude the likelihood that a student will claim a particular gender identity for the purpose of gaining a perceived advantage in athletic competition.

identity that is different from the gender listed on their official birth certificates.”⁵⁴ For purposes of the “Transgender Participation” policy, a student’s school district “shall determine a student’s eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season.”⁵⁵

The *Soule* Plaintiffs allege that CIAC’s “Transgender Participation” rule violates Title IX’s prohibition on sex discrimination by depriving cisgender girls of equal athletic opportunities. Plaintiffs contend that, for purposes of assigning students to sex-separated teams under Title IX, a student’s sex must be defined based on biological differences.⁵⁶ The Complaint alleges that there are “biological differences” between girls who are transgender and girls who are cisgender that give girls who are transgender an unfair athletic advantage.⁵⁷ Specifically, Plaintiffs allege that girls who are transgender go through “male puberty,” which “quickly increases the levels of circulating testosterone” and

⁵⁴ CIAC HANDBOOK, *supra* note 53, at 55.

⁵⁵ *Id.*

⁵⁶ See Amended Verified Complaint For Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶¶ 4–5.

As a result, in scholastic track competition in Connecticut, more boys than girls are experiencing victory and gaining the advantages that follow, even though postseason competition is nominally designed to ensure that equal numbers of boys and girls advance to higher levels of competition. In the state of Connecticut students who are born female now have materially fewer opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born male . . . This reality is discrimination against girls that directly violates the requirements of Title IX: ‘Treating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX’s mandate of equal opportunity for both sexes.’

McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 295 (2d Cir. 2004).

⁵⁷ See Amended Verified Complaint For Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶¶ 2–3.

Unfortunately for Plaintiffs and other girls in Connecticut, those dreams and goals—those opportunities for participation, recruitment, and scholarships—are now being directly and negatively impacted by a new policy that is permitting students, who are biologically male to compete in girls’ athletic competitions if they claim a female gender identity. [Because Title IX focuses on equal opportunities between the sexes, because this Complaint is precisely concerned with effects of biological differences between males and females, because the terms “boys” and “men” are commonly understood to refer to males, and to avoid otherwise inevitable confusion, we refer generally in this complaint to athletes who are biologically male as ‘boys’ or ‘men,’ and to athletes who are biologically female as ‘girls’ or ‘women.’] . . . This discriminatory policy is now regularly resulting in boys displacing girls in competitive track events in Connecticut—excluding specific and identifiable girls including Plaintiffs from honors, opportunities to compete at higher levels, and public recognition critical to college recruiting and scholarship opportunities that should go to those outstanding female athletes.

“drives a wide range of physiological changes that give males a powerful physiological athletic advantage over females.”⁵⁸ Plaintiffs therefore argue that gender identity should be irrelevant when determining whether students are eligible to participate in girls’ sports.⁵⁹

II. A PRIMER ON TRANSGENDER DISCRIMINATION AND WHY TITLE IX NEEDS TO PROTECT TRANSGENDER YOUTHS

Although there has been progress made for those athletes facing discrimination based on sex, there is a history of sex-based discrimination in athletics. “Myths, such as the idea that physical exertion would harm women’s reproductive systems or that women were inherently inferior athletes, were historically used to ‘protect’ women out of participation in entire fields, including marathon racing and contact sports, despite ample evidence that girls can compete and win against boys.”⁶⁰ Discrimination against transgender student athletes derives from the same “history of gender discrimination and [sex] stereotyping that has impeded the achievement of gender equality in sports as a whole.”⁶¹ “This policing of gender has been used to justify subjecting transgender student athletes to numerous additional barriers to participating in sports”⁶² Because transgendered high school students are the focus of the *Soule* case, it is important to intertwine the sex-based discrimination in athletics with an explanation of what it means to be transgendered, and why Title IX needs to protect transgender youths.

With Title IX, the role of women and girls in education and sports progressed despite systemic barriers, and it has indeed resulted in a dramatic increase in

⁵⁸ *Id.* ¶ 46.

⁵⁹ *See Id.* ¶ 62-70.

⁶⁰ Medley & Sherwin, *supra* note 1; *see* Nick Hoult, *How Kathrine Switzer Overcame Sporting Misogyny to Become the First Woman to Run a Marathon*, THE TELEGRAPH (Apr. 21, 2018), <https://www.telegraph.co.uk/athletics/2018/04/21/marathon-trailblazer-kathrine-switzer-just-20-year-old-kid-wanted/>; *see also* Bonsitu A. Kitaba-Gaviglio, *All This National Champion Wrestler Wants is a Chance to Compete*, ACLU (Mar. 8, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-education/all-national-champion-wrestler-wants-chance-compete>; *see also* *The Girl Who Wanted to Play Football*, ACLU-IN (Mar. 3, 2014), <https://www.aclu-in.org/en/news/girl-who-wanted-play-football>.

⁶¹ Medley & Sherwin, *supra* note 1.

⁶² *See id.*; *see also* Katrina Karkazis, *Stop Talking About Testosterone—There’s No Such Thing As a ‘True Sex’*, THE GUARDIAN (Mar. 6, 2019), https://www.theguardian.com/commentisfree/2019/mar/06/testosterone-biological-sex-sports-bodies?CMP=share_btn_tw; *see also* Diane Klein & Dylan Malagrino, *Sex Testing in Sports: An Uneasy Resolution—Last in a Two-Part Series*, DAILY J. (Dec. 14, 2009); *see also* Diane Klein & Dylan Malagrino, *Distinguishing Sex in Sports—First in a Two-Part Series*, DAILY J. (Dec. 11, 2009).

girls' participation in sports.⁶³ Some did not welcome this change,⁶⁴ and into the 2000s, women still have had to fight to play.⁶⁵ If there is still a substantial disparity in equality in sports between the genders,⁶⁶ how will this disparity help or hinder transgender student athletes?

A. Transgender Issues

"*Transgender* is an umbrella term for those people whose gender identity differs from the sex they were assigned at birth."⁶⁷ There are many terms that are used when describing gender issues: cisgender, intersex,⁶⁸ and natal sex.⁶⁹ For the majority of the population, one's natal sex corresponds with their gender. People who are transgender are "[people] whose current gender identity differs from the sex they were assigned at birth."⁷⁰ Some people feel they have the wrong body for the gender with which they identify. Some transgender individuals feel that their assigned sex does not match their gender identity, whereas other transgender individuals may feel that neither gender

⁶³ Medley & Sherwin, *supra* note 1; *Bobbi Gibb: The First Woman to Run the Boston Marathon*, EAT RUN READ (Apr. 19, 2012), <http://www.eatrunread.com/2012/04/bobbi-gibb-first-woman-to-run-boston.html> (showing when responding to the barring of a woman from a race where she ran the same course as a man and beating them, the founder of the modern Olympics, Baron Pierre de Coubertin said, "It is indecent that the spectators should be exposed to the risk of seeing the body of a women being smashed before their very eyes. Besides, no matter how toughened a sportswoman may be, her organism is not cut out to sustain certain shocks." The philosophy in this statement has survived, despite the progress women have made in sports).

⁶⁴ See *E.g.*, *Hoover v. Meiklejohn* 430 F. Supp. 164 (D. Colo. 1977) (analyzing Donna Hoover, a sixteen-year-old high school student, filed a lawsuit challenging exclusion of girls to play soccer in the state of Colorado).

⁶⁵ See *E.g.*, *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000) (analyzing when a female student brought Title IX class action lawsuit against state university and individual defendants seeking to force university to field intercollegiate women's fast pitch softball and women's soccer teams).

⁶⁶ Kelsey Casselbury, *Gender Discrimination in Sports*, SPORTSREC (Dec. 5, 2018), <https://www.sportsrec.com/5820642/gender-discrimination-in-sports>.

Statistics show that female sports do not carry the same weight as male sports. According to the Women's Sports Foundation, male athletes get \$179 million more in athletic scholarships each year than females do. Additionally, collegiate institutions spend just 24 percent of their athletic operating budgets on female sports, as well as just 16 percent of recruiting budgets and 33 percent of scholarship budgets on female athletes.

⁶⁷ SANDRA L. CARON, *SEX MATTERS FOR COLLEGE STUDENTS: SEX FAQ'S IN HUMAN SEXUALITY* 27 (Pearson, 2nd ed. 2007).

⁶⁸ See *Intersex*, INTERSEX SOCIETY OF NORTH AMERICA, https://isna.org/faq/what_is_intersex/ (defining a term used to describe people born with a "reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male").

⁶⁹ See *Natal Sex*, THE FREE DICTIONARY, <http://medical-dictionary.thefreedictionary.com/natal+sex> (defining the sex a child is assigned at birth, typically based on anatomy).

⁷⁰ *Terminology*, CDC (Dec. 18, 2019), <https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm>; see *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Oct. 26, 2020).

accurately describes their identity, and do not wish to be placed into either gender category.⁷¹ Gender Identity disorder,⁷² and the underlining feeling of gender dysphoria⁷³ have different connotation than cross-dressing.⁷⁴ Dressing or acting as a gender different from your sex is not the same as feeling you are in the wrong body, and the psychological impact those dissociative feelings have on the wellbeing of the person. It is this psychological difference that had transgendered people facing, unfortunately, the stigma that they have a mental illness when diagnosed.⁷⁵

B. Sports and Transgender Athletes

Possibly the most discussed misconception with transgender athletes are the possible physical advantages that male-to-female transgendered persons would have to their cisgender teammates and opponents.⁷⁶ Or in the alternative, that a female-to-male athlete would bring a disadvantage to his team because he was born a woman and may not have the physical capabilities of his teammates.⁷⁷ Consider that the NCAA addressed these barriers to inclusion in the collegiate setting. Although the NCAA has identified and wisely addressed many of these

⁷¹ *Sexual Orientation and Gender Identity Definitions*, *supra* note 70 (“‘Gender identity’ is ‘[o]ne’s innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.’”); *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> (last visited Oct. 26, 2020) (“‘Non-binary’ is an adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories. While many also identify as transgender, not all non-binary people do”).

⁷² *See What is Gender Dysphoria?*, WEBMD, <https://www.webmd.com/sex/gender-dysphoria#1> (last visited Oct. 26, 2020) (explaining that gender identity disorder is a condition in which a male or female feels a strong identification with the opposite sex).

⁷³ *Id.* (explaining that gender dysphoria is literally being uncomfortable with one’s assigned gender).

⁷⁴ Crossdressers usually understand their gender and have no problem living as that gender. The need to dress as a different gender is not related to their gender identity. *See Cross Dressing Information*, GENDER CTR., <https://gendercentre.org.au/resources/support-resources/cross-dressing> (last visited Nov. 8, 2020).

⁷⁵ *See* Madeline H. Wyndzen, *All Mixed Up: A Transgendered Psychology Professor’s Perspective on Life, the Psychology of Gender, & “Gender Identity Disorder”*, GENDER PSYCH. (2008), <http://www.genderpsychology.org/> (indicating psychopathology continues to label gender identity issues as a “disorder”).

⁷⁶ *See* Joe Leigh Simpson et al., *Gender Verification in the Olympics*, 284 JAMA Network 1568 (2000); *see also* Scott Skinner-Thompson & Iona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 274 (2013) (“Concerns that permitting transgender students to participate in K-12 athletics will lead to injuries for transgender males competing with cisgender males, or cisgender females competing with transgender females, or competitive advantages or disadvantages, lack merit”).

⁷⁷ *See* Simpson et al., *supra* note 76; *see also* Scott Skinner-Thompson et al., *supra* note 76, at 274; *see also* J.C. Reeser, *Gender Identity and Sport: Is the Playing Field Level*, 39 BRITISH J. SPORTS MED. 695 (2005), <https://bjsm.bmj.com/content/bjsports/39/10/695.full.pdf>.

issues,⁷⁸ high school students may not be able to follow the same format because of age and the medical community's reluctance in treating people so young.⁷⁹

Back in 2011, the NCAA adopted policies concerning transgender students into collegiate athletic programs,⁸⁰ stating:

The following policies clarify participation of transgender student-athletes undergoing hormonal treatment for gender transition: 1. 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. 2. 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.⁸¹

Additionally, the NCAA has addressed those student athletes that fall under the category of "Non-Hormone treatment," requiring those student athletes to compete as their gender assigned at birth, stating:

Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender. A trans[gender] male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team. A trans[gender] female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.⁸²

⁷⁸ See generally NCAA TRANSGENDER HANDBOOK, *supra* note 13.

⁷⁹ See Serena Freewomyn, *What Would You Do If This Was Your Child?*, THE BILERICO PROJECT (May 26, 2008), http://bilerico.lgbtqnation.com/2008/05/what_would_you_do_if_this_was_your_child.php.

⁸⁰ See NCAA TRANSGENDER HANDBOOK, *supra* note 13.

⁸¹ *Id.* at 13.

