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M. Olivia McQuade

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DRUG-FREE IS THE WAY TO BE EXCEPT IF YOU'RE TRANSGENDER: A CONSTITUTIONAL ANALYSIS OF HIGH SCHOOL ATHLETIC ASSOCIATIONS' TRANSGENDER POLICIES

M. OLIVIA MCQUADE*

INTRODUCTION

Imagine growing up and being told that you are banned from playing a sport because of how you identify. This is the stark reality for many transgender student-athletes throughout the United States. Many states' interscholastic high school athletic associations have created restrictive transgender policies that either prohibit transgender student-athletes from participating in sports or require them to provide proof of hormone therapy.¹ For example, the Idaho High School Activities Association's transgender policy states that a "male-to-female transgender student athlete who is taking medically prescribed hormone treatment under a physicians care for the purposes of gender transition may participate on a boys team at any time, but must complete one year of hormone treatment related to the gender transition before competing on a girls team."² In 2016, the executive director of the Idaho High School Activities Association, Ty Jones, received a letter from the U.S. Department of Education's Office for

* May 2021 graduate of Marquette University Law School with a Sports Law Certificate from the National Sports Law Institute. 2020-2021 Editor-in-Chief of the Marquette Sports Law Review, 2021 winner of the Anne Wall Top Scholar in Sports Law Award, and 2021 winner of the National Sports Law Writing Competition. 2013 graduate of Skidmore College with a B.A. in Sociology and 2016 graduate of Johns Hopkins School of Education with a Master of Science in Education. This Article was originally written for Professor Paul M. Anderson's Sports Law Seminar Course. Olivia is currently the head of civil litigation at JB, Entreprises, SC Law & Strategy. Olivia would like to thank her mom, dad, and two older brothers for the unconditional support and encouragement throughout her life. In addition, she would like to thank Jake for being her rock.

1. See, e.g., MO. STATE HIGH SCH. ACTIVITIES ASS'N, 2019-2020 OFFICIAL HANDBOOK OF THE MISSOURI STATE HIGH SCHOOL ACTIVITIES ASSOCIATION 140 (91st ed. 2019).

2. IDAHO HIGH SCH. ACTIVITIES ASS'N, RULES AND REGULATIONS 2018-2019 101 (2018).

Civil Rights stating that the association's transgender policy needed to change because it was discriminatory.³ However, the letter "went away" shortly after President Trump was elected.⁴ Now, nineteen states and counting have used Idaho's policy as a template to draft their respective transgender policies.⁵

In general, when transgender student-athletes challenge high school athletic associations' policies, they often rely on Title IX and the Equal Protection Clause of the Fourteenth Amendment.⁶ However, when transgender policies require hormone testing prior to athletic participation, student-athletes could and in some cases should challenge the policies on Fourth Amendment grounds. Therefore, this paper provides an analysis of transgender high school athletes' constitutional privacy claims brought against hormone testing requirements.

This paper will examine interscholastic high school athletic associations' transgender policies that require hormone testing in an effort to analyze the potential for transgender athletes to bring Fourth Amendment privacy claims. Part I discusses the transgender participation debate by providing examples of high school athletic associations' transgender policies and details the effects of those policies on transgender students. Part II gives an overview of the Fourth Amendment and its application to student-athletes and drug testing. Part III provides a Fourth Amendment analysis using a specific high school athletic association's transgender policy and concludes by contemplating if transgender policies that require hormone testing violate transgender student-athletes' Fourth Amendment privacy rights.

I. PARTICIPATION DEBATE

High school sports have become the "latest battleground over transgender rights."⁷ Specifically, where transgender students live dictates whether they can participate on the team of their choice.⁸ This section, therefore, provides examples of state-specific transgender policies and the effects that those policies

3. Scott McIntosh, *Yes, Idaho Already Has a Reasonable Transgender Student-Athlete Policy*, IDAHO STATESMAN (Mar. 5, 2020, 12:00 AM), <https://www.idahostatesman.com/opinion/from-the-opinion-editor/article240888126.html>.

4. *Id.*

5. Troy Oppie, *Lawmakers in 19 States Cloning Idaho's Transgender Athlete Bill*, BOISE STATE PUBLIC RADIO (Feb. 8, 2021, 7:10 AM), <https://www.boisestatepublicradio.org/idaho-news/2021-02-08/lawmakers-in-19-states-cloning-idahos-transgender-athlete-bill#stream/0>.

6. See, e.g., Dylan O. Malagrino, *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*, 31 MARQ. SPORTS L. REV. 35, 71 (2020).

7. Elizabeth A. Sharrow, *How High School Sports Became the Latest Battleground Over Transgender Rights*, CONVERSATION (Dec. 22, 2020, 8:35 AM), <https://theconversation.com/how-high-school-sports-became-the-latest-battleground-over-transgender-rights-151361>.

8. *Id.*

have on transgender student-athletes.

A. Transgender Policy Examples

Among the interscholastic high school athletic associations that do permit transgender students to participate on the team of their choice, there are those that set themselves apart by requiring transgender students to undergo hormone therapy prior to participation.