⁸² *Id.*

Although this policy might be more appropriate for older, young adult student athletes, this would not necessarily be an available remedy for teen or pre-teen athletes because the hormone replacement requirement may not be an option for someone so young.⁸³

Because of their youth and early stage of understanding gender identification, high school students have few opportunities in using hormone replacement therapy. Most high school student athletes would fall under the NCAA guideline for “Non Hormone Replacement” student athlete.⁸⁴ This label could preclude them from participating under the NCAA inclusion guidelines,⁸⁵ because “[a]ny transgender student athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.”⁸⁶ Meaning a transgender male (who is transitioning from female to male) student-athlete and not taking testosterone related to that gender transition may participate on a men’s or women’s team, and a transgender female (who is transitioning from male to female) student athlete and not taking hormone treatments related to gender transition may not compete on a women’s team. Although an individual school might allow the student athlete to play on the sex-specific team, there are important secondary effects associated with this concession such as the team may be disqualified from championship games.⁸⁷

C. How Does This Pertain to High School Student Athletes?

Where does this leave the majority of high school transgender student athletes? Unfortunately, at a disadvantage to participate in high school athletics because fairness on the playing field is a core value established early in sports. Many may cry foul if a male-to-female transgendered athlete were allowed to participate on a female team for fear of advantages that accompany males physically.⁸⁸ There is also potentially a fear of fraud, in that some people might hold the misperception that transgender youths are misrepresenting their gender

⁸³ Priyanka Boghani, *When Transgender Kids Transition, Medical Risks are Both Known and Unknown*, FRONTLINE PBS (June 30, 2015), <https://www.pbs.org/wgbh/frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/> (“[D]octors tread carefully, navigating medical interventions that carry risks that are both known and unknown”). See also Wylie C. Hembree et al., *Gender Dysphoria/Gender Incongruence Guideline Resources*, ENDOCRINE SOC’Y (Sept. 1, 2017), <https://www.endocrine.org/clinical-practice-guidelines/gender-dysphoria-gender-incongruence>.

⁸⁴ See Healy, *supra* note 49; see also NCAA TRANSGENDER HANDBOOK, *supra* note 13, at 13.

⁸⁵ See Healy, *supra* note 49; see also NCAA TRANSGENDER HANDBOOK, *supra* note 13, at 13.

⁸⁶ NCAA TRANSGENDER HANDBOOK, *supra* note 13, at 13.

⁸⁷ See *id.*

⁸⁸ See Skinner-Thompson et al., *supra* note 76, at 274 (“Concerns that permitting transgender students to participate in K-12 athletics will lead to injuries for transgender males competing with cisgender males, or cisgender females competing with transgender females, or competitive advantages or disadvantages, lack merit”).

to have a competitive advantage in high school athletic competitions.⁸⁹ Although there has been progression in college sports,⁹⁰ the International Olympic Committee,⁹¹ and at the professional level as in the Ladies Professional Golf Association,⁹² and the U.S. Tennis Association,⁹³ high school programs need guidance in making recommendations to navigate this important yet underdiscussed subject. And, the *Soule* complaint has brought the conversation to the forefront.

⁸⁹ *Id.* at 288 (“Concerns regarding the use of a gender identity standard being open to subjective interpretation and abuse by students looking to gain a competitive advantage in a sport are also entirely unsubstantiated”).

⁹⁰ See generally NCAA TRANSGENDER HANDBOOK, *supra* note 13.

⁹¹ Sheila L. Cavanagh & Heather Sykes, *Transsexual Bodies at the Olympics: The International Olympic Committee’s Policy on Transsexual Athletes at the 2004 Athens Summer Games*, 12(3) BODY & SOC’Y SAGE PUBL’N, 75–102 (2006).

In May 2004 the International Olympic Committee (IOC) implemented a policy enabling transsexual athletes to compete at the summer Olympic Games in Athens. The IOC Medical Commission proposed that transsexual athletes who had Sex Reassignment Surgery (SRS) before puberty shall be admitted to competition; that all other transsexuals must be post-operative (SRS including external genitalia and gonadectomy); must have legal and governmental recognition of their gender conferred by their country of citizenship; hormonal therapy administered by medical personal to minimize ‘gender-related advantages’ in competition; and live for a minimum of two years in their newly assigned gender. The guidelines proposed by the Medical Commission were accepted by the Executive Board of the IOC and it was also decided that individual cases would be assessed for eligibility. If the gender of an athlete is questioned the IOC reserves the right to carry out a sex-test. Although mandatory sex-testing of athletes was discontinued at the 2000 Olympic Games, the IOC is presently authorized to implement what has been called ‘suspicion based testing’.

⁹² Thomas, *supra* note 41 (“L.G.P.A. players voted players have voted to eliminate the tour’s requirement that players be ‘female at birth’ and to allow transgender athletes to compete, less than two months after a transgender woman sued the tour in federal court, arguing that the rule violated California civil rights law”); see John Huggan, *Muirfield to Vote Again on Allowing Women to Join Honourable Company of Edinburgh Golfers*, GOLF DIGEST (Jan. 9, 2017), <https://www.golfdigest.com/story/muirfield-to-vote-again-on-allowing-women-to-join-honourable-company-of-edinburgh-golfers>; see also John Huggan, *Muirfield Vote Fails to Admit Women Members, Club Removed from Open ROTA*, GOLF DIGEST (May 19, 2016), <https://www.golfdigest.com/story/muirfield-vote-fails-to-admit-women-members-club-removed-from-open-rot>.

⁹³ *Transgender Inclusion Policy*, USTA MIDWEST, <https://www.usta.com/en/home/about-usta/who-we-are/national/transgender-inclusion-policy.html> (last visited Oct. 22, 2020) (defining “transgender” and corresponding UTSA guidelines as: “(1) Those who transition from female to male are eligible to compete in the male category without restriction; (2) Those who transition from male to female are eligible to compete in the female category under the following conditions: (a) The athlete has declared that her gender identity is female; (b) The declaration cannot be changed, for sporting purposes, for a minimum of four years; and (c) Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimize gender-related advantages in sport competitions; (3) In the event of non-compliance, the athlete’s eligibility for female competition will be suspended for 12 months”).

III. USING EXISTING LAWS TO ENSURE EQUALITY FOR TRANSGENDER STUDENT-ATHLETES IN HIGH SCHOOL

There are twenty states and the District of Columbia that have antidiscrimination statutes that prohibit discrimination on the basis of gender, and/or gender identity and expression.⁹⁴ These antidiscrimination statutes are helpful to further the high school policy discussion at dispute in *Soule*. This Section will consider the dispute in *Soule* and discuss Title IX as the source of law for resolving the debate about transgender athletes' participation in the sex-segregated high school athletics.⁹⁵

A. *Soule* Background

In *Soule*, cisgender Connecticut girls, who lost competitions to transgender athletes filed a complaint with the Department of Education's Office of Civil Rights arguing that by respecting transgender students' identities, Connecticut school discriminated against cisgender student athletes. The Plaintiffs in this action are four female high school athletes.⁹⁶ Plaintiffs seek to prevent transgender competitors from participating in interscholastic outdoor and indoor track events on the basis of their gender identity because of the sex assigned at birth. More specifically, Plaintiffs allege that Andraya Yearwood and Terry Miller, who are transgender girls, should not be permitted to participate in girls track events pursuant to the CIAC's transgender participation policy because it arguably violates Title IX.⁹⁷ The CIAC policy allows student athletes, male or female, to participate in interscholastic athletics based on "the gender identification of that student in current school records and daily life activities in the school" and community at the time that sports eligibility is determined.⁹⁸

1. Andraya Yearwood and Terry Miller

Andraya Yearwood and Terry Miller (also sometimes known as T.M.) spent four years participating in track and field in accordance with Connecticut law and state policy.⁹⁹ Both Terry and Andraya are girls who are transgender, which means that they were assigned a male sex at birth but identify as female.¹⁰⁰ Like

⁹⁴ *Transgender Inclusion in High School Athletics*, *supra* note 28 and accompanying text.

⁹⁵ See generally Barnes, *supra* note 43.

⁹⁶ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶¶10-14.

⁹⁷ See *id.* at ¶¶ 77-86.

⁹⁸ *Id.* at ¶¶ 73-74.

⁹⁹ Declaration of Andraya Yearwood, *Soule et al. v. Conn. Ass'n of Sch.s, Inc. et al.*, No. 3:20-cv-00201-RNC, ¶ 6 (D. Conn. Feb. 20, 2020); Declaration of T.M., *Soule et al. v. Conn. Ass'n of Sch.s, Inc. et al.*, No. 3:20-cv-00201-RNC, ¶¶6, 10 (D. Conn. Feb. 20, 2020).

¹⁰⁰ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 2; Declaration of T.M., *supra* note 99, at ¶ 3.

cisgender girls, Terry and Andraya have a female gender identity and live their lives as girls.¹⁰¹

From the time she was a child, Andraya has known that she is a girl.¹⁰² By the time Andraya started high school, she was known to her family and peers as a girl and participated in all aspects of school consistent with her female gender.¹⁰³ In her everyday life and on her track team, Andraya is accepted as a girl by her family, her friends, her teammates, and her coaches.¹⁰⁴ Likewise, Terry also knew from a young age that she is a girl.¹⁰⁵ After years of repressing her identity, Terry came out as transgender in tenth grade and began to live all aspects of her life as a girl;¹⁰⁶ and, like Andraya, is accepted as a girl by her family, her friends, her teammates, and her coaches.¹⁰⁷

Andraya and Terry love to run, and they both participated in Indoor and Outdoor Track and Field on their respective girls' teams.¹⁰⁸ They participated in track for the same reasons as their cisgender peers: being a part of a team creates lasting social and emotional relationships; through the training and competition they are able to invest physical and emotional energy and release stress and anxiety;¹⁰⁹ and the experience gives them a place to be free to be themselves and thrive.¹¹⁰ Like their teammates and other athletes in Connecticut and beyond, they valued being part of a team more than winning.¹¹¹ During the season they each trained multiple hours per day, five days per week, and pushed themselves and their teammates to improve.¹¹² "I am lucky to live in a state that

¹⁰¹ Declaration of Andraya Yearwood, *supra* note 99, at ¶¶ 2-3; Declaration of T.M., *supra* note 99, at ¶ 3-5.

¹⁰² Declaration of Andraya Yearwood, *supra* note 99, at ¶ 2 ("In the summer before eighth grade, Andraya told her parents that she is transgender and started to receive social and medical support for her transition").

¹⁰³ *Id.* at ¶ 3 (stating she has legally changed her name to "Andraya" and has been undergoing hormone therapy for several years. As a result of her medical transition, Andraya's circulating hormones are comparable to the hormone levels of non-transgender girls).

¹⁰⁴ *Id.* at ¶¶ 2, 6.

¹⁰⁵ Declaration of T.M., *supra* note 99, ¶ 3 ("She recalls as far back as fifth grade being aware of her female gender but not yet having the language or support to understand what she needed to live authentically").

¹⁰⁶ *Id.* at ¶¶ 4-5 (explaining that she has since updated her Connecticut birth certificate to accurately reflect her sex as female and is undergoing hormone therapy. As a result of her hormone treatment, Terry has circulating hormones at levels typical of non-transgender girls).

¹⁰⁷ *Id.* at ¶¶ 11-12.

¹⁰⁸ See Declaration of Andraya Yearwood, *supra* note 99, at ¶¶ 4-7; see also Declaration of T.M., *supra* note 99, at ¶¶ 6-8.

¹⁰⁹ Declaration of Andraya Yearwood, *supra* note 99, at ¶¶ 4-7; Declaration of T.M., *supra* note 99, at ¶¶ 6-8.

¹¹⁰ Declaration of Andraya Yearwood, *supra* note 99, at ¶¶ 4-7; Declaration of T.M., *supra* note 99, at ¶¶ 6-8.

¹¹¹ Declaration of Andraya Yearwood, *supra* note 99, at ¶¶ 4, 11; Declaration of T.M., *supra* note 99, at ¶¶ 6, 14; See 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, 2 (2011) ("Educators have long recognized the physical, psychological, social, and educational benefits that sports provide to students").

¹¹² Declaration of Andraya Yearwood, *supra* note 99, at ¶ 7; Declaration of T.M., *supra* note 99, at ¶ 7.

protects my rights and to have a family that supports me,” Andraya explained.¹¹³ “This is what keeps me going. Every day I train hard—I work hard to succeed on the track, to support my teammates, and to make my community proud.”¹¹⁴

Andraya and Terry both excelled in track and field but, contrary to the allegations by Plaintiffs, their successes have been a result of hard work and are well within the range of high school track times for cisgender girls. Indeed, some of the Plaintiffs in this case have placed ahead of one or both Andraya and Terry in the 55-meter, the 100-meter and the 300-meter events.¹¹⁵ After the Complaint was filed, Plaintiff Chelsea Mitchell placed first in the 55-meter race at the Class S State Open in front of both Terry and Andraya.¹¹⁶

2. Connecticut State Law

In 2011, the Connecticut General Assembly passed a comprehensive transgender rights bill that specifically prohibits discrimination based on gender identity and expression in education, employment, public accommodation, and housing.¹¹⁷ “In the educational context, [this Public Act modified] Section 10-15c of the Connecticut General Statutes . . . , and protects the fundamental rights of [transgender] students and ensures that such students have equal access to educational programming and activities, free of discrimination.”¹¹⁸

Under rules established by the CIAC, which serves as the sole governing body for inter-scholastic athletic activities in Connecticut, Andraya, Terry, and other girls who are transgender participate on girls’ sports teams, and boys who are transgender participate on boys’ sports teams.¹¹⁹ The CIAC policy, which has been in effect since 2013, does not allow students to play on girls’ teams based on whether “they claim” to have a female gender identity.¹²⁰ The governing by-laws of the CIAC dictate student participation based on “the

¹¹³ Dan Brechlin, *Connecticut High School Transgender Athletes ‘No Longer Want to Remain Silent’ Following Title IX Complaint*, HARTFORD COURANT (June 20, 2019), <https://www.courant.com/sports/high-schools/hc-sp-transgender-policy-runners-respond-20190619-20190620-5x2c7s2f5jb6dnw2dwpftiw6ru-story.html>; *See generally About CIAC*, CONN. INTERSCHOLASTIC ATHLETIC CONF., http://ciacsports.com/site/?page_id=13 (last visited Oct. 26, 2020).

¹¹⁴ Brechlin, *supra* note 113.

¹¹⁵ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 11; Declaration of T.M., *supra* note 99, at ¶ 14.

¹¹⁶ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 11; Declaration of T.M., *supra* note 99, at ¶ 14; *but see* Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶¶ 67, 70 (asserting that the message sent to non-transgender girls under CIAC’s policy is “Give up. You can’t win”); *See* Shawn McFarland, *For the Second Week in a Row, Canton’s Chelsea Mitchell Beats Terry Miller in 55-Meter Dash, This Time to Win State Open Title*, THE HARTFORD COURANT (Feb. 22, 2020), <https://www.courant.com/sports/high-schools/hc-sp-chelsea-mitchell-terry-miller-55-meter-dash-state-open-20200222-zdwb7shfbnfrxajs2hgmdwutbi-story.html>.

¹¹⁷ *See* An Act Concerning Discrimination, Public Act N. 11-55, 2011 Conn. Acts 55. (Reg. Sess.).

¹¹⁸ *Guidance on Civil Rights Protections and Supports for Transgender Students*, CONN. ST. DEP’T OF EDUC. (Sept. 2017), https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance.pdf?la=en.

¹¹⁹ *See generally Reference Guide for Transgender Policy*, *supra* note 4.

¹²⁰ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶ 2.

gender identification of that student in current school records and daily life activities in the school and community.”¹²¹

The student’s school must verify that the “expression of the student’s gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.”¹²² The policy restricts participation to the athletic classification of the student’s lived and consistently expressed gender identity and bars participation in athletics of both genders.¹²³ The CIAC’s policy is not unusual. Across the country, high school athletic associations have policies allowing boys and girls who are transgender to play on the same teams as other boys and girls.¹²⁴ Athletic associations in sixteen states have policies that—like the CIAC’s—allow transgender students to participate without requiring students to establish any proof of medical transition.¹²⁵ In the additional sixteen states, the athletic associations allow transgender students to participate without hormone therapy or other medical transition on a case-by-case basis.¹²⁶ Other states allow transgender students to participate after beginning hormone therapy.¹²⁷

Based on the athletic policies that exist in almost every state, Terry and Andraya would be eligible to participate in the girls’ category either based on their female gender identity, their updated birth certificate, and/or their hormone levels. Transgender men and women also continue to participate in competitive athletics at every stage of their careers, and no post-secondary or elite athletic body regulates competition based on chromosomes, the relief requested by Plaintiffs.¹²⁸ The NCAA and the International Olympic Committee allow women who are transgender to compete on women’s teams after a period of undergoing hormone therapy.¹²⁹

¹²¹ CIAC HANDBOOK, *supra* note 53.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *Policies for Transgender Student Athletes*, HANOVER RSCH. (Feb. 2014), <https://www.gssaweb.org/wp-content/uploads/2015/04/Policies-for-Transgender-Student-Athletes-1.pdf>; see also Courtney Crowder, *8 States, 8 Transgender Athletics Policies*, DES MOINES REG. (Aug. 4, 2016), <https://www.desmoinesregister.com/story/life/living-well/2016/08/04/midwest-transgender-athletes-mixed-policies/88037176/>.

¹²⁵ See *High School Transgender Athlete Policies*, *supra* note 12 (offering a multi-state policy breakdown complete with accompanying local policy statements).

¹²⁶ See *id.*

¹²⁷ *Id.*

¹²⁸ See Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶ 177.

¹²⁹ See NCAA TRANSGENDER HANDBOOK, *supra* note 13, at 13 (permitting men who are transgender to participate on men’s teams with no medical intervention and women who are transgender to participate on women’s teams after one year of hormone therapy); see also *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, INT’L OLYMPIC COMM. (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf (permitting men who are

Further, in an opinion letter dated January 7, 2015, OCR interpreted how Title IX should apply to transgender individuals.¹³⁰ LGBTQ+ students have always faced barriers to safe learning environments.¹³¹ Title IX, the federal law prohibiting sex discrimination in schools, has historically guaranteed that students' status as queer and as transgender does not interfere with their ability to access education.¹³² Title IX prevents discrimination "on the basis of sex" in educational institutions that receive federal funds.¹³³ In particular, the 2015 Letter explained that "[t]he Department's Title IX regulations permit schools to provide sex-segregated . . . athletic teams . . . [and] when a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity."¹³⁴ Determining the meaning of "on the basis of sex" in Title IX will be central to any impending Title IX challenge to transgender student-athlete policies.¹³⁵ However, "the executive branch's interpretation of 'on the basis of sex'" in Title IX has provided inconsistent guidance for interpreting "on the basis of sex."¹³⁶

In an effort to clarify those protections, the Department of Education under the Obama Administration released guidance that said prohibiting transgender students from using facilities that align with their gender identity violates federal anti-discrimination laws.¹³⁷ On May 13, 2016, the U.S. Department of Justice

transgender to compete in the men's category with no medical intervention and women who are transgender to compete in the women's category upon proof of suppressed testosterone for a period of 12 months).

¹³⁰ See U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., Opinion Letter on Transgender Student Restroom Access to Facilities (Jan. 7, 2015), https://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.

¹³¹ KOSCIW ET AL., *supra* note 9, at 72 (according to GLSEN's 2017 National School Climate Survey, students who attend school with formal policies and practices to protect transgender and gender-nonconforming students were less likely to experience harassment and discrimination, they were also less likely to miss school due to fear of safety, had higher post-graduation aspiration and stronger school performance).

¹³² See Gabriele Arkles, *Federal Appeals Courts Agree: Trans People Belong in Schools*, ACLU (Feb. 19, 2020), <https://www.aclu.org/news/lgbt-rights/federal-appeals-courts-agree-trans-people-belong-in-schools/>.

¹³³ 20 U.S.C. §§ 1681–88 (2012).

¹³⁴ See U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *supra* note 130.

¹³⁵ See generally 20 U.S.C. § 1681(a).

¹³⁶ Lenzi, *supra* note 33, at 869; See generally *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 719 (4th Cir. 2016), *rev'd*, 137 S. Ct. 1239 (2017) (explaining that "an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute"); See also *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (reversing the Fourth Circuit, the Supreme Court issued a one-sentence opinion: "Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017").

¹³⁷ See Press Office, *U.S. Departments of Education and Justice Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, U.S. DEP'T. OF EDUC. (May 13, 2016),

<https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-help-schools-ensure-civil-rights-transgender-students>; see also Catherine E. Lhamon, Assistant Secretary for Civil Rights & Vanita Gupta, Principle Deputy Assistant Attorney General for Civil Rights, *Dear Colleague Letter on Transgender Students*, OFF. FOR CIV. RIGHTS., U.S. DEP'T OF EDUC. & CIV. RIGHTS. DIV., U.S. DEP'T OF

and the U.S. Department of Education under the Obama Administration issued a Dear Colleague Letter,¹³⁸ summarizing public schools' obligations regarding transgender students under Title IX and explaining how those departments evaluate a school's compliance with those obligations.¹³⁹ This letter informed public schools that, for the purposes of Title IX, sex discrimination encompasses discrimination based on gender identity: "When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity."¹⁴⁰ This letter also stated that the "Departments treat a student's gender identity as the student's 'sex' for purposes of Title IX and its implementing regulations."¹⁴¹ The guidance also made it more likely to ensure transgender students were addressed by their correct names and pronouns and treated consistently with the gender identity. But even with the guidance published, few students knew about their rights, and even fewer had the tools to defend them. The 2016 Letter included notice that Title IX protects students from discrimination in school on the basis of gender identity, including in regard to names and pronouns, restrooms, and athletics.¹⁴² The guidance made clear that Title IX allows students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity.¹⁴³ That letter further stated that, when a school provides sex-segregated activities and facilities, "transgender students must be allowed to participate in such activities . . . consistent with their gender identity."¹⁴⁴

JUST. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

¹³⁸ See Lhamon et al., *supra* note 137; see generally Emma Brown, *U.S. Senator: Education Dept. Overstepped Authority on Sexual Assault Complaints*, WASH. POST (Jan. 7, 2016), <https://www.washingtonpost.com/news/education/wp/2016/01/07/u-s-senator-education-department-overstepped-authority-on-sexual-assault-complaints> (noting that Dear Colleague Letters are considered administrative guidance, which agencies promulgate to clarify regulations that already exist, and are not new regulations which require soliciting and responding to public input).

¹³⁹ See Lhamon et al., *supra* note 137.

¹⁴⁰ *Id.* at 3.

¹⁴¹ See Joseph Spitzer, *U.S. Departments of Justice and Education Weigh in on Transgender Issues*, JOHNSON & BELL (May 2016), <http://johnsonandbell.com/alerts-blog/employment/u-s-departments-of-justice-and-education-weigh-in-on-transgender-issues/>, (explaining the guidelines set forth in the "Dear Colleague" Letter: *Transgender Students*, U.S. DEP'T. OF EDUC. & U.S. DEP'T. OF JUST. (May 13, 2016)).

¹⁴² See Lhamon et al., *supra* note 137.

¹⁴³ *Id.* at 3.

¹⁴⁴ The letter also directly mentioned how a school should integrate transgender students into athletics: "A school may not . . . adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) . . . [but] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research based medical knowledge" Although the letter was largely a victory for transgender students, the guidance still allowed a school to prevent transgender student-athletes from participating on single-sex teams that align with their gender identity if the prohibition was based on "sound, current, and research-based medical knowledge." *Id.* In a footnote in the Dear Colleague Letter, the Obama Administration applauded the NCAA's only partially inclusive transgender student-athlete policy, noting that NCAA officials "consulted

At the same time, those two Departments issued a document with “examples of policies and emerging practices for supporting transgender students.”¹⁴⁵ In the section addressing athletics, the Departments cited examples from New York, California, Rhode Island that allowed students who are transgender to participate in athletics consistent with their gender identity.¹⁴⁶

However, on February 22, 2017, under the then new U.S. Administration, those same two Departments withdrew and rescinded that 2016 guidance, but they did not replace it with anything different.¹⁴⁷ The Trump Administration released its own Dear Colleague Letter stating: “[Transgender access to sex-segregated facilities and activities] is an issue best solved at the state and local

with medical experts, athletics officials, affected students, and a consensus report entitled, *On the Team: Equal Opportunity for Transgender Student Athletes*” to write its guidelines. See Lhamon et al., *supra* note 138, at 7 n.18.; But see Dr. Pat Griffin & Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes*, NAT’L CTR. FOR LESBIAN RTS. 24-31 (Oct. 4, 2010), <https://www.ncrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf> (distinguishing in their On the Team report between high school and collegiate athletics by recommending a partially inclusive model for colleges but a fully inclusive model for high schools).

¹⁴⁵ Ann Whalen & David Esquith, *Examples of Policies and Emerging Practices for Supporting Transgender Students*, U.S. DEP’T. OF EDUC., OFF. OF ELEMENTARY AND SECONDARY EDUC., OFF. OF SAFE AND HEALTHY STUDENTS (May 2016), <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

9. How do schools ensure transgender students have the opportunity to participate in physical education and athletics consistent with their gender identity?

Some school policies explain the procedures for establishing transgender students’ eligibility to participate in athletics consistent with their gender identity. Many of those policies refer to procedures established by state athletics leagues or associations.

- The NYSED Guidance explains that ‘physical education is a required part of the curriculum and an important part of many students’ lives. Most physical education classes in New York’s schools are coed, so the gender identity of students should not be an issue with respect to these classes. Where there are sex-segregated classes, students should be allowed to participate in a manner consistent with their gender identity.’
- The LAUSD Policy provides that ‘participation in competitive athletics, intramural sports, athletic teams, competitions, and contact sports shall be facilitated in a manner consistent with the student’s gender identity asserted at school and in accordance with the California Interscholastic Federation bylaws.’ The California Interscholastic Federation establishes a panel of professionals, including at least one person with training or expertise in gender identity health care or advocacy, to make eligibility decisions.
- The Rhode Island Interscholastic League’s policy states that all students should have the opportunity to participate in athletics consistent with their gender identity, regardless of the gender listed on school records. The policy provides that the league will base its eligibility determination on the student’s current transcript and school registration information, documentation of the student’s consistent gender identification (e.g., affirmed written statements from student, parent/guardian, or health care provider), and any other pertinent information.

¹⁴⁶ See Whalen & Esquith, *supra* note 145; See generally Sandra Battle, Acting Assistant Secretary for Civil Rights & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, *Dear Colleague Letter*, OFF. FOR CIV. RTS., U.S. DEP’T OF EDUC., CIV. RTS. DIV., U.S. DEP’T OF JUST. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [hereinafter 2017 Dear Colleague Letter] (Both of these documents remain available on the DOE’s website).

¹⁴⁷ Lenzi, *supra* note 33, at 871. See 2017 Dear Colleague Letter, *supra* note 146 (repealing the guidance of the Obama Administration).

level. Schools, communities, and families can find—and in many cases have found—solutions that protect all students.”¹⁴⁸ The Trump Administration’s Dear Colleague Letter further stated that the Department of Education and Department of Justice have decided to “withdraw and rescind” the Obama Administration’s former guidance on transgender student inclusion.¹⁴⁹

In the absence of any guidance, the Departments stated that “there must be due regard for the primary role of the States and local school districts in establishing educational policy.”¹⁵⁰ This position was repealed again in a March 2020 report by the Department of Education Office of Civil Rights.¹⁵¹ As one court stated:

[T]he 2017 [Letter] did not propound any “new” or different interpretation of Title IX or the Regulation, nor did the 2017 [Letter] affirmatively contradict the 2015 and 2016 Guidance documents. It instead appears to have generated an interpretive vacuum pending further consideration by those federal agencies of the legal issues involved in such matters.¹⁵²

Although it created an “interpretive vacuum” in regard to federal law, the 2017 Letter was unequivocal in stating that “the Departments believe that, in this context, there must be due regard for the primary role of the States and local

¹⁴⁸ Press Release, *U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance*, U.S. DEP’T EDUC. (Feb. 22, 2017), <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-issues-statement-new-title-ix-guidance>; see also 2017 Dear Colleague Letter, *supra* note 146, <https://www.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> (stating that the U.S. Department of Education and the U.S. Department of Justice “believe that . . . there must be due regard for the primary role of the States and local school districts in establishing educational policy”); see also Trudy Ring, *Betsy DeVos’s Education Dept. Threatens Funding for Pro-Trans Schools*, ADVOCATE (May 28, 2020), <https://www.advocate.com/transgender/2020/5/28/betsy-devos-education-dept-threatens-funding-pro-trans-schools>.