1. Idaho High School Activities Association

One of the most highly publicized transgender policies has been Idaho's. As stated above, the Idaho High School Activities Association (IHSAA) makes clear that interscholastic teams must be separated by sex.⁹ The policy also states that if there is a dispute regarding a student's sex, it should be resolved by requesting a health examination or a statement from the student's doctor.¹⁰ The student's doctor can verify the student's biological sex by testing the student's "reproductive anatomy,"¹¹ "genetic makeup,"¹² or "normal endogenously produced testosterone levels."¹³ Thus, if a transgender student wants to participate in the sport of his or her choice, he or she must consent to provide the above-mentioned private information.

To go even further, Idaho signed into law the Fairness in Women's Sports Act, prohibiting transgender girls from competing and participating in women's sports.¹⁴ The Bill made clear that interscholastic public schools must have designated and separate sports teams for males and females based on their biological sex.¹⁵ The Bill expressly states that teams designated for females are not open to males.¹⁶ If a student does choose to dispute the rule, they must provide proof of their sex by presenting a signed doctor's note that indicates the student's sex based on their internal and external anatomy, their endogenously produced testosterone levels, and an analysis of their genetic makeup.¹⁷ Furthermore, the ban applies to all public school sports teams, resulting in a transgender girl not being permitted to participate on the team of her choice.¹⁸

9. IDAHO HIGH SCH. ACTIVITIES ASS'N, *supra* note 2.

10. IDAHO HIGH SCH. ACTIVITIES ASS'N, RULES AND REGULATIONS 2021-2022 Rule 11 (2021), <https://idhsaa.org/asset/Rules%20&%20Regs/Printable%20Manual%2021-22.pdf>.

11. *Id.*

12. *Id.*

13. *Id.*

14. H.R. 500, 65th Leg., 2d Reg. Sess. (Idaho 2020).

15. *Id.*

16. *Id.*

17. *Id.*

18. Associated Press, *Idaho Governor Signs into Law Anti-Transgender Legislation*, NBC NEWS

There was and still exists controversy regarding whether transgender student-athletes can and should participate on the team of their choice. Many female athletes support the Bill because they feel that it preserves fair competition for females.¹⁹ Many believe that transgender females have inherent advantages over biological females due to body size, muscle mass, and training.²⁰ While many female athletes support the Bill, two civil rights groups, the ACLU and Legal Voice, filed federal lawsuits challenging the Bill, alleging that the law is discriminatory and an invasion of the Fourth Amendment.²¹ Specifically, the lawsuit contends that the Fairness in Women's Sports Act violates Fourth Amendment "protections against invasion[s] of privacy because of tests required should an athlete's gender be challenged."²² On November 19, 2020, the Department of Justice filed a friend-of-the-court brief defending Idaho's Fairness in Women's Sports Act against Equal Protection Clause challenges.²³ Currently, the Fairness in Women's Sports Act awaits legal review in the Ninth Circuit Court of Appeals in the case *Hecox v. Little*.²⁴ *Hecox* involves one plaintiff, a Boise State student who came out as transgender after graduating high school in 2019, and a second plaintiff, a 17-year-old cisgender girl at Boise State High School.²⁵ The federal lawsuit asserts that Idaho's Fairness in Women's Sports Act violates Title IX and the Equal Protection Clause.²⁶

2. Missouri State High School Activities Association

The Missouri State High School Activities Association's (MSHSAA) transgender policy requires that transgender students participate in sex-

(Mar. 31, 2020, 7:59 AM), <https://www.nbcnews.com/feature/nbc-out/idaho-governor-signs-law-anti-transgender-legislation-n1172886>.

19. See Trudy Ring, *Martina Navratilova Supports Idaho's Ban on Trans Female Athletes*, ADVOCATE (Aug. 3, 2020, 5:22 PM), <https://www.advocate.com/transgender/2020/8/03/martina-navratilova-supports-idahos-ban-trans-female-athletes>.

20. See *id.*

21. 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, 11:43 AM), <https://www.dailymail.co.uk/news/article-8222353/Federal-lawsuit-challenges-Idahos-transgender-sports-ban.html>.

22. *Id.*

23. Press Release, U.S. Dep't of Just., The Dep't of Just. Files Brief Defending the Constitutionality of Idaho's Fairness in Women's Sports Act (Nov. 19, 2020), <https://www.justice.gov/opa/pr/departmentt-justice-files-brief-defending-constitutionality-idahos-fairness-womens-sports-act>.

24. Oppie, *supra* note 5.

25. Julie Moreau, *Idaho's Transgender Sports Ban Challenged in Federal Court*, NBC NEWS (Apr. 16, 2020, 10:43 AM), <https://www.nbcnews.com/feature/nbc-out/idaho-s-transgender-sports-ban-challenged-federal-court-n1185381>.