¹⁴⁹ Lenzi, *supra* note 33, at 187; see 2017 Dear Colleague Letter, *supra* note 146; see also Hogan Lovells et al., *U.S. Departments of Education and Justice Withdraw Guidance on Transgender Students*, JDSUPRA (Feb. 23, 2017), <https://www.jdsupra.com/legalnews/u-s-departments-of-education-and-29841/>.

¹⁵⁰ See 2017 Dear Colleague Letter, *supra* note 146; see also Lovells et al., *supra* note 149.

¹⁵¹ See KENNETH L. MARCUS, ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS FISCAL YEAR 2017-18, U.S. DEP’T OF EDUC. 11, 19 (Mar. 2020), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2017-18.pdf>.

¹⁵² *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 298 (W.D. Pa. 2017) (holding that excluding transgender students from restrooms consistent with their gender identity likely constitutes sex-based discrimination in violation of the Equal Protection Clause) (Put plainly, the law surrounding the [Title IX] regulation and its interpretation and application to Title IX claims relative to the use of common restrooms by transgender students, including the impact of the 2017 Guidance, is at this moment so clouded with uncertainty that this court is not in a position to conclude which party in this case has the likelihood of success on the merits of that statutory claim”). *Id.* at 301.

school districts in establishing educational policy.”¹⁵³ And since then, this position has been repeated by the OCR.¹⁵⁴

In Connecticut, Section 10-15c of the Connecticut General Statutes protects the fundamental rights of transgender students and ensures that such students have equal access to educational programming and activities, free of discrimination.¹⁵⁵ Just like in the New York, California, and Rhode Island policies cited in the Department of Education’s May 2016 document,¹⁵⁶ the transgender participation policy adopted by the Connecticut Association of Schools operating as Connecticut Interscholastic Athletic Conference provides that students who are transgender participate in athletics consistent with their gender identity.¹⁵⁷ Accordingly, on February 23, 2017, then-Governor Dannel P. Malloy and Connecticut Commissioner of Education Dianna R. Wentzell jointly issued a memorandum to Connecticut superintendents of schools reaffirming Connecticut’s unwavering commitment to provide every student in Connecticut with access to a high-quality education in a safe, supportive, inclusive and welcoming environment.¹⁵⁸ The same day, “[Governor Malloy] signed an executive order ensuring that the rights of transgender students receiving an education continue uninterrupted.”¹⁵⁹

Additional guidance was published by the Connecticut State Department of Education in September 2017, which made clear that both federal and state laws protect transgender and gender non-conforming students from discrimination.¹⁶⁰

¹⁵³ See 2017 Dear Colleague Letter, *supra* note 146; see also Lovells et al., *supra* note 149.

¹⁵⁴ See generally Timothy C. J. Blanchard, *Soule DOE Impending Enforcement Letter*, U.S. DEP’T. OF EDUC. (May 15, 2020), <http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>; see also Viet Tran, *HRC Responds to the Trump Administration’s Decision to Attack Transgender Youth*, HUM. RTS. CAMPAIGN (May 28, 2020), <https://www.hrc.org/blog/hrc-responds-to-the-trump-administrations-decision-to-attack-transgender-yo>.

¹⁵⁵ Education & Culture, Title 10, CONN. GEN. STAT. § 10-15c (2019) (“Discrimination in public schools prohibited. School attendance by five-year-olds. (a) The public schools shall be open to all children five years of age and over who reach age five on or before the first day of January of any school year, and each such child shall have, and shall be so advised by the appropriate school authorities, an equal opportunity to participate in the activities, programs and courses of study offered in such public schools, at such time as the child becomes eligible to participate in such activities, programs and courses of study, without discrimination on account of race, color, sex, gender identity or expression, religion, national origin or sexual orientation; provided boards of education may, by vote at a meeting duly called, admit to any school children under five years of age”).

¹⁵⁶ See Whalen & Esquith, *supra* note 145.

¹⁵⁷ The CIAC is a division of the Connecticut Association of Schools, Inc. See The CIAC is a division of the Connecticut Association of Schools, Inc. See CONN. INTERSCHOLASTIC ATHLETIC CONF., www.cas.casciac.org (last visited Nov. 17, 2020); see generally CIAC HANDBOOK, *supra* note 53, at 55.

¹⁵⁸ Gov. Malloy Signs Executive Order Protecting Transgender Students in Connecticut Schools, THE OFF. OF GOVERNOR DANIEL P. MALLOY (Feb. 23, 2017), <https://portal.ct.gov/Malloy-Archive/Press-Room/Press-Releases/2017/02-2017/Gov-Malloy-Signs-Executive-Order-Protecting-Transgender-Students-in-Connecticut-Schools>

¹⁵⁹ *Id.*; See Kathleen Megan, *Malloy Signs Executive Order to Strengthen Protecting of Transgender Students*, THE HARTFORD COURANT (Feb. 24, 2017), <https://www.courant.com/education/hc-trump-transgender-bathrooms-20170223-story.html>.

¹⁶⁰ *Guidance on Civil Rights Protections and Supports for Transgender Students*, *supra* note 118, at 4.

Also, Connecticut Public Act 11-55 specifically addressed antidiscrimination on the basis of gender identity and expression.¹⁶¹ Hence, Connecticut law requires that transgender students be permitted to participate in sex-segregated activities consistent with their gender identity.

Then, despite the position expressed in February 2017 and March 2020 about “due regard for the primary role of the States and local school districts . . . ,”¹⁶² and despite the lack of any subsequently-issued guidance from the DOE on this subject, on March 24, 2020, the DOJ filed a Statement of Interest in *Soule*.¹⁶³ The DOJ responded by agreeing with the cisgender girls.¹⁶⁴ This move contradicts countless court decisions protecting transgender students, especially a 2015 decision in which the Seventh Circuit Court of Appeal clarified that Title IX does indeed protect transgender students against discrimination.¹⁶⁵ Still, the DOJ warned the schools that this policy of inclusion will be punished by withholding federal funds.¹⁶⁶ In short, the government is threatening to punish schools for providing inclusive school environments.

In that Statement, the DOJ suggests that “[the] Court [in *Soule*] should not read Title IX to compel schools to require students to participate on sex-specific teams solely on the basis of their gender identity.”¹⁶⁷ The Statement fails to mention any of the prior guidance issued by the Departments.¹⁶⁸ Moreover, the Statement fails to mention the DOE at all;¹⁶⁹ despite that the DOE is the department that interprets and enforces Title IX.¹⁷⁰

¹⁶¹ See An Act Concerning Discrimination, Public Act No. 11-55, 2011 Conn. Acts (Reg. Sess.).

¹⁶² 2017 Dear Colleague Letter, *supra* note 146; See Lovells et al., *supra* note 149.

¹⁶³ See Statement of Interest at 1-2, *Soule v. Conn. Ass’n of Schs.*, No.3:20-cv-00201 (D. Conn. Mar. 24, 2020) (explaining how the Government has “a significant interest in the proper interpretation of Title IX. . . [to ensure] federal funds are not used to discriminate on the basis of sex and other protected classes”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 12 (citing *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015), and contending “[e]ven if the term ‘sex’ is somehow ambiguous, if ‘only one of the permissible meanings’ of an allegedly ambiguous term ‘produces a substantive effect that is compatible with the rest of the law,’ this Court should adopt it because the Judiciary ‘cannot interpret federal statutes to negate their own stated purposes’”).

¹⁶⁶ See Dawn Ennis, *Betsy DeVos Tells Connecticut: Ban Transgender Athletes, or Say Goodbye to Your Federal Funding*, FORBES (May 29, 2020), <https://www.forbes.com/sites/dawnstaceyennis/2020/05/29/betsy-devos-tells-connecticut-ban-transgender-athletes-or-say-goodbye-to-your-federal-funding/#2e1ad9281793>.

¹⁶⁷ Statement of Interest, *supra* note 163, at 12. See Ring, *supra* note 148.

¹⁶⁸ Statement of Interest, *supra* note 163.

¹⁶⁹ As noted in the text above, individuals who believe their Title IX rights have been violated can file a complaint with OCR. According to OCR’s case processing manual, the DOE is the agency that then investigates that complaint and the DOJ only becomes involved if OCR completes its investigation and then OCR refers the case to the DOJ for court enforcement. See U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., HOW THE OFFICE FOR CIVIL RIGHTS HANDLES COMPLAINTS (Nov. 2018), <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html>. When the DOE or Secretary DeVos is sued in Court, the DOJ will also represent the DOE. See, e.g., *Parents for Privacy v. Dallas Sch. Dist.* No. 2, 326 F.Supp.3d 1075, 1091 (D. Or. 2018).

¹⁷⁰ The DOE is the federal agency charged with interpreting and enforcing Title IX on behalf of the United States. See, e.g., *Sex Discrimination Issues*, U.S. DEP’T. OF EDUC. OFF. OF CIV. RTS. (Jan. 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue.html> (“The Office for

3. Plaintiffs' OCR Complaint

In June 2019, Plaintiffs in *Soule* submitted a complaint with Department of Education Office of Civil Rights alleging discrimination under Title IX.¹⁷¹ Many, if not most, of the allegations in the OCR Complaint mirror the allegations in the later complaint filed in the federal lawsuit.¹⁷² In the OCR Complaint, Plaintiffs requested OCR to investigate the alleged violations of Title IX described in the OCR Complaint. They also sought an order from OCR requiring CIAC to, among other things:

- (1) revise its rules to exclude individuals who are in all physiological and hormonal respects males from participating in girls' or women's athletic competitions;
- (2) issue revised records of all girls' athletic competitions from 2017 to the present in which any biological male participated who would have been disqualified by application of [(1)] above, removing such individuals from any list of winners or qualifiers for participation in any further competition;
- (3) issue a press release naming and giving proper credit – including championship credit as appropriate – to every girl who would have been identified as a champion or as qualifying for participation in a higher-level competition but for the participation in any meet of any biological male who would have been disqualified by application of [(1)] above; and,

Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex in education programs and activities that receive federal financial assistance"). Individuals who believe their Title IX rights have been violated may therefore file a complaint with the DOE's Office for Civil Rights. *See OCR Complaint Forms – Electronic and PDF Versions*, U.S. DEP'T. OF EDUC. OFF. OF CIV. RTS. (Oct. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>. The *Soule* plaintiffs filed a complaint in 2019 with OCR, and that OCR is continuing with that proceeding. *See Verified Complaint for Declaratory and Injunctive Relief and Damages, Soule et al. v. Conn. Ass'n of Sch.s, Inc. et al.*, No. 3:20-cv-00201-RNC (D. Conn. Dec. 12, 2020). The complaint is listed as an open proceeding on the DOE's website. *See Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of October 2, 2020 7:30am Search*, U.S. DEP'T. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html> (last visited Oct. 28, 2020).

¹⁷¹ *Title IX Discrimination Complaint on Behalf of Minor Children Selina Soule, [Second Complainant], and Alanna Smith*, U.S. DEP'T. OF EDUC. (June 17, 2019), <http://www.adfmedia.org/files/SouleComplaintOCR.pdf>.

¹⁷² *Compare, Id. with*, Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3.

- (4) issue a declaration that Title IX neither permits nor requires CIAC's Policy that allows biological males to compete in high school women's athletic events.¹⁷³

After Plaintiffs filed the OCR Complaint in June 2019, OCR opened an investigation of Plaintiffs' allegations.¹⁷⁴ On February 12, 2020, Plaintiffs commenced a federal action, seeking the same relief as requested previously in the OCR complaint, and then on April 17, 2020, Plaintiffs filed an amended complaint seeking essentially the same relief.¹⁷⁵

B. Soule Complaint

In the complaint, the *Soule* Plaintiffs pray for relief, namely:

- (1) A declaration that Defendants have violated Title IX by failing to provide competitive opportunities that effectively accommodate the abilities of girls;
- (2) A declaration that Defendants have violated Title IX by failing to provide equal treatment, benefits, and opportunities for girls in athletic competition;
- (3) An injunction prohibiting all Defendants, in interscholastic athletic competitions sponsored, organized, or participated in by the Defendants or any of them, from permitting males . . . from participating in events that are designated for girls, women, or females;
- (4) An injunction requiring all Defendants to correct any and all records, public or non-public, to remove male athletes from any record or recognition purporting to record times, victories, or qualifications for elite competitions designated for girls or women, and conversely to correctly give credit and/or titles to female athletes who would have received

¹⁷³ *Title IX Discrimination Complaint on Behalf of Minor Children Selina Soule, [Second Complainant], and Alanna Smith*, *supra* note 171.

¹⁷⁴ See U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *supra* note 169 (explaining how OCR procedure for complaints, noting that "a preponderance of the evidence supports a conclusion that the recipient failed to comply with the law").

¹⁷⁵ Verified Complaint for Declaratory and Injunctive Relief and Damages, *Soule et al. v. Conn. Ass'n of Sch.s, Inc. et al.*, 3:20-cv-00201 (D. Conn. 2020).

such credit and/or titles but for the participation of athletes born male and with male bodies in such competitions;

- (5) An injunction requiring all Defendants to correct any and all records, public or non-public, to remove times achieved by athletes born male and with male bodies from any records purporting to record times achieved by girls or women;
- (6) An award of nominal and compensatory damages and other monetary relief as permitted by law;
- (7) An award of Plaintiffs' reasonable attorneys' fees and expenses, as authorized by 42 U.S.C. § 1988;
- (8) Such other and further relief as the Court deems appropriate.¹⁷⁶

To support their complaint that CIAC is violating Title IX, Plaintiffs allege in their complaint that that CIAC changed its policy “at some time before 2017.”¹⁷⁷ In fact, CIAC adopted its policy four years earlier, in 2013.¹⁷⁸ For seven years, transgender athletes in Connecticut have been participating in interscholastic athletics consistent with their gender identity. During those seven years—in which tens of thousands of student athletes have competed on single-sex teams—Plaintiffs have not identified any support for their claims that “the problem of [girls and women who are transgender] taking opportunities from [non-transgender girls and women] has grown very rapidly,”¹⁷⁹ that “increasing numbers of [girls who are transgender] are in fact competing in girls’ and women’s events each year,”¹⁸⁰ or that non-transgender girls “will simply vanish from the victory podium and national rankings.”¹⁸¹

Plaintiffs also allege that Terry “abruptly appeared” in girls’ track competition.¹⁸² Neither Andraya nor Terry “abruptly” began competing in girls’ track. Rather, both girls spent long periods of their lives coming to terms with their gender, coming out to their friends and family, and then transitioning at

¹⁷⁶ Cf. *Title IX Discrimination Complaint on Behalf of Minor Children Selina Soule, [Second Complainant], and Alanna Smith*, *supra* note 171, at 25; Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 175, at ¶ 172 (A-H).

¹⁷⁷ Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 175, at ¶ 70.

¹⁷⁸ See *CIAC Statement on Transgender Policy Change*, CIAC (Feb. 20, 2020), <http://ciacsports.com/site/?p=14124>.

¹⁷⁹ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶ 64.

¹⁸⁰ *Id.* at ¶ 65.

¹⁸¹ *Id.* at ¶ 67.

¹⁸² *Id.* at ¶ 88.

school.¹⁸³ Only then did they begin to compete on girls' teams consistent with the recommendation of medical providers and CIAC policy.¹⁸⁴

Throughout their Complaint, Plaintiffs also refer to Andraya and Terry as “biological males” but offer no consistent definition of “biological male.”¹⁸⁵ There are many biological components of sex, including chromosomal, anatomical, hormonal, and reproductive elements. These elements do not always align within an individual as typically male or typically female, either because that individual has intersex traits or because that individual has undergone medical care for gender dysphoria.¹⁸⁶ For these reasons, the Endocrine Society has said “the terms biological sex and biological male or female are imprecise and should be avoided.”¹⁸⁷ Plaintiffs allege “inescapable biological facts”¹⁸⁸ in referring to Andraya and Terry as “males,” Plaintiffs claim that “if males compete in girls’ events after puberty, equally gifted and dedicated female athletes simply can’t win.”¹⁸⁹

¹⁸³ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 2.

I was assigned the sex of male at birth but have always known I was a girl. It was always something that just felt true inside but I did not have the words to share it until I came out as transgender the summer before I started eighth grade. My family supported me throughout my transition. By the time I started high school I was known to everyone as a girl and ever since I have been living all aspects of my life as a girl.

Declaration of T.M., *supra* note 99, at ¶¶ 3-4.

At birth I was assigned the sex of male but I have known that I am a girl since at least the fifth grade. When I was younger I just did not have the language to explain what made me different and it took me several years before I was able to come out as transgender . . . I finally came out as transgender in tenth grade and have been living as a girl since then. I currently take hormone therapy that brings my body into alignment with the girl that I am. I have hormone levels that are typical of non-transgender girls.

¹⁸⁴ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 6 (“I have been running on the girls’ team since ninth grade and I have always been supported by my teammates and coaches. Everyone at my school knows me and treats me as a girl”); Declaration of T.M., *supra* note 99, at ¶ 10 (“When I came out as transgender publicly and was diagnosed with gender dysphoria, I started to compete in girls’ track because it was essential to my health that I be treated as a girl in all aspects of life. This was in tenth grade”).

¹⁸⁵ Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3.

¹⁸⁶ See David Andrew Griffiths, *Shifting Syndromes: Sex Chromosome Variations and Intersex Classifications*, SOC. STUD. OF SCI. (Feb. 9, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5808814/>.

¹⁸⁷ Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11) J. CLIN. ENDOCRINOLOGY & METABOLISM 3869, 3875 (Sept. 13, 2017) (noting that the terms “biological male or female” should be avoided because not all individuals have physical attributes that align perfectly with biological maleness or femaleness, such “as [individuals] with XY chromosomes who may have female-appearing genitalia”); See *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 743 (E.D. Va. 2018) (“This term has not been accepted by the medical community, because ‘sex’ —the ‘attributes that characterize biological maleness or femaleness’ (such as sex-determining genes, sex chromosomes, internal and external genitalia, and secondary sex characteristics) — is distinct from ‘gender,’ or the ‘internal, deeply held sense’ of being a man or a woman”).

¹⁸⁸ Amended Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶ 50.

¹⁸⁹ *Id.* at ¶ 63.

In their complaint, Plaintiffs provide tables comparing the Best High School Outdoor 100m Times in 2019 between boys and girls,¹⁹⁰ and the best times for Andraya and Terry competing on their respective high school girls' teams do not come close to the best times registered for the presumably non-transgender girls on that list.¹⁹¹ Thus, based on the allegations in the Complaint alone, it is demonstrably untrue that a non-transgender female athlete “can’t win” in a race with a transgender athlete. Indeed, two days after filing the complaint, Plaintiff Chelsea Mitchell beat both Terry and Andraya in a high school indoor track and field 55-meter race, and she beat Terry in the 300-meter race at the Connecticut State Championship for Class S for the 2020 Indoor Track & Field season.¹⁹² In their Complaint, Plaintiffs also claim that their alleged deprivation of participation at championship meets cost them “the visibility necessary to attract the attention of college recruiters and resulting scholarships.”¹⁹³ But, Plaintiffs make no allegations that college recruitment and the resulting scholarships are linked to participation in certain meets or tied to a threshold of media coverage, as opposed to result times alone. All track and field race times are publicly available and college recruiters can assess a runner’s skill, consistency, and improvement through high school based solely on result times.¹⁹⁴

C. Using Title IX to Apply the Policies to Educational Institutions

Title IX is the source of law to protect transgender high school athletes and require policies of inclusion to ensure equality in education including the opportunity to play sports. Title IX states, “No person in 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.”¹⁹⁵ The parties in *Soule* dispute whether cisgender high school girls are subject to sex-based discrimination under Title IX because transgender high school girls are permitted to participate in track and field on teams sex-separated for girls. Really this issue is whether Title IX requires high schools to permit transgender youths to participate in high school sports on the sex-separated teams consistent with their gender identity.¹⁹⁶ And, at the crux of this issue is who is included in the protected class designated by

¹⁹⁰ See *id.* at ¶ 54.

¹⁹¹ See *id.* at ¶¶ 90-91.

¹⁹² Declaration of T.M., *supra* note 99, at ¶ 14; Declaration of Andraya Yearwood, *supra* note 99, at ¶ 11.

¹⁹³ Amended Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 3, at ¶ 107.

¹⁹⁴ Declaration of T.M., *supra* note 99, at ¶ 16.

¹⁹⁵ 20 U.S.C § 1681–1688 (2012).

¹⁹⁶ *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 272 (S. Ct. 1977) (holding that a sex-discrimination statute (New York’s Human Rights Law) protects a transgender athlete’s right to participation in sex-segregated sports consistent with the athlete’s gender identity); See Buzuvis, *supra* note 111, at 25.

the term “sex”? Neither Title IX nor its regulations defines the term “sex”, nor has the U.S. Supreme Court defined the term “sex” in the context of Title IX.

Transgender students are protected under Title IX because schools may not discriminate against an individual based on his or her failure to conform to sex stereotypes.¹⁹⁷ Courts have interpreted Title IX to prohibit gender identity discrimination based on the legal theory of sex stereotyping.¹⁹⁸ Prohibiting “sex stereotyping” developed in the context of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex, as well as other characteristics, in employment.¹⁹⁹ Federal courts may “look to case law interpreting Title VII of the Civil Rights Act of 1964,” which prohibits employment discrimination on the basis of, among other qualities, sex “for guidance in evaluating a claim brought under Title IX.”²⁰⁰ So, federal courts today rely on Title VII case law to interpret Title IX, and the sex stereotyping argument has thus transitioned into interpretations of Title IX, as well.²⁰¹ And, there is recent guidance interpreting “sex” for Title VII.

The U.S. Supreme Court ruling in *Bostock* determined Title VII of the 1964 Civil Rights Act includes protection for workers based on their sexual orientation and gender identity.²⁰² In this decision, the Court held that, under Title VII, which prohibits sex-based discrimination in employment, that “it is

¹⁹⁷ See generally *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151–52 (N.D.N.Y. 2011) (asserting that a male student who was harassed due to his perceived sexual orientation had a valid Title IX claim under a sex-stereotyping theory).

¹⁹⁸ *Id.* at 152.

¹⁹⁹ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (stating that it is an “unlawful employment practice” if an employer discriminates against employees based on an employee’s sex). Title VII applies to individuals who are discriminated against because they do not conform to stereotypical gender roles. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). In *Price Waterhouse*, a woman was denied a promotion because she acted too “macho.” Her superiors told her she needed to act [walk, talk, and dress] more “femininely” to advance at the company. In *Price Waterhouse*, the Court stated that sex stereotyping is a form of sex-based discrimination: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group” *Id.* Further, in *Smith v. City of Salem*, the court relied on the sex-stereotyping theory established in *Price Waterhouse* to provide Title VII relief to a transgender firefighter, who was terminated after she outwardly transitioned from a man to a woman. *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004). (“[A] label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”). *Id.* at 575.

²⁰⁰ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd. (Grimm I)*, 822 F.3d 709, 718 (4th Cir. 2016) (citing *Jennings v. Univ. of N. C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX”); *See Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994) (holding that the Title IX discrimination claim should be interpreted by principles governing Title VII); *see also M.A.B.*, 286 F. Supp. 3d 704, 713 (D. Md. 2018) (“[T]he Court turns to Title VII precedent for guidance [in interpreting a Title IX claim]”).

²⁰¹ *See Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (“[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII”).

²⁰² *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1734 (2020) (explaining “an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules”).

impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”²⁰³ So, treating an employee differently because the employee is transgender is discrimination on the “basis of sex” under Title VII. The same should be the case for Title IX.

Yet, this Supreme Court decision came right after the U.S. Department of Health and Human Services’ released of their interpretation of Section 1557.²⁰⁴ This interpretation revoked provisions present in the 2016 rule that prohibited discrimination based on gender identity, now states sex-based discrimination will be limited to one’s sex—“male or female and as determined by biology.”²⁰⁵ This decision does not take into account the complexities of sex and gender and leaves room for a legal interpretation that does not protect transgender patients against discrimination in the medical field.²⁰⁶

“These two decisions have very different interpretations of how trans[gendered] people will be protected under the law.”²⁰⁷ Although the HHS interpretation, which was released before the Supreme Court decision, claims sex-based discrimination only relates to one’s biological sex.²⁰⁸ The majority opinion in *Bostock* stated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²⁰⁹ Title IX is intended to ensure that gender

²⁰³ *Id.* at 1758 (Alito, J., dissenting) (explaining “there is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex”).

²⁰⁴ Ose Arheghan, *Post-SCOTUS Ruling, We Must Still Fight for LGBTQ Title IX Protections*, ADVOCATE (June 23, 2020), <https://www.advocate.com/commentary/2020/6/23/post-scotus-ruling-we-must-still-fight-lgbtq-title-ix-protections>; See *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs*, U.S. DEPT’ HEALTH & HUM. SERVICES (June 12, 2020), <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>.

²⁰⁵ *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs*, *supra* note 205 (explaining how HHS decided to eliminate certain provisions of the 2016 Rule HHS viewed as exceeding the scope of the authority delegated by Congress in Section 1557, stating “HHS will enforce Section 1557 by returning to the government’s interpretation of sex discrimination according to the plain meaning of the word ‘sex’ as male or female and as determined by biology”); See Arheghan, *supra* note 205.

²⁰⁶ See The Leadership Conference on Human Rights et. al., *Letter to Director Donovan Re: Section 1557 of the Affordable Care Act (ACA)*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Apr. 12, 2016), <https://civilrights.org/resource/letter-to-director-donovan-re-section-1557-of-the-affordable-care-act-aca/> (addressing how the HHS’s “final rule” leaves room for transgender discrimination in health programs and activities).

²⁰⁷ Arheghan, *supra* note 205.

²⁰⁸ *Id.*; See *HHS Publishes Section 1557 Final Rule on Nondiscrimination in Health and Health Education Programs*, CIGNA (June 16, 2020), <https://www.cigna.com/employers-brokers/insights/informed-on-reform/news/hhs-finalizes-new-section-1557-rule> (explaining “the final rule . . . amends regulations issued by the Centers for Medicare & Medicaid Services to ensure nondiscrimination on the ‘basis of sex’ is consistently applied,” however the word “sex” is defined by gender assignment at birth).

²⁰⁹ Arheghan, *supra* note 205; See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741-2, 1746 (2020) (explaining “there is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex.” The Court goes on to explain a scenario where an employer fires a transgender person who was identified as a male at birth but now identifies as a female. The Court held, “If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally

discrimination and harassment never stops someone from succeeding in education.