26. *Id.*

separated sports so long as the student's medical and hormone therapy is consistent with current medical standards.²⁷ Meaning, if a transgender female student-athlete is not taking hormone treatment, she may not compete on a girls' sports team but may join a co-ed or boys' team.²⁸ Therefore, if a transgender female student-athlete wants to compete on a girls' team, she must undergo one year of hormone suppression treatment before participating on the team.²⁹ In addition, to maintain eligibility, that same student is required to provide "continuing medical documentation that the appropriate hormone levels are being maintained."³⁰ Not only do transgender athletes have to undergo one year of hormone therapy prior to athletic participation, but they also have to provide ongoing proof of their hormone levels throughout their high school athletic career. As MSHSAA states, "[t]his policy is adopted to insure [sic] competitive fairness, equity and physical safety of all interscholastic sports and student-athletes."³¹ Currently, Missouri lawmakers are attempting to create bills similar to that of the Fairness in Women's Sports Act. Representative Chuck Basye wants to push a resolution that asks voters to require transgender athletes to participate on the team that matches the biological sex on their birth certificates.³² Time will tell if this bill gets passed.

3. Wisconsin Interscholastic Athletic Association

The Wisconsin Interscholastic Athletic Association (WIAA) has five criteria that determine if a transgender student can participate on a sports team that is different from the student's birth certificate.³³ The criteria include school registration information, a written statement from the student affirming their gender identity and expression, documentation from individuals such as friends, teachers, and parents affirming the "actions, attitudes, dress and manner"³⁴ to demonstrate the student's gender identity, written documentation from the

27. Urhahn, *supra* note 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Austin Huguelet, *Columbia-area Rep Wants Public Vote on New Rules Targeting Transgender Athletes*, SPRINGFIELD NEWS-LEADER (Mar. 5, 2021, 6:30 AM), <https://www.news-leader.com/story/news/politics/2021/03/05/transgender-trans-athletes-missouri-bill-targeting-proposed-2022-ballot-girls-sports/6919789002/>; see also Andrea Salcedo, *Missouri Dad's Testimony Against Transgender Sports Ban Goes Viral: 'Let Them Have Their Childhoods'*, WASH. POST (Mar. 18, 2021, 7:25 AM), <https://www.washingtonpost.com/nation/2021/03/18/missouri-father-transgender-bill-vid-eo/>.

33. Wis. Interscholastic Athletic Ass'n, *Transgender Participation Policy* (2018), <https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf> [hereinafter Wis. Interscholastic Athletic Ass'n Pol'y].

34. *Id.*

student's health care provider, and medical documentation.³⁵ Specifically, a male-to-female student must undergo one year of hormone therapy prior to participation on a female team.³⁶ WIAA's rationale for the transgender participation policy is to

balance the important goals of 1) equity (since providing equal opportunities in all aspects of school programming is a core value in education), 2) physical safety (since biological males or androgen-supplemented biological females are typically stronger and faster than biological females) and 3) competitive equity (since the ideal of a "level playing field" is an inherent expectation at all levels of sports competition).³⁷

Wisconsin representatives have also proposed bills that ban transgender athletes from participating in girls' sports from kindergarten through college.³⁸ However, the proposals will likely face scrutiny from Democratic Governor Tony Evers.³⁹

B. Effects of Restrictive Transgender Policies

Transgender athletes participate in sports for many of the same reasons others do, the comradery, "psychological resiliency, feelings of connectedness, and positive self-image."⁴⁰ Yet, as demonstrated, in many states transgender athletes are denied the opportunity to participate, or if they are permitted to participate, they must overcome intrusive and stigmatizing obstacles. Many transgender students face hurdles before ever stepping into the sports arena. Transgender youth experience bullying, harassment, violence, and discrimination.⁴¹ These students have limited access to restrooms and locker

35. *Id.*

36. *Id.*

37. *Id.*

38. Scott Bauer, *Wisconsin Bills Seek to Ban Transgender Athletes*, AP NEWS (Mar. 2, 2021), <https://apnews.com/article/legislature-womens-sports-bills-wisconsin-bf0d51530d4a99272bde7cffa87b635>.

39. *Id.*

40. Erin E. Buzuvis, "As Who They Really Are": *Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 L. & INEQ. 341, 353-54 (2016); see also Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as A Public Health Issue*, 40 CARDOZO L. REV. 1813, 1830 (2019) (discussing how participation in athletics positively impacts mental health in student-athletes).

41. Susan Rankin & Genevieve Weber, *Harassment and Discrimination – LGBTQ Student-Athletes*, in *Mind, Body and Sport: Understanding and Supporting Student-Athlete Mental Wellness* 78, 79 (Gary T. Brown ed., National Collegiate Athletic Association 2014).

rooms, and many are treated inappropriately by school administrators.⁴² Coupling the already existing discrimination with policies that deny transgender youth the opportunity to participate in sports contributes to their psychological distress.⁴³

Psychological distress for transgender student-athletes can be experienced through gender dysphoria.⁴⁴ Gender dysphoria is “psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.”⁴⁵ There are various ways for transgender individuals to affirm their gender such as social, legal, and medical affirmation.⁴⁶ In particular, social affirmation can be achieved by participating in clubs or sports. Research suggests that transgender student-athletes have a GPA that is 0.4 points higher than their non-participating peers and transgender student-athletes report “a positive sense of belonging at school.”⁴⁷ While athletic participation can contribute to transgender students’ gender affirmation, for many, hormone treatment is a prerequisite to athletic participation.