Title IX protects transgender individuals from gender-based discrimination. The Supreme Court first ruled that Title IX's application to peer harassment and defined the scope of liability for educational institutions that fail to respond appropriately to known occurrences.²¹⁰ In *Davis v. Monroe*, the Court held,

[a] private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.²¹¹

In *Miles v. New York University*,²¹² the U.S. District Court for the Southern District of New York held that Jennifer Miles, a transgender woman, could sue under Title IX for sexual harassment even though she was assigned male at birth.²¹³ The court stated that Title IX “does not prohibit expressing disapproval of conduct involved in the transformation from one gender to another.”²¹⁴ How will this advance inclusion in high school athletics? Although no court has ruled directly on whether Title IX protects athletes participating in sex-specific high school athletics, a court should hold such protection from gender-discrimination tracks consistently with protections for transgender individuals from gender-based discrimination in the harassment context requires the protection in the high school sports context.²¹⁵

penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. [T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision”).

²¹⁰ See *Davis v. Monroe*, 526 U.S. 629 S. Ct. 1661 (1999) (stating that a Title IX cause of action is available if a federally funded school is shown to have been indifferent, had actual knowledge and, “that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school”).

²¹¹ *Id.* (according to *Davis*, the elements are: actual knowledge and that harassment is so severe, pervasive, and objectively offensive as to deprive the victims of access to the educational opportunities or benefits of educational opportunities, then the school will be held liable for inaction).

²¹² 979 F. Supp. 248 (S.D.N.Y. 1997).

²¹³ *Id.* at 249–50.

²¹⁴ *Id.* at 249.

²¹⁵ See *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (holding that discrimination against transgender students by having trans-restrictive bathroom policies constitutes sex discrimination under Title IX of the Education Amendments Act of 1972); see also *Dodds v. U.S. Dep't. of Educ.*, 845 F.3d 217 (6th Cir. 2016) (holding that discrimination against transgender students for a trans-restrictive bathroom

Having a cause of action for such harassment or denial of access or exclusion could give high schools and high school associations more incentive to implement policy that discourages such behavior. Title IX protects discrimination based on gender—it would be proper to set policy and guidelines to deter not only discrimination and harassment but allow equal opportunity to allow access to the educational opportunities or benefits provided by the school including participate in high school athletes.²¹⁶ High Schools need to adopt better policies regarding transgender athletes otherwise they are vulnerable to Title IX challenges, or if policies are written with an element of exclusion, these public state institutions could possibly face constitutional challenges.

IV. WHY TOO MANY POLICIES ARE INSUFFICIENT: CURRENT POLICIES IN PLACE

The problem with initiating new policy in this area is the unfamiliarity of the issue of how to incorporate transgendered student athletes into high school athletic programs. The law and public schools are slow to understand needs of underrepresented students such as transgendered youths, whether it be ignorance to the subject or simply a refusal to recognize there is an issue that needs attention. Some stated rules or guidelines in practice involving transgendered athletes are invasive,²¹⁷ and can be a privacy issue for the athlete.²¹⁸ There are still questions as to what should be done in way of having

policy likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution).

²¹⁶ See *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1102 (D. Minn. 2000) (recognizing a cause of action brought by a student who was harassed by a member of the same sex for causing a hostile educational environment, per Title IX); see also *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (involving a student who was harassed because he didn't conform with male/female stereotype); Lenzi, *supra* note 33.

²¹⁷ Arne Ljungqvist et al., *Statement of the Stockholm Consensus on Sex Reassignment in Sports*, OLYMPIC.ORG (Nov. 12, 2003), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/20040517-IOC-Approves-Consensus-With-Regard-To-Athletes-Who-Have-Changed-Sex/EN-report-905.pdf#_ga=2.138219186.300258968.1603474907-1160000849.1603474907 (“In the event that the gender of a competing athlete is questioned, the medical delegate (or equivalent) of the relevant sporting body shall have the authority to take all appropriate measures for the determination of the gender of a competitor”); see also *IAFF Publishes Briefing Notes and Q&A on Female Eligibility Regulations*, WORLD ATHLETICS (May 7, 2019), <https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>; see also *Eligibility Regulations for the Female Classification*, IAAF ATHLETICS (May 1, 2019), <https://www.sportsintegrityinitiative.com/wp-content/uploads/2019/05/IAAF-Eligibility-Regulations-for-the-Female-Classi-2-compressed.pdf>; see also Klein & Malagrino, *supra* note 62; see also Klein & Malagrino, *supra* note 62.

²¹⁸ See Reeser, *supra* note 77.

This review examines gender identity issues in competitive sports, focusing on the evolution of policies relating to female gender verification and transsexual participation in sport. The issues are complex and continue to challenge sport governing bodies, including the International Olympic Committee, as they strive to provide a safe environment in which female athletes may compete fairly and equitably.

separate locker rooms and bathrooms for transgendered students.²¹⁹ Some states have explicit language and policies regarding restroom use and other gender specific facilities.²²⁰ Although this is a promising trend, many states are still struggling with these issues.²²¹ This section will highlight the benefits of inclusive policies and the negative effects of exclusive policies, and explain why transgender youths should not have to undergo hormone therapy or use puberty blockers to participate in high school athletics.

A. What Are the Negative Effects of Insufficient Policies?

The negative effect of exclusion is denying a student the positive impacts playing sports can have on youths.²²² The progression for new policies concerning inclusion of transgendered athletes goes beyond the playing field. Sports participation is used to enhance educational opportunity. The Centers for Disease Control and Prevention recommends that all kids get an hour of physical activity each day to help fight child obesity and keep kids healthy and active. In addition to these health benefits, sports might also improve children's performance in school by lowering their stress levels and giving them self-confidence and a sense of belonging.²²³ Not only is sports good for growing bodies but the secondary effects could also be "lower teenage pregnancy rates, better grades and higher self-esteem."²²⁴ To create an environment that allows

²¹⁹ See *California Law Allows Transgender Students to Pick Bathrooms, Sports Teams they Identify with*, CBS NEWS (Aug. 12, 2013, 10:46 pm), <https://www.cbsnews.com/news/california-law-allows-transgender-students-to-pick-bathrooms-sports-teams-they-identify-with/>; see *Whitaker*, 858 F.3d 1034 (holding that discrimination against transgender students by having trans-restrictive bathroom policies constitutes sex discrimination under Title IX of the Education Amendments Act of 1972); see also *Dodds*, 845 F.3d 217 (holding that discrimination against transgender students for a trans-restrictive bathroom policy likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution).

²²⁰ *Here's How to Make Your School for Trans Students or Advocate for Yourself or Your Family*, NAT'L CTR FOR TRANSGENDER EQUAL., <https://transequality.org/schoolaction> (last visited Oct. 29, 2020) (California, Connecticut, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington).

²²¹ See, e.g., *Brown*, *supra* note 23; see, e.g., *Ring*, *supra* note 23. See *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (holding that a university policy that prohibited a transgender man from using campus locker rooms designated for males was not discriminatory under Title IX.); see also, Lynn Moore, *Muskegon-Area School Districts Unprepared to Deal with Transgender Students*, MUSKEGON LIVE (Oct. 3, 2010), http://www.mlive.com/news/muskegon/index.ssf/2010/10/muskegon-area_school_districts.html.

²²² See *Medley & Sherwin*, *supra* note 1 ("When girls are pushed out of sports, they miss out on the community building, leadership skills, and all of the other benefits that being part of a team can offer").

²²³ Kathryn Hatter, *How Does Sports Help Kids in School?*, HELLO MOTHERHOOD (Nov. 28, 2018), <https://www.hellomotherhood.com/how-do-sports-help-kids-in-school-6755607.html>.

²²⁴ Tara Parker-Pope, *As Girls Become Women: Sports Pay Dividends*, N.Y. TIMES (Feb. 15, 2010), <http://well.blogs.nytimes.com/2010/02/15/as-girls-become-women-sports-pay-dividends/> ("Almost four decades after the federal education law called Title IX opened the door for girls to participate in high school and college athletics, a crucial question has remained unanswered: Do sports make a long-term difference in a woman's life?").

all students to excel, schools should be a safe, healthy place for advancement for the future. The NCAA inclusion policy concerning transgender youths begins, “The purpose of this resource is to provide guidance to NCAA athletic programs about how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge.”²²⁵ High schools are preemptory in establishing work ethic and goals needed in college as well as life. High school is also the environment needed to educate and mentor the idea of acceptance. In setting these recommendations at the high school level, it permits transgender student athletes to play on teams that reflect their gender identity and deters the secondary effects of inferiority and seclusion that, in extreme cases, lead to suicide.²²⁶

Of course, there are many concerns to take into consideration to review when drafting policy, such as safety and welfare for all student athletes, fairness on the playing field, and development of policies that are respectful to all students. There are misconceptions about unfair advantages when a male-to-female player is allowed to play on a female team. Being born male gives the physical advantages of being male,²²⁷ while living as a female. At the college level, this concern is addressed by the NCAA policies.²²⁸

The policies set by the NCAA are geared more towards older student athletes, eighteen and older. High school students are still developing both physically and mentally. NCAA policies address transgender athletes that are participating in hormone therapy;²²⁹ but, this is not the same situation for high school transgender student athletes because of their immature physical development. Hormone replacement therapy in people so young is controversial.²³⁰ If high schools followed the NCAA’s new policies, many high school transgendered athletes would be precluded from participation,²³¹ because many parents, students, and their physician’s would be hesitant to proscribe hormone treatment to young people entering into puberty. If hormone treatment

²²⁵ NCAA TRANSGENDER HANDBOOK, *supra* note 13, at 2.

²²⁶ See Stephen Russell, PhD & Kara Joyner, PhD, *Adolescent Sexual Orientation and Suicide Risk: Evidence From a National Study*, 90 AM. J. OF PUB. HEALTH 1276 (Aug. 2001), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446760/pdf/0911276.pdf> (stating that LGBT youth are also at increased risk for suicidal thoughts and behaviors, suicide attempts, and suicide. A nationally representative study of adolescents in grades 7–12 found that lesbian, gay, and bisexual youth were more than twice as likely to have attempted suicide as their heterosexual peers).

²²⁷ See Griffin & Carroll, *supra* note 144.

²²⁸ See NCAA TRANSGENDER HANDBOOK, *supra* note 13.

²²⁹ See *id.*

²³⁰ See Healy, *supra* note 49.

²³¹ *Id.*; See NCAA TRANSGENDER HANDBOOK, *supra* note 13.

Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender. A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men’s or women’s team. A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women’s team.

is not used, the fear is a transgendered athlete, male-to-female, would have an unfair advantage on the playing field due to physical differences between males and females.

The World Professional Association for Transgender Health (WPATH) gives medical protocols for the transitional period where a transgendered person lives consistently with the gender with which he/she identify.²³² The recommendation for children transitioning is to allow the child to dress, live, and function socially in a consistent manner with the child's gender identity.²³³

The NCAA has shown promising progression in development of thoughtful and respectful policies for transgender student athlete inclusion. The use of medical science helps to safeguard misconceptions.²³⁴ It is also important to state the NCAA says individual schools can continue to make their own decisions about eligibility during regular season play.²³⁵ And for high school sports, Connecticut has it right.

B. Why the Current Policies Are Not Measuring Up to a Suitable Standard

Certainly, there are challenges and concerns regarding transgender athletes competing against cisgender athletes: competitive safeguards and equity primary among those concerns, especially without prerequiring hormone treatments and/or puberty blockers. Now, the *Soule* case presents a situation where the focus girls, Andraya and Terry, are participating in a non-contact sport:²³⁶ track and field, where the concern for competitive safeguards might be less at issue than a contact sport like wrestling. Also, these girls have been receiving gender-affirming hormone therapies as part of their medically

²³² See *Seniors, Youth, Schools, and Families*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH http://wpath.org/resource_medicine.cfm (last visited Oct. 30. 2020).

²³³ AM. CIV. LIBERTIES UNION, *supra* note 15, at 9.

²³⁴ NCAA TRANSGENDER HANDBOOK, *supra* note 13.

Providing medical advice and understanding of the complexities of the transitioning student-athlete are: Eric Vilain, M.D., Ph.D., Professor of Human Genetics, Pediatrics and Urology, Director of the Center for Gender-Based Biology and Chief of Medical Genetics in the UCLA Department of Pediatrics, member of the International Olympic Committee medical advisory board; R. Nick Gorton, M.D., Emergency Medicine Physician, Sutter Davis Hospital, Primary Care Provider, Lyon- Martin Women's Health Services—San Francisco, Medical-Legal Consultant for transgender health care for Lambda Legal, the Transgender Law Center, the Northwest Justice Project, the New York Legal Aid Society, National Center for Lesbian Rights Sports Project and the Sylvia Rivera Law Project; Lori Kohler, M.D., Medical Director of the Family Health Center at San Francisco General Hospital.

²³⁵ NCAA TRANSGENDER HANDBOOK, *supra* note 13.

²³⁶ Judith S. Lohman, *Requirements for Boys and Girls Athletic Teams*, OLR RSCH. REP. (Dec. 15, 1999), <https://www.cga.ct.gov/PS99/rpt%5Colr%5Chtm/99-R-1286.htm> (stating CIAC designates the following sports as "contact sports": "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports whose purpose or major activity is bodily contact").

supported transition;²³⁷ and, as a result of their medical treatments, both girls have circulating hormone levels comparable to cisgender girls.²³⁸ So, in *Soule*, the Plaintiffs are complaining about transgender girls, with comparable female hormone levels, running alongside them on the track sharing in the spotlight that comes with high school athletics.²³⁹ Denying girls like Andraya and Terry the right to participate in track and field because of the Plaintiffs' complaints seems contrary to the equal opportunity in education Title IX is meant to provide.

So much so, that even in circumstances where the focus will be on transgender youths who wish to participate in contact sports without receiving hormone treatments and/or puberty blockers as part of a medical transition, Title IX should protect those transgender youths' rights to play high school sports, as well. A decision whether to risk medical transition should be left to the transgender minor, the family, and the doctor or specialist without negatively impacting these transgender youths' right to equal opportunity in education.

1. Physiological Differences: Risks, Especially in Contact Sports

Do the physical differences in sex innately give males an advantage in athletics?²⁴⁰ The more physical the sport becomes, the more important the physiological indicators might matter. If the data suggests it might,²⁴¹ how do we reconcile that with the goals of Title IX? Certainly, no one source has all the answers. According to the Gay, Lesbian & Straight Education Network, as of 2019, there is no research to support the claim that allowing transgender athletes to play on the team that fits their gender identity will create a

²³⁷ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 3; Declaration of T.M., *supra* note 99, at ¶ 4.

²³⁸ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 3; Declaration of T.M., *supra* note 99, at ¶ 4.

²³⁹ Declaration of Andraya Yearwood, *supra* note 99, at ¶ 3; Declaration of T.M., *supra* note 99, at ¶ 4; See Skinner-Thompson, *supra* note 76, at 277 ("Concerns regarding unfair competition or diminution in opportunities for females do not justify trans exclusion . . . Inclusion of transgender female athletes possesses little to no risk to Title IX's goal of providing equal opportunities for all female students"; see also Brenden v. Indep. Sch. Dist., 477 F.2d 1292, 1299 (8th Cir. 1973); Att'y Gen. v. Mass. Interscholastic Athletic Assoc., 393 N.E.2d 284, 285–86, 296 (Mass. 1979); Gomes v. R.I. Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979), vacated on other grounds, 604 F.2d 733 (1st Cir. 1979).

²⁴⁰ See Skinner-Thompson, *supra* note 76, at 274 ("Concerns that permitting transgender students to participate in K-12 athletics will lead to injuries for transgender males competing with cisgender males, or cisgender females competing with transgender females, or competitive advantages or disadvantages, lack merit").

²⁴¹ See Buzuvis, *supra* note 111, at 35. ("Empirical research does not provide conclusive answers about the competitive advantage afforded by sex-based physical traits that are present at birth and/or that have been modified by surgical or hormonal transition"). Compare Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances The Best Elite Women to Boys and Men*, DUKE LAW CTR. FOR SPORTS L. & POL'Y, <https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance/> (last visited Oct. 31, 2020), with Espen, Tønnessen et al., *Performance Development in Adolescent Track and Field Athletes According to Age, Sex and Sport Discipline*, PLOS ONE (June 4, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0129014> and Richard J. Auchus, *Endocrinology and Women's Sports: the Diagnosis Matters*, DUKE LAW CTR. FOR SPORTS L. AND POL'Y, (2018) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4850&context=lcp>.

competitive imbalance.²⁴² Transgender children display the same variation in size, strength, and athletic ability as other youth.²⁴³

2. Effects of Hormones: Risks

Should these only be permissible once the child reaches adulthood? Treatments versus Impact on athletics? Even if there is a competitive advantage in some instances, this does not change the recommendation that high school youths should not be prerequired to undergo hormone therapy or puberty blockers to participate in sex-separated sports in light with their gender identity. Sports are too valuable to in a child's development to exclude certain youths from participating because they are transgender. Think of the developmental life experiences of which exclusionary policies would be depriving these kids by preventing or discouraging them from competing in high school sports. Not to mention cultivating sportsmanship—how to compete passionately and, more importantly, how to lose respectfully; and channeling self-discovery, in a controlled competitive environment, where someone can test their physical limit as their true selves. And, these important opportunities should be withheld from high school youths if the best medical approach to affirming their gender does not include taking hormones or puberty blockers.

a. Puberty Blockers

Puberty blockers, such as treatment with gonadotropin-releasing hormone agonists (GnRHa) present risks too high for some high school youths, such as its permanence and irreversibility, lack of clinical data, the child's capacity to understand the gravity of this path, and specialists reluctant to treat minors with puberty blockers.²⁴⁴ Despite some accepted use of GnRHa among health care providers for transgender high school youths, significant gaps exist in the literature regarding efficacy, side effects, and interactions of medical transition regimens for adolescent transgender patients, particularly of combined GnRHa

²⁴² See *Gender Affirming and Inclusive Athletics Participation*, *supra* note 7.

²⁴³ See *id.*

²⁴⁴ See Simone Mahfouda et al., *Puberty Suppression in Transgender Children and Adolescents*, 5 THE LANCET DIABETES & ENDOCRINOLOGY, (May 22, 2017) (“Puberty suppression as a treatment for gender-incongruent minors (aged under 18 years) has been the subject of prolific debate and ethical discussion, at times generating a schism among specialists”).

and gender-affirming hormone regimens.²⁴⁵ “Barriers to such research include lack of Food and Drug Administration approval.”²⁴⁶

As such, “few studies have examined the ability of puberty-suppression treatments to alleviate the distress that might have been experienced by children and adolescents with a transgender identity.”²⁴⁷ This lack of research highlights the critical issue regarding available data on puberty blockers.²⁴⁸ Similarly, very few studies have assessed physical and cognitive function during treatment. “This dearth in the scientific literature is compounded by several factors. Because the prevalence of gender incongruence is fairly low, convenience samples are often used, and participant numbers tend to be small.”²⁴⁹ And, “[b]ecause of ethical considerations, few opportunities exist for randomized controlled trials.”²⁵⁰

b. Gender-Affirming Hormone Therapies

Gender-affirming “hormone [therapies] are designed to induce characteristics of the desired sex while reducing characteristics of the natal sex and allowing individuals to project their gender identity.”²⁵¹ “Treatment is individualized, and [the therapies] may require education, counseling, real-life experience, medical evaluation, hormone treatment, and in some cases sex reassignment surgery.”²⁵² However, the risks of undergoing gender-affirming

²⁴⁵ See Rachel K. Jensen et al., *Effect of Concurrent Gonadotropin-Releasing Hormone Agonist Treatment on Dose and Side Effects of Gender-Affirming Hormone Therapy in Adolescent Transgender Patients*, TRANSGENDER HEALTH, (Oct. 29, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6818477/pdf/trgh.2018.0061.pdf>. (“[GnRHa] side effects include hot flashes, mood swings, and weight gain reflecting the induction of hormone suppression in subjects. . . . Additionally, GnRHa have potential adverse effects on bone mineral density, though studies have largely been inconclusive on the true extent of the risk, and risks associated with prolonged use of GnRHa have not been examined”); See also Darios Getahun et al., *Cross-sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study*, ANNALS OF INTERNAL MED. (Aug. 21, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6636681/pdf/nihms-1030323.pdf> (GnRHa have potential adverse effects on bone mineral density, though studies have largely been inconclusive on the true extent of this risk, and risks associated with prolonged use of GnRHa have not been examined. This study demonstrated that cross-sex estrogen is a risk factor for venous thromboembolism and probably ischemic stroke among transfeminine persons. “The patterns of increases in [venous thromboembolism] and ischemic stroke rates among transfeminine persons are not consistent with those observed in cisgender women. These results may indicate the need for long-term vigilance in identifying vascular side effects of cross-sex estrogen”).

²⁴⁶ See Jensen et al., *supra* note at 245.

²⁴⁷ See Mahfouda et al., *supra* note 244.

²⁴⁸ See *id.* (stating that this study and studies like it all use small sample size with no randomized controlled trials, which is the gold standard for studies).

²⁴⁹ *Id.* (“Much of the research is longitudinal in design, and sample sizes are often further reduced by attrition”).

²⁵⁰ *Id.*

²⁵¹ Amanda Irving & William Lehault, *Clinical Pearls of Gender-Affirming Hormone Therapy in Transgender Patients*, MENTAL HEALTH CLINICIAN (Mar. 26, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6007530/>.

²⁵² *Id.*

hormone therapies may be too high for some high school youths, and high-quality evidence-based recommendations are lacking.²⁵³ What the data does show is that “as many as 1.8% of adolescents identify as transgender and many more seek care, yet the impact of gender-affirming hormone therapy [] on cardiometabolic health is unknown.”²⁵⁴ “Transgender individuals receiving [‘masculinising’] or [‘feminizing’] gender-affirming hormone therapy with testosterone or estradiol respectively, are at increased risk of adverse cardiovascular outcomes, including myocardial infarction and stroke.”²⁵⁵

Additionally, there is an “increased risk of breast cancer in trans[gender] women compared with cisgender men, and a lower risk in trans[gender] men compared with cisgender women.”²⁵⁶ “In trans[gender] women, the risk of breast cancer increased during a relatively short duration of hormone treatment and the characteristics of the breast cancer resembled a more female pattern.”²⁵⁷ Further, “skin diseases in transgender patients often are underdiagnosed and underrecognized despite [their important impact on] quality of life and mental health.”²⁵⁸

V. RECOMMENDATIONS FOR HIGH SCHOOL POLICY: EDUCATION AND SPORTS GIVE A COMPLETE ACADEMIC EXPERIENCE—A NATIONAL POLICY FOR HIGH SCHOOL ASSOCIATIONS

The purposes for these policy recommendations are to give guidance to all high school athletic programs on importance of inclusion and equal opportunity it should offer all participating student-athletes.

The recommended policies and procedures to follow will aid high school student-athlete programs in giving guidance to the intuitions, teams, and coaches so they can have proper knowledge and understanding of transgender

²⁵³ See Hamidi Oksana, & Caroline J. Davidge-Pitts, *Transfeminine Hormone Therapy*, 48 ENDOCRINOLOGY AND METABOLISM CLINICS N. AM. 341 (2019), <https://pubmed.ncbi.nlm.nih.gov/31027544/> (“Data on care of transgender women are scarce and high-quality evidence-based recommendations are lacking”).

²⁵⁴ Natalie J. Nokoff et al., *Body Composition and Markers of Cardiometabolic Health in Transgender Youth Compared With Cisgender Youth*, J. CLINICAL ENDOCRINOLOGY & METABOLISM (Sept. 23, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7112978/>.

²⁵⁵ See Cassandra Spanos et al., *Effects of Gender-Affirming Hormone Therapy on Insulin Resistance and Body Composition in Transgender Individuals: A Systematic Review*, WORLD J. DIABETES (Mar. 15, 2020), <https://www.ncbi.nlm.nih.gov/pubmed/32180895>.

²⁵⁶ See Christel J. M. de Blok et al., *Breast Cancer Risk in Transgender People Receiving Hormone Treatment: Nationwide Cohort Study in the Netherlands*, BMJ (May 14, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6515308/>.

²⁵⁷ *Id.*

²⁵⁸ See Howa Yeung, et al., *Dermatologic Conditions in Transgender Populations*, ENDOCRINOLOGY & METABOLISM CLINICS N. AM. (June 2019), <https://www.ncbi.nlm.nih.gov/pubmed/31027550>. (“For transfeminine patients, . . . conditions include hirsutism, pseudofolliculitis barbae, and melasma. Post-procedural keloids and other cutaneous complications are discussed”).

youths, the need for gender neutral locker rooms and bathrooms, coming together to form concise guidelines to implement these policies into existing programs.

A. Instituting National Policy for Public Schools

The recommendation begins with instituting a national policy for high school associations to create uniformity in executing inclusion guidelines. GLSEN has recommended that “all students shall be permitted to participate in interscholastic athletics in a manner consistent with their gender identity, under the guidelines established by the state interscholastic association.”²⁵⁹ However, *Soule* presents an opportunity for a federal standard under Title IX, having a cohesive policy that incorporates educational benefits and fosters diversity in high school sports is needed to ensure the benefit of participation high school sports will be enjoyed by all students. Participation in sports helps to provide a more meaningful education by enhancing opportunity that is found through scholarships and the cohesiveness belonging to a team can provide.²⁶⁰ Sports have helped lower income students have a greater educational experience.²⁶¹ This is important to include transgender youths for the same reason as low income students. Transgender youths are at a high risk for lower self-esteem and suicide.²⁶² Sports gives confidence and promotes acceptance in diversity because sports teams provide a place where unity and working together is needed to win. These qualities and traits prepare young adults to thrive in a diverse, new secondary educational environment.

In drafting and initiating inclusion policies, schools will preempt the possibility that a high school program could be vulnerable to a constitutional challenge or attack through anti-discriminatory statute. In writing the policies, the core values of the schools should be incorporated.²⁶³ What better way to promote acceptance and diversity than having an inclusion policy?

It aids the students, teachers, and coaches in understand differences of others while at the same time educating the student body and teachers about a

²⁵⁹ *Model School District Policy on Transgender and Gender Nonconforming Students*, GLSEN (Sept. 2018),

https://transequality.org/sites/default/files/images/resources/trans_school_district_model_policy_FINAL.pdf.

²⁶⁰ See Jomills Henry Braddock II, “Race, Athletics, and Educational Attainment: Dispelling the Myths,” 12 *YOUTH & SOC’Y* 335, 335-349 (Mar. 1981) (stating that there is positive correlation between athletic participation, academic performance, and self-esteem for 17,000 students).

²⁶¹ *Id.*

²⁶² See Joseph G. Kosciw, *The 2001 National School Climate Survey: The School Related Experiences of our Nations Lesbian, Gay, Bisexual and Transgender Youth*, GLSEN (2001), <https://test-glsen.pantheonsite.io/sites/default/files/2001%20National%20School%20Climate%20Survey%20Full%20Report.pdf>.