Some argue that “[f]or both male and female transgender athletes, participation policies based on hormone usage unnecessarily complicate what is already a complex and challenging decision about whether and when to undergo hormone treatment.”⁴⁸ Opponents of restrictive transgender bills claim that they discriminate “against transgender girls and women, and would subject athletes to invasive tests to prove their gender, likely causing some potential athletes to avoid sports.”⁴⁹ Those who support sex-segregated teams and hormone pre-requirements argue that transgender students have unfair advantages over biological females, which violates Title IX.⁵⁰ However, there does not seem to exist much evidence to support the notion that transgender student-athletes have

42. Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 53 HARV. J. ON LEGIS. 459, 459 (2016).

43. Buzuvis, *supra* note 40, at 363.

44. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited Dec. 1, 2021).

45. *Id.*

46. *Id.*

47. *Gender Affirming and Inclusive Athletics Participation*, GLSEN, <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation#8> (last visited Dec. 1, 2021) (citing GLSEN (2013) *The Experiences of LGBT Students in School Athletics* (Research Brief)).

48. Buzuvis, *supra* note 40.

49. Keith Ridler, *Idaho Governor Signs Into Law Anti-Transgender Legislation*, AP NEWS (Mar. 31, 2020), <https://apnews.com/article/laws-virus-outbreak-us-news-courts-id-state-wire-301b65cf83f4e958a196a45f43c912c4>.

50. Scott Bauer, *Wisconsin Bills Seek to Ban Transgender Athletes*, AP NEWS (Mar. 2, 2021), <https://apnews.com/article/legislature-womens-sports-bills-wisconsin-bf0d51530d4a99272bde7cffffa87b635>; *see also* Ridler, *supra* note 49.

an unfair competitive advantage over biological female athletes.⁵¹ In fact, the misconception stems from the idea that males are “faster, stronger, and better”⁵² at sports than females. As professional soccer player, Megan Rapinoe put it, transgender policies and bills “are attempting to solve a problem that doesn’t exist . . . [p]roponents of these bills argue that they are protecting women . . . I know that the threats to women’s and girls’ sports are lack of funding, resources and media coverage; sexual harassment; and unequal pay.”⁵³ This misconception not only impacts how interscholastic high school athletic associations craft their transgender policies, but it impacts student-athletes who wish to play on the team of their choice.

C. History of the Legal Climate

Not only is there a battleground among state high school athletic associations’ transgender policies, but there is also confusion stemming from the U.S. Department of Education, the U.S. Department of Justice, and State legislatures’ guidance on transgender participation. On May 13, 2016, the Obama Administration released a Dear Colleague Letter explaining that public schools “must treat the [transgender] student consistent with the student’s gender identity.”⁵⁴ The letter informed public schools that they “may not require transgender students to have a medical diagnosis, undergo any medical treatment, or produce a birth certificate or other identification document before treating them consistent with their gender identity.”⁵⁵ This guidance lasted roughly nine months until President Trump took office.

On February 22, 2017, under the Trump Administration, the Department of Education and the Department of Justice withdrew and rescinded the 2016 Dear Colleague Letter.⁵⁶ However, the new Dear Colleague Letter did not replace the old one with anything new and different but it did say that “the Departments

51. Leong, *supra* note 40, at 1846.

52. *Id.* (citing Cheryl Cooky et al., “What Makes a Woman a Woman?” Versus “Our First Lady of Sport”: A Comparative Analysis of the United States and the South African Media Coverage of Caster Semenya, 37 J. Sport & Soc. Issues 31 (2013)).

53. Megan Rapinoe, *Opinion: Megan Rapinoe: Bills to Ban Transgender Kids from Sports Try to Solve a Problem That Doesn’t Exist*, WASHINGTON POST (Mar. 28, 2021), <https://www.washingtonpost.com/opinions/2021/03/28/megan-rapinoe-transgender-kids-sports-ban/>.

54. Catherine E. Lhamon, Assistant Secretary for Civil Rights & Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, *Dear Colleague Letter on Transgender Students*, U.S. DEP’T OF EDUC. OFF FOR CIV. RTS., U.S. DEPT. OF JUST. CIV. RTS. DIV (May 13, 2016), <https://www.justice.gov/opa/file/850996/download>.

55. *Id.*

56. Sandra Battle, Acting Assistant Secretary for Civil Rights & T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, *Dear Colleague Letter*, U.S. DEP’T OF EDUC. OFF FOR CIV. RTS., U.S. DEPT. OF JUST. CIV. RTS. DIV (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

believe that, in this context, there must be due regard for the primary role of the States and local districts in establishing educational policy.”⁵⁷ Although the 2017 Dear Colleague Letter did not propose any new guidance, it did repeal the 2016 Dear Colleague Letter which prohibited policies that required hormone testing.⁵⁸ Further, the Biden Administration has not produced a Dear Colleague Letter providing guidance for public schools. Thus, we are left with “an interpretive vacuum pending further consideration by those federal agencies of the legal issues involved in such matters.”⁵⁹

On January 20, 2021, President Biden signed “Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,”⁶⁰ an Executive Order that ensures inclusion for transgender athletes.⁶¹ However, eleven days after the Executive Order was signed, a group of well-known women athletes and activists proposed federal legislation that would exempt girls’ competitive sports from the Executive Order.⁶² Although it is clear that President Biden wanted to ensure inclusive opportunities for transgender student-athletes, there is still much debate over whether the athletes can and should participate in the sport affiliated with their gender identity. Currently, fourteen states require some sort of medical proof of an athlete’s gender identity before he or she is eligible for athletic participation.⁶³ Ten states do not have statewide guidance and eleven states have created additional barriers for the inclusion of transgender students.⁶⁴ Inconsistent nationwide and statewide guidance on transgender participation in sport has caused many transgender students to feel excluded, isolated, and uncomfortable,⁶⁵ causing some to file lawsuits against their respective school or athletic association.⁶⁶

57. *Id.*

58. Lhamon, *supra* note 54.

59. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 298 (W.D. Pa. 2017).

60. Joseph R. Biden Jr., *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

61. *Id.*

62. Christine Brennan, *Sports Leaders Seek to Protect Women’s Sports while Accommodating Transgender Girls and Women*, USA TODAY (Feb. 1, 2021, 4:24 PM), <https://www.usatoday.com/story/sports/2021/02/01/group-protect-womens-sports-accommodate-transgender-athletes/4345854001/>.

63. *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Dec. 1, 2021).

64. *Id.*

65. 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, 53 (2011).

66. *See* Selina Soule, et al., v. Connecticut Association of Schools, Inc., et al, 2020 WL 6580265 (D. Conn. Feb. 26, 2020); *see also* Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (Transgender student brought a Title IX and Equal Protection

D. Hypothetical Transgender Student-Athlete

Consider the following hypothetical: Charlie is a junior at Flames high school. Charlie is a soccer player who played on the varsity boys' team her freshman year. Charlie was born male but struggled with her gender identity for years. Charlie transitioned to female her sophomore year and wants to play on the girls' soccer team this upcoming season. Soccer has always been a positive outlet for Charlie, especially since she has experienced bullying stemming from her gender identity. Charlie is excited for the upcoming season so that she can finally play on the team she feels most comfortable with.

Shortly after registering for the girls' soccer team, Charlie's excitement faded upon hearing that the Flames Interscholastic High School Athletic Association (FIHSAA) adopted a transgender policy similar to that of Idaho. The transgender policy makes clear that if a biological male wants to participate on a girls' team, the individual has to undergo hormone treatment as a condition for participation. The purpose of FIHSAA's transgender policy is to ensure that transgender female athletes suppress endogenous male hormones so that they have less of an advantage over biological females. Thus, before Charlie joins the girls' team, she has to consent to undergo hormone testing to prove that she has completed one year of hormone therapy. Charlie is terrified because she has already faced harassment and discrimination and she does not want anyone to know that she has undergone hormone therapy. She just wants to play on the girls' soccer team and feel included. Charlie wondered if her transgender status would be an issue her entire life. Charlie also wondered whether any rules or policies would protect her privacy rights.

II. THE FOURTH AMENDMENT APPLICATION TO ATHLETICS

Even though Charlie is a fictional character, her story is similar to real transgender athletes' experiences. The pervasiveness of this type of situation in 2021 requires us to ask what protections are available for student-athletes like Charlie, who wish to join teams that align with their gender identities. There are many reasons why a transgender student-athlete might not first look to the Fourth Amendment for relief. One reason is that the Fourth Amendment is often overlooked by a narrative of regulating police.⁶⁷ However, the Fourth Amendment is "a right of the people"⁶⁸ that broadly protects against privacy intrusions.⁶⁹ "The overriding function of the Fourth Amendment is to protect

Claim against the school board and superintendent).

67. Thomas P. Crocker, *The Political Fourth Amendment*, 88 Wash. U.L. Rev. 303, 307 (2010).

68. *Id.* at 303.

69. *See* U.S. Const. amend. IV.

personal privacy and dignity against unwarranted intrusion by the State.”⁷⁰ Thus, it seems that transgender student-athletes who face these types of obstacles would have recourse under the Fourth Amendment.

A. History of The Fourth Amendment

The Fourth Amendment states:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷¹

Currently, Fourth Amendment jurisprudence covers two areas, police regulation, and individual privacy.⁷² To analyze interscholastic high school athletic associations’ transgender policies, this paper will look to the individual privacy narrative of the Fourth Amendment.