²⁶³ Many schools such as Kickemuit Middle School in Warren Rhode Island, have implemented a “no bullying” policy that make any student involved in any type of bullying suffer penalties. See generally, Lenzi, *supra* note 33.

misunderstood and underrepresented class of people who attend the school. Such policies promote an open dialogue to inform and correct misconceptions that could stir fear, resentment, and hate. Introduction of such a policy will, in some ways, affect the whole student body. There may be reluctance by some parents who have a misguided belief that discussion of this subject is taboo, but his secondary effect should welcome a civil discourse because not everyone will be in agreement and this type of discussion should be a point of reference to begin such a dialogue.

B. Guidelines for Implementation into Established Programs

There are three main issue that should be addressed when providing an inclusive policy: 1) Including transgendered student athletes without a prerequisite of taking hormone replacement therapy; 2) The need for gender-neutral bathrooms and locker rooms; and, 3) mandatory training for teachers and coaches on gender issues.

1. Including Transgendered Student Athletes Without Prerequiring Hormone Therapy or Puberty Blockers

There are many concerns about teenagers taking gender-affirming hormones and/or puberty blockers.²⁶⁴ Due to health risk of hormone therapies,²⁶⁵ and concern doctors have in giving the therapy to youths,²⁶⁶ these treatments should not be a prerequisite to have equal opportunity in educational activities, including high school sports. High school male and female athletes must endure changes in their bodies. Some children develop at different rates than others;²⁶⁷ these differences place many high school athletes on different levels of ability

²⁶⁴ See Healy, *supra* note 49.

²⁶⁵ Colette Bouchez, *HRT: Revisiting the Hormone Decision*, WEB M.D., <http://www.webmd.com/menopause/features/hrt-revisiting-the-hormone-decision> (last visited Oct. 31, 2020) (Stating all the health risks associated with HRT).

²⁶⁶ Healy, *supra* note 49.

²⁶⁷ See Kurt W. Fischer & Daniel Bullock, *Chapter 3: Cognitive Development In School-Age Children: Conclusions And New Directions*, in *DEVELOPMENT DURING MIDDLE CHILDHOOD: THE YEARS FROM SIX TO TWELVE* (W. Andrew Collins ed., 1984), <https://www.ncbi.nlm.nih.gov/books/NBK216774/>.

naturally.²⁶⁸ It is possible that one boy or one girl has developed faster than his or her teammate, should this preclude them from participating in sports?²⁶⁹

There is a concern that a male-to-female athlete will develop faster and stronger than her teammates, in cases such as this, there may have to be an arbitrary decision as playing in the sport would injure participants. Unfair advantage should stay out of this decision.²⁷⁰ The decision whether to have treatment including gender-affirming hormone therapy and/or puberty blockers is a decision between the transgender minor, the family, and the doctor or specialist. Puberty blockers, although beneficial in certain ways, has not been evaluated enough, especially in the long term for high school athletic associations to require.²⁷¹ There is no real data regarding long term psychological effects; current data only addresses effects in the aggregate.²⁷² Sure, it may level out some of the issues associated with athletic competitive advantage between sexes, but potential risks outweigh those benefits. And gender-affirming hormone therapies, although beneficial in certain ways, still present issues for youths, including regret or transition remorse;²⁷³ but there is, likewise too limited data to require a minor to undergo to have equal opportunity in educational activities,²⁷⁴ including high school sports.

²⁶⁸ See Medley & Sherwin, *supra* note 1; see also Pat Eaton-Robb, *Transgender Sprinters Finish 1st, 2nd at Connecticut Girls Indoor Track Championships*, WASH. TIMES (Feb. 24, 2019), <https://www.washingtontimes.com/news/2019/feb/24/terry-miller-andraya-yearwood-transgender-sprinter/> (“One high jumper could be taller and have longer legs than another, but the other could have perfect form, and then do better . . . One sprinter could have parents who spend so much money on personal training for their child, which in turn, would cause that child to run faster”).

²⁶⁹ See Donna Rose, *Transsexual Athletes Treated Unfairly*, CNN (Oct. 20, 2010), <http://www.cnn.com/2010/OPINION/10/18/rose.transsexuals.sports/index.html>.

Some charge that we compete because of some inherent competitive advantage. Such charges are as ignorant as they are absurd. We compete for the same reasons that others do: Because we love our sport, because we are athletes and because we want to continue doing something we enjoy. Competition is a fundamental right that we refuse to relinquish simply because our path to manhood or womanhood was nontraditional.

²⁷⁰ On March 28, 1931, 17-year-old Jackie Mitchell signed a contract to play baseball for the Chattanooga Lookouts, a Class AA minor league team. Five days later, on April 2, 1931, Jackie pitched against the New York Yankees in an exhibition game. In front of 4,000 fans, she struck out Babe Ruth and Lou Gehrig. *This Day in Minor League History*, MILB, <http://www.milb.com/milb/history/tdih.jsp?tdih=0402&sid=milb> (Last visited Nov. 15, 2020).

²⁷¹ See Mahfouda et al., *supra* note 244.

²⁷² See generally *id.*

²⁷³ See Tishelman et al., *supra* note 31.

²⁷⁴ See Oksana & Davidge-Pitts, *supra* note 253 (“Data on care of transgender women are scarce and high-quality evidence-based recommendations are lacking”).

2. The Need for Gender-Neutral Bathrooms and Locker Rooms

Certainly, issues that should be addressed in any suggested policy is the need for gender neutral facilities such as bathrooms and locker rooms.²⁷⁵ Gender-neutral bathrooms would be single stall restrooms a person of any gender can use. Many people, not just transgender youths, could benefit from these restrooms. These bathrooms could accommodate disabled people who may have a caregiver of a different gender. For the same reasons, single parents who have a child who is a different gender than them would also benefit from the addition of more gender-neutral bathrooms.²⁷⁶ Critics of gender neutral bathrooms say that they increase the likelihood of sexual assaults in such spaces allow seclusion and isolation where predators can lay in wait.²⁷⁷ The same rationale can be used in favor of gender neutral bathrooms because many transgendered students have been abused or harassed because of the bathroom they use, having a gender neutral bathroom might thwart such incidents.²⁷⁸

However, transgender youths should not be required only to use gender-neutral bathrooms and locker rooms. Transgender youths should be permitted to “access sex-segregated [bathrooms,] changing facilities, and locker rooms with the teams they belong to and are consistent with their gender identity”²⁷⁹ “Barring trans[gender] youth[s] from using the locker room that aligns with their gender identity [actually] places them at risk.”²⁸⁰ “Transgender people (and, specifically, trans[gender] women) are at high risk of being victims of violence throughout their lives, even before adolescence.”²⁸¹ Privacy is an important factor for all students in locker rooms. Facilities with privacy areas (such as restrooms with stalls or changing areas with curtains)—for all students, including transgender students—would meet student needs. Schools may also

²⁷⁵ See Associated Press, *URI Students, Faculty Call for more Gender-Neutral Bathrooms*, U.S. NEWS (Nov. 8, 2019), <https://www.usnews.com/news/best-states/rhode-island/articles/2019-11-08/uri-students-faculty-call-for-more-gender-neutral-bathrooms>.

²⁷⁶ See *id.*

²⁷⁷ See *What Experts Say*, NAT’L CTR FOR TRANSGENDER EQUAL., <https://transequality.org/what-experts-say> (last visited Nov. 18, 2020).

²⁷⁸ See generally JoEtta Gonzales, *Equity in the Classroom: Creating Culturally Responsive Learning Communities* Kyrene School District, DOKUMEN (Sept. 16, 2011), <https://dokumen.tips/documents/joetta-gonzales-director-seena-skelton-co-director-the-equity-alliance.html>.

For transgender and gender non-conforming people, the lack of safe bathroom access is the most frequent form of discrimination faced but the least acknowledged by policy makers. Even in San Francisco, many transgender and non-transgender people have no safe places to go to the bathroom - get harassed, beaten, and arrested in both women’s and men’s rooms. Many avoid public bathrooms altogether and develop health problems.

²⁷⁹ *Transgender Inclusion in High School Athletics*, *supra* note 17, at 2.

²⁸⁰ *Id.*

²⁸¹ *Id.*

make other private changing rooms available to any student who requests additional privacy.

3. Mandatory Training for Teachers and Coaches on Gender Issues

Acceptance and tolerance training for coaches and students will be an important feature of any inclusion policy. Although this country has had a history of intolerance for those who are different,²⁸² America is rich in diversity. Athletes like Jackie Robinson,²⁸³ Ray Kemp,²⁸⁴ and Martina Navratilova²⁸⁵ faced great adversity to play the sport they loved. These athletes,²⁸⁶ with time, determination, and a common ground known as the playing field, won the respect and acceptance of their teammates.

School children spend the majority of their weekday days with coaches and teachers. Being a model for their team and students by doing tolerance training will have positive effects on the student body as a whole and students should feel safe to go to their teacher and coaches if they are encountering any problems. Such training has its critics.²⁸⁷ The program should have age-

²⁸² See Civil Rights Act of 1964 Pub. L. No. 88–352, 241 (1964).

²⁸³ *Jackson Robinson*, BHA, http://www.myblackhistory.net/Jackie_Robinson.htm (last visited Nov. 15, 2020) (stating that Jackie Robinson was the first African American major-league baseball player).

²⁸⁴ Bob Barnett, *Profile: Ray Kemp*, PRO FOOTBALL HALL OF FAME (Jan. 18, 2015), <https://www.profootballhof.com/news/profile-ray-kemp/> (“Ray Kemp was a charter member of the Pittsburgh Steelers (then Pirates) when they entered the NFL in 1933. He was the only black Pirate and only one of two black players in the entire NFL”).

²⁸⁵ *Bio Martina Navratilova*, WTA, <https://www.wtatennis.com/players/140007/martina-navratilova/bio> (last visited Oct. 31, 2020) (stating Martina Navratilova competed on the WTA Tour in singles and doubles for 22 years from 1973 to 1994; she then returned for regular doubles activity from 2000 to 2006, before retiring a Grand Slam champion at age 49. She has won 18 Grand Slam singles titles, 31 Grand Slam women's doubles titles (an all-time record), and 10 Grand Slam mixed doubles titles; in total she has won 59 Grand Slam titles. “She is a global icon for lesbian and gay rights and is, as she describes it herself, a citizen of the world”). *Contra* Ring, *supra* note 23 (However, consider that in 2020, Navratilova supports Idaho’s ban on transgender female athletes).

²⁸⁶ See generally *Jackie Robinson Became Baseball's First Black Major League Player When He Debuted With The Brooklyn Dodgers*, TODAY IN HISTORY (Apr. 15, 1947), <http://www.tihapp.com/events/27996>.

Robinson was also derided by opposing teams. Some, notably the St. Louis Cardinals, threatened to strike if Robinson played. After the threat, National League President Ford Frick and Baseball Commissioner Happy Chandler let it be known that any striking players would be suspended. Robinson . . . became the target of rough physical play by opponents (particularly the Cardinals). On April 22, 1947, during a game between the Dodgers and the Philadelphia Phillies, Phillies players . . . called Robinson a [the n-word] from their dugout and yelled that he should ‘go back to the cotton fields’. Rickey later recalled that [Phillies manager Ben Chapman] ‘did more than anybody to unite the Dodgers. When he poured out that string of unconscionable abuse, he solidified and united thirty men.

²⁸⁷ See Erik Eckholm, *In Efforts to End Bullying, Some See Agenda*, N.Y. TIMES (Nov. 6, 2010), <https://www.nytimes.com/2010/11/07/us/07bully.html> (describing that there will possibly be some criticism and a misconception that tolerance training will instruct children on being homosexual. “Candi Cushman, an educational analyst with Focus on the Family, a Christian group, said that early lessons about sexuality and gay parents reflected a political agenda, including legitimizing same-sex marriage. ‘We need to protect all

appropriate materials on sexual diversity and promote an understanding that there are differences in every family.²⁸⁸

Policies will mimic school guidelines of respect and promote a safe and healthy environment for all to participate. The Department of Education issued guidance to support educators in combating bullying in schools by clarifying when student bullying may violate federal education anti-discrimination laws.²⁸⁹

CONCLUSION

The history and policies of athletics are ever evolving. When the NCAA adopted its Transgender Inclusion Policy, this decision was evidence that sports associations should do more to provide opportunities for transgender student athletes, and it remains an issue that high school athletic associations across the country need to address. Barring such students from participating in sports is a disservice to athletics. The bright line of exclusion in their school community as opposed to cisgender peers and this must change if there is potential to ensure equality in high school sports. Transgender youths should have the same opportunity to participate in high school athletics as their peers without prerequiring hormone therapy or puberty blockers, and Title IX of the Education Amendments Act of 1972 is the source of law for that protection. *Soule* presents the opportunity for our federal courts to settle the debate: transgender youths are entitled to equal opportunity in education against any challenge alleging that their participation in high school athletics—as their true gender identities—violates Title IX.²⁹⁰ Title IX is the source of law that provides such protection, not deny it because Title IX is intended to ensure that gender discrimination and harassment never stops someone from succeeding in education. We owe it to these kids to find a way they may play.

children from bullying,’ Ms. Cushman said. ‘But the advocacy groups are promoting homosexual lessons in the name of antibullying’’).

²⁸⁸ See *id.*

²⁸⁹ Public Affairs, *Guidance Targeting Harassment Outlines Local and Federal Responsibility*, White House to Convene Conference on Bullying, US DEP’T. OF EDUC. (Oct. 26, 2010), <http://www.ed.gov/news/press-releases/guidance-targeting-harassment-outlines-local-and-federal-responsibility>.

²⁹⁰ See Barnes, *supra* note 43.