Current Fourth Amendment jurisprudence regarding an individual’s right to privacy stems from *United States v. Katz*. In *Katz*, the Supreme Court moved away from property interests and physical trespass into whether there was a governmental intrusion upon an expectation of privacy that is subjectively held by a person and objectively reasonable to society.⁷³ Specifically, the Court stated that “the Fourth Amendment protects people, not places.”⁷⁴ Fourth Amendment privacy protections have been enforced by more recent Court decisions as seen in *Camara v. Municipal Court of City and County of San Francisco*. “The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”⁷⁵ Ultimately, *Katz* set the stage for future Fourth Amendment privacy jurisprudence in determining whether a search is reasonable.⁷⁶

70. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

71. U.S. Const. amend. IV.

72. Crocker, *supra* note 67, at 307.

73. *Katz v. U.S.*, 389 U.S. 347, 361 (1967).

74. *Id.* at 351.

75. *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 528 (1967).

76. *See U.S. v. Calandra*, 414 U.S. 338, 354 (1974) (“The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one’s person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual’s life”).

To determine whether a search is reasonable, courts balance the intrusion of the individual's Fourth Amendment protections versus the legitimate government interest.⁷⁷ Factors to consider for balancing include, the nature of the privacy interest intruded upon, the character of the intrusion, and the nature and immediacy of the governmental interest at issue.⁷⁸ In addition to balancing interests, the reasonableness inquiry usually requires the government to obtain a warrant before any search can occur.⁷⁹ However, a warrant is not required "[w]hen special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."⁸⁰ The Court has found that the special needs exception applies in the public school sphere.⁸¹ Thus, before analyzing individual privacy intrusions, it is necessary to determine what constitutional protections public school students retain.

B. Drug-Testing Public School Student-Athletes

In a heavily cited First Amendment case, the Supreme Court established that students do not shed their constitutional rights at the school entrance.⁸² In fact, the Court has held that the Fourth Amendment applies to public schools in order to protect students from unreasonable searches conducted by school administrators.⁸³ However, public school students "have a lesser expectation of privacy than members of the population generally."⁸⁴ Moreover, student-athletes have an even lesser expectation of privacy because they subject themselves to regulation by trying out and participating on sports teams.⁸⁵ "Somewhat like adults who choose to participate in 'a closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."⁸⁶ As a result, courts have found that drug-testing student-athletes does not violate their right to privacy. Because this paper analyzes interscholastic athletic associations' transgender policies, it is necessary to briefly determine whether state athletic associations are state actors.

77. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

78. *Id.* at 647.

79. *Id.* at 653.

80. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

81. *Id.*

82. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

83. *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008).

84. *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985).

85. *Vernonia Sch. Dist. 47J*, 515 U.S. at 657.

86. *Id.* (citing *Skinner v. Railway Labor Execs. Ass'n.*, 489 U.S. 602 (1989)).

1. State Action Doctrine

Each state has a governing body comprised of voluntary member schools which regulate athletic competition for all students.⁸⁷ Each state's association has bylaws that serve as a contract between the association and the member schools.⁸⁸ There is no one fact or set of circumstances that determine whether an association is a state actor.⁸⁹ In its most recent case on the issue, the Supreme Court determined that “[s]tate action may be found only if there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”⁹⁰ At its core, an action taken by a private association within a state that is composed of public school members and governed by public administrators constitutes state action for purposes of the Fourteenth Amendment due to the sufficient entwinement with the private association.⁹¹ Thus, for purposes of this paper, it will be assumed that interscholastic athletic associations comprised of mostly public schools and who are governed by public administrators be considered state actors who must comply with the Fourth Amendment.

2. Drug Testing Cases

The following cases detail how the Supreme Court has analyzed drug testing public school students.

a. Vernonia School District 47J v. Acton

In *Vernonia School District 47J v. Acton*, the Supreme Court heard a case brought by a student and his parents challenging the constitutionality of random urinalysis testing as a requirement for participation in interscholastic athletics.⁹² Vernonia School District 47J implemented “The Student Athlete Drug Policy” because student drug use had become a major issue for the school community.⁹³ The district found that some student-athletes were the “leaders of the drug

87. See National Federation of State High School Associates, 2020-2021 NFHS Handbook, at 17-18 (2020), <https://www.nfhs.org/media/4119446/2020-21-nfhs-handbook10-1.pdf> (last visited Dec. 1, 2021).

88. *Id.* at 12.

89. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

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

91. See *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 616 (7th Cir. 2011) (stating that the Wisconsin Interscholastic Athletic Association was a state actor because it was comprised of mostly public schools and the “Association’s purpose is to govern, regulate, and control interscholastic sports in a manner that promotes the ideals of members schools”).

92. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995).

93. *Id.* at 648.

culture.”⁹⁴ The district implemented the drug testing policy and made clear that any student who wished to play a sport had to sign a form consenting to the urinalysis and also obtain a written consent form from their parents.⁹⁵ The student-athletes were tested at the beginning of the season and then randomly throughout the season.⁹⁶

In analyzing whether Vernonia School District 47J violated students’ Fourth Amendment protections, the Court had to analyze the reasonableness of the drug testing policy.⁹⁷ Specifically, the Court balanced the intrusion on the students’ interest against the governmental interests in performing the drug testing.⁹⁸ Although in past Fourth Amendment jurisprudence, reasonableness required obtaining a warrant, the Court stated that special needs exist in the public school context, alleviating the need for a warrant.⁹⁹ Following the balancing test, the Court first determined the nature of the privacy interest which the search intruded upon.¹⁰⁰ The Court found that the student-athletes had a reduced expectation of privacy because they “voluntarily participate[d] in school athletics hav[ing] reason to expect intrusions upon normal rights and privileges, including privacy.”¹⁰¹ Second, the Court considered the character of the intrusion.¹⁰² Here, the Court found that the invasion of privacy was not significant because the urinalysis simply tested for drugs, not whether students were pregnant, diabetic, etc.¹⁰³ Finally, the Court considered the nature and immediacy of the governmental concern and the effectiveness of the means.¹⁰⁴ So, is the interest “important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”¹⁰⁵ The Court found that the concern of reducing drugs among high school students was important and compelling, especially pertaining to student-athletes.¹⁰⁶ Ultimately, the Court stated, after balancing the various interests, “the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—

94. *Id.* at 649.

95. *Id.* at 650.

96. *Id.*

97. *Id.* at 652.

98. *Id.* at 652-53.

99. *Id.* at 653.

100. *Id.* at 654.

101. *Id.* at 657.

102. *Id.* at 658.

103. *Id.*

104. *Id.* at 660.

105. *Id.* at 661.

106. *Id.* at 661-62.

we conclude Vernonia’s Policy is reasonable and hence constitutional.”¹⁰⁷

b. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

Roughly seventeen years after *Vernonia*, the Supreme Court heard *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, where high school students challenged the constitutionality of their school’s urinalysis drug testing policy.¹⁰⁸ The Policy required that all middle and high school students participating in extracurricular activities be required to consent to urinalysis testing for drugs.¹⁰⁹ The Court analyzed the school district’s drug policy similar to the way it did in *Vernonia*. It reviewed the drug policy for reasonableness and also found that the special needs exception to the warrant requirement applied.¹¹⁰ The Court then balanced the students’ privacy interests against the school district’s interest in performing the random drug tests.¹¹¹ First, the Court determined that the students had a limited expectation of privacy because, even though they participated in extracurricular activities, the students subjected themselves to many of the same intrusions that athletes are exposed to.¹¹² Second, the Court determined that the character of the intrusion was not significant because the test results were kept confidential, the tests were performed with only the student in the room, and the test results were not turned over to law enforcement authority.¹¹³ Third, the Court considered the nature and immediacy of the government’s concerns and the efficacy of the Policy.¹¹⁴ The Court found that because of the nationwide concern of drug use and the increased drug use in the district, the Policy was reasonable.¹¹⁵ In addition, the Court found that “testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”¹¹⁶ Thus, the school district’s drug policy was “[w]ithin the limits of the Fourth Amendment.”¹¹⁷

Now having an understanding of how the Court has applied the Fourth

107. *Id.* at 664-65.

108. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls, 536 U.S. 822 (2002).

109. *Id.*

110. *Id.* at 828.

111. *Id.* at 831.

112. *Id.*

113. *Id.* at 832-33.

114. *Id.* at 834.

115. *Id.* at 836.

116. *Id.* at 837.

117. *Id.* at 838.

Amendment to drug-testing cases, it is necessary to look at a specific interscholastic high school athletic association's transgender policy to determine if it falls in line with past jurisprudence or if there should be a new test for determining privacy intrusions on transgender student-athletes. The specific state analyzed is Wisconsin because it encompasses many of the same components as other states' transgender policies. Further, it provides a good example of many of the hurdles transgender student-athletes must surpass in order to participate in sports.

III. ANALYSIS OF WISCONSIN'S TRANSGENDER POLICY USING THE FOURTH AMENDMENT

As demonstrated in the above cases, the Supreme Court has generally held that student-athletes have a reduced expectation of privacy by virtue of participating in school athletics.¹¹⁸ Further, the Court has found that drug testing student-athletes does not violate their Fourth Amendment right to privacy.¹¹⁹ However, it is worth being absolutely clear that Charlie's situation is unlike drug-testing cases as seen in *Vernonia* and *Earls*. In this context, Charlie is not a student-athlete who is subjected to random drug testing. Charlie is a transgender female who would be subjected to hormone testing prior to being able to participate on the girls' soccer team *because of* her transgender status.

If Charlie were to challenge the WIAA's transgender policy on Fourth Amendment grounds, the Court would determine the reasonableness of the search by balancing WIAA's need for the search against the invasion of Charlie's personal rights that the search entails. Furthermore, courts consider the scope of the intrusion by looking at how the search is conducted and the reasoning behind the search.¹²⁰

First, Charlie would have to establish the nature of her privacy interest on which the search intrudes. Like in *Vernonia*, Charlie is a public school student in the temporary custody of the State. Although Charlie has a reduced expectation of privacy with regard to participating in sports, she likely has a greater expectation of privacy regarding her gender identity. "Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity."¹²¹ Specifically, Charlie is unlike the students in *Vernonia*, because she would be drug tested due to her gender status, not because of her general participation in the sport. The Fourth Amendment protects expectations of privacy that society deems reasonable.¹²² So, while

118. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 646 (1995).

119. *Id.* at 664-65.

120. *Shaw v. D.C.*, 944 F. Supp. 2d 43, 55 (D.D.C. 2013).

121. Lhamon, *supra* note 54.

122. *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 494, 496 (6th Cir. 2008).

ordinarily, a student-athlete has a reduced expectation of privacy, it is likely that Charlie's transgender status heightens her expectation of privacy because society deems an expectation in someone's bodily privacy as reasonable and legitimate.¹²³ "When government conduct collects evidence in a way that interferes with customs and social expectations, revealing what a reasonable person might expect would remain hidden, it violates a reasonable expectation of privacy."¹²⁴ Gender is synonymous with bodily privacy and "[t]he right to bodily privacy is fundamental."¹²⁵ By choosing to participate in athletics, Charlie does not automatically volunteer herself to be subject to various requirements that demonstrate her hormone levels. Charlie does not subject herself to provide state officials access to her medical documentation of hormone treatment. Nor does she subject herself to provide documentation from friends, teachers, and parents affirming her gender identity. Thus, it is likely that she has a heightened expectation of privacy. However, even if a court were to find that Charlie has a reduced expectation of privacy with regard to her transgender status, the WIAA would have to establish that it has a legitimate interest in requiring hormone testing.

As the expectation of privacy increases, the categories of permitted governmental intrusion decreases.¹²⁶ WIAA states that its rationale for its transgender policy is to balance equity, physical safety, and competitive equity.¹²⁷ In *Vernonia*, the Court found that the government had a legitimate interest in random drug testing because of the importance of deterring drug use.¹²⁸ In addition, the Court found that the drug problem was effectively addressed by permitting drug testing.¹²⁹ WIAA's interest in hormone testing transgender athletes has nothing to do with deterring drug use. In fact, it promotes transgender athletes to take hormone drugs. WIAA's rationale for the transgender policy does not seem to promote equity, as it would single out transgender students and not permit them to participate on certain teams unless they undergo hormone therapy. Finally, as noted earlier, there is no proof that transgender students pose a physical safety risk or competitive advantage over their cisgender peers. It is evident that WIAA does not have a legitimate interest in requiring hormone testing prior to athletic participation. Even if it did, the transgender policy does not further WIAA's interest in promoting equity, as it diminishes transgender students' ability to participate in athletics. One scholar,

123. *Id.*

124. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 509 (2007).

125. *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992).

126. *Brannum*, 516 F.3d at 498.

127. Wis. Interscholastic Athletic Ass'n pol'y, *supra* note 33.

128. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 647 (1995).

129. *Id.*

while discussing drug testing student-athletes stated, “[e]ven though privacy and human dignity are values deeply rooted in our Constitutional tradition, they seem to be values that many Americans and the Supreme Court are ready to dismiss in the face of a widely held perception of a drug epidemic.”¹³⁰ Although this scholar discussed general drug testing, the same principle rings true regarding hormone testing transgender student-athletes. Because of a misconception about unfair competition, state high school athletic associations are willing to disregard transgender students’ privacy and human dignity.

By applying the *Katz* reasonableness standard to Charlie’s situation, the WIAA likely violates Charlie’s Fourth Amendment right of privacy. Specifically, Charlie’s reasonable expectation of privacy outweighs WIAA’s interest in requiring hormone testing prior to athletic participation. “School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.”¹³¹

Although the Court has not taken a case on this specific issue it is worth discussing because transgender students have and continue to face obstacles regarding athletic participation. Interscholastic athletic associations that require hormone testing place undue pressure on transgender students to undergo hormone therapy even if they may not be ready to do so. Because of the numerous challenges transgender students face, there is an immediate need for legal remedies that protect transgender students and protect them from privacy intrusions. Therefore, the Fourth Amendment could provide recourse.

CONCLUSION

This paper analyzed interscholastic high school athletic associations’ transgender policies of requiring hormone testing to determine whether they impinge on transgender student-athletes’ Fourth Amendment privacy rights. Specifically, it looked at transgender student-athletes’ heightened expectation of privacy and whether their interests are outweighed by high school athletic associations’ interests in requiring hormone testing. High school athletic associations do not have an overall legitimate governmental interest in hormone testing. Thus, transgender student-athletes’ privacy interests outweigh high school athletic associations’ interest in hormone testing. Moreover, high school associations’ transgender policies that attempt to ensure equal opportunities, actually minimize opportunities for transgender athletes.

Overall, when interscholastic high school athletic associations create

130. Donald Crowley, *Student Athletes and Drug Testing*, 6 MARQ. SPORTS. L. J. 95, 131 (1995-1996).

131. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

policies that require hormone testing, they further exclude transgender athletes. Such policies interfere with transgender athletes' privacy rights by impinging on their right to be left alone. The Fourth Amendment protects individuals against unwarranted intrusions. Policies that require hormone testing constitute unwarranted intrusions. If state high school athletic associations continue to require hormone testing prior to participation, they will further alienate transgender students. Transgender students deserve more and should be permitted to participate on the team of their choice without having to compromise their privacy